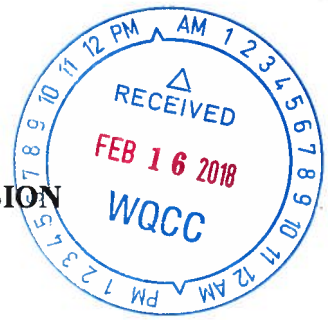

STATE OF NEW MEXICO
BEFORE THE WATER QUALITY CONTROL COMMISSION

IN THE MATTER OF PROPOSED AMENDMENTS TO GROUND AND SURFACE WATER PROTECTION REGULATIONS, 20.6.2 NMAC

No. WQCC 17-03 (R)

AMIGOS BRAVOS/GILA RESOURCES INFORMATION PROJECT'S CLOSING ARGUMENT

Pursuant to the New Mexico Water Quality Act ("Act"), NMSA 1978, §§ 74-6-1 to 74-6-17, Section 20.1.6.304 NMAC (Water Quality Control Commission's Rules for Rulemaking), and the Hearing Officer's Order issued on December 11, 2017, Amigos Bravos and Gila Resources Information Project ("AB/GRIP") submits the following Closing Argument.

I. STANDARD FOR RULEMAKING

The Water Quality Control Commission ("Commission" or "WQCC") adopts regulations pursuant to its authority in NMSA 1978, § 74-6-4. In adopting regulations, the Commission shall give weight it deems appropriate to all relevant facts and circumstances, including:

(1) character and degree of injury to or interference with health, welfare, environment and property;
(2) the public interest, including the social and economic value of the sources of water contaminants;
(3) technical practicability and economic reasonableness of reducing or eliminating water contaminants from the sources involved and previous experience with equipment and methods available to control the water contaminants involved;
(4) successive uses, including but not limited to domestic, commercial, industrial, pastoral, agricultural, wildlife and recreational uses;
(5) feasibility of a user or a subsequent user treating the water before a subsequent use;
(6) property rights and accustomed uses; and
(7) federal water quality requirements.

NMSA 1978, § 74-6-4(E).

In adopting regulations pursuant to Section 74-6-4(K), the Commission must also consider the best available scientific information. The Commission's decision to adopt a regulation must be based on substantial evidence. "Substantial evidence supporting administrative agency action is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." Oil Transportation Co. v. New Mexico State Corporation Commission, 110 N.M. 568, 571, 798 P.2d 169, 172 (1990). The agency must consider all evidence in the record. Perkins v. Department of Human Services, 106 N.M. 651, 654, 748 P.2d 24, 27 (Ct. App. 1987).

In addition, the Water Quality Act does not authorize the Commission to promulgate rules that would violate the Act. § 74-6-4(C); State ex rel. Stapleton v. Skandera, 2015-NMCA-044, ¶ 8, 346 P.3d 1191 ("the administrative agency's discretion may not justify altering, modifying, or extending the reach of a law created by the Legislature"). The Commission's rulemaking authority is limited by NMSA 1978, Section 74-6-12, which states that in adopting regulations "reasonable degradation of water quality resulting from beneficial use shall be allowed. Such degradation shall not result in impairment of water quality to the extent that water quality standards are exceeded."

Finally, decisions of the Commission may be overturned upon appeal if the decision is (1) arbitrary, capricious or an abuse of discretion, (2) not supported by substantial evidence in the record, or (3) otherwise not in accordance with the law. Section 74-6-7(B) NMSA 1978. "Statutes create administrative agencies, and agencies are *limited to the power and authority that is expressly granted and necessarily implied by statute.*" In re PNM Elec. Servs., 1998-NMSC-17, ¶ 10, 125 N.M. 302.

II. INTRODUCTION

The New Mexico Environment Department ("NMED") and industry (mining and dairy interests) propose to undo over 36 years of ground water protection in New Mexico by authorizing through rule the issuance of life-time variances allowing industries to pollute our most precious public resource in perpetuity. Martin Testimony transcript, volume II, page 287, lines 1-10. This radical shift in interpretation of the Water Quality Act's variance provision and Commission practice comes at a time when it is more critical than ever to protect New Mexico's scarce water resources.

Ground water in New Mexico "belongs to the public." NMSA 1978, § 72-12-1 (2003). Our state's ground water does not belong to the owners of private property above ground water. While individuals and entities may use ground water for "beneficial use," subject to appropriate authorization from the State, *id.*, ground water in New Mexico is a public resource to be protected. Additionally, the Constitution declares that "water and other natural resources of this state" are "of fundamental importance to the public interest, health, safety and the general welfare." N.M. Const. art. XX, § 21. Public water in New Mexico is held in trust by the State for the benefit of the public. New Mexico v. G.E., 467 F.3d 1223, 1243 (10th Cir. 2006). The pollution of public water in New Mexico is also a criminal public nuisance. NMSA 1978, §30-8-2 (1993). The great public importance of water, as evidenced at all levels of New Mexico law, led the New Mexico Supreme Court, in Kaiser Steel Corp. v. W. S. Ranch Co., to declare:

> Our entire state has only enough water to supply its most urgent needs. Water conservation and preservation is of utmost importance. Its utilization for maximum benefits is a requirement second to none, not only for progress, but for survival.

1970-NMSC-043,¶ 1 5 , 81 N.M. 414, 417; *see also, e.g.,* NMSA 1978, § 74-1-12(A) (1999) (describing water as "the state's most precious resource").

Protection of groundwater quality in New Mexico is not mutually exclusive of economic development and, in particular, of economically viable dairy and mining industries in New Mexico. Both goals have historically been achievable under the existing regulations and continue to be achievable. AB/GRIP urge the Commission to protect the groundwater of our state for this generation and future generations by rejecting NMED's proposed removal of the current five-year variance limit.

III. ARGUMENT

A. Statutory and Regulatory History of Variances.

The Water Quality Act ("WQA" or "Act") is the primary statutory mechanism by which ground water in our state is protected and by which the public can participate in the permitting process for the State's most precious public resource. The objective of the Act is to prevent and abate water pollution. Bokum Res. Corp. v. N.M. Water Quality Control Comm'n, 1979-NMSC-090, ¶ 59, 93 N.M. 546. The WQCC's statutory authority and mandate comes from the Water Quality Act, NMSA 1978, Sections 74-6-1 through 74-6-17 (1967, as amended through 2013) ("WQA" or "Act"). To carry out the Act's broad remedial purpose, the Act requires the WQCC to "adopt, promulgate and publish regulations to *prevent or abate water pollution* in the state." NMSA 1978, Section 74-6-4(E) (2009) (emphasis added).

The Act authorizes the Commission to promulgate regulations "specifying the procedure under which variances may be sought" and to grant variances from Commission regulations only under the following circumstances:

> [The WQCC] may grant an individual variance from any regulation of the commission whenever it is found that compliance with the regulation will impose an unreasonable burden upon any lawful business, occupation or activity. The commission may only grant a variance conditioned upon a person effecting a particular abatement of water pollution within a reasonable period of time. Any variance shall be granted for the period of time specified by the commission. The commission shall adopt regulations specifying the procedure under which variances may be sought, which regulations shall provide for the holding of a public hearing before any variance may be granted.

NMSA 1978, Section 74-6-4(H).

Section 74-6-4(H) of the Act authorizes the Commission to permit pollution only on a case-by-case basis through the issuance of a variance, and only after the Commission has conducted a public hearing at which the petitioner meets a specific statutory burden. Thus, the Legislature clearly understood that water pollution may unfortunately occur given the nature of certain industries and the limits of today's technology and sought to provide a *temporary* relief mechanism for regulated entities within the context of the Act's purpose of preventing or abating water pollution.

Variances allow polluters to *temporarily* avoid strict compliance with regulations, but only when necessary and justified by site-specific circumstances. Under the Act, variance proceedings are adjudicatory. This assures that due process is provided not only to the regulated entity who wants to avoid regulation, but also to others who may be adversely affected if the variance is granted.

The Legislature also placed a limit on the duration of variances. The WQA states that, "The commission may only grant a variance conditioned upon a person effecting a particular abatement of water pollution *within a reasonable period of time*." NMSA 1978, Section 74-6-4(H) (emphasis added). Both the face of the Act and its express purpose make clear that the

Legislature never intended the issuance of variances "for the life of a facility" so that industry could pollute New Mexico's most precious public resource in perpetuity.

The Commission first promulgated implementing regulations for the Act in 1967. In 1968, Regulation No. 5, "Procedure for Requesting a Variance," was promulgated, providing the variance mechanism to regulated entities.[1] A few years later, the Commission amended Regulation No. 5 to limit variances to one year.[2] In 1981, the Commission aligned the duration of variances with the duration of discharge permits by extending the variance limit from one year to five years. 1-210(D)(9) NMAC (1981).[3] The five-year variance limit has remained in effect since 1981.

B. The Purpose of a Variance is to Permit Temporary Pollution of Ground water and to Facilitate Abatement of Water Pollution Within a Reasonable Period of Time.

NMED's and the New Mexico Mining Association's ("NMMA" or "industry") argument that since the Commission's adoption of the Copper Rule and the Dairy Rule, "variances have a different role than is contemplated by Movant's [AB/GRIP] argument, which assumes that the purpose of a variance is to allow water pollution" is without merit for the following reasons.

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[1] New Mexico Commission of Public Records; New Mexico State Records Center and Archives series 5; Administrative Law Division Formerly Known as Rules Division subseries 5.1; Agency Historic Rules Collection sub-series 5.1.177; Rules – Water Quality Control Commission, Box no. 267. *See* Exhibit A of AB/GRIP's Motion to Dismiss in Part.

[2] New Mexico Commission of Public Records; New Mexico State Records Center and Archives series 5; Administrative Law Division Formerly Known as Rules Division subseries 5.1; Agency Historic Rules Collection sub-series 5.1.177; Rules – Water Quality Control Commission, Box no. 267. *See* Exhibit B of AB/GRIP's Motion to Dismiss in Part.

[3] New Mexico Commission of Public Records; New Mexico State Records Center and Archives series 5; Administrative Law Division Formerly Known as Rules Division subseries 5.1; Agency Historic Rules Collection sub-series 5.1.177; Rules – Water Quality Control Commission, Box no. 267. *See* Exhibit D of AB/GRIP's Motion to Dismiss in Part.

NMMA Response to AB/GRIP's Motion to Dismiss in Part, page 3; NMED Response to AB/GRIP's Motion to Dismiss in Part, page 6.

First, under the Act, the *only* purpose of a variance is to temporarily allow water pollution and to facilitate abatement of water pollution. Section 74-6-4(H). The Act only authorizes the Commission to grant variances "conditioned upon a person *effecting a particular abatement of water pollution within a reasonable period of time*". *Id.* (emphasis added). Under this plain language, variances can only be granted to regulated entities that are polluting ground water above standards and are striving to become compliant with Commission regulations within a reasonable period of time. *Id.*; Martin Testimony, transcript volume II, page 245, lines 1-7. Therefore, the purpose of a variance is to allow the regulated entity a reasonable period of time to determine how to become compliant with Commission regulations pertaining to ground water. Martin Testimony, transcript volume I, page 195, lines 4-19.

Second, contrary to NMED's assertion, the purpose of a variance, under the plain language of § 74-6-4(H), is not to grant regulated facilities permanent variances from the prescriptive requirements of the Dairy and Copper Rules that do not result in water pollution, such as for variances "from the number or location of monitoring wells, to certain design specifications of a facility". NMED Response to AB/GRIP's Motion to Dismiss in Part, pages 5-6; Vollbrecht Testimony transcript, volume I, page 75, lines 13-20; Martin Testimony transcript, pages 195-199. If NMED and industry want the Commission to have the authority to grant variances for permanent relief from the prescriptive requirements of the Copper and Dairy Rules, outside of the Act's required condition of effecting abatement, the proper remedy for NMED and industry is to propose a legislative amendment to the Water Quality Act itself. The Commission cannot amend the Act through promulgation of regulations.

Third, a variance from the prescriptive requirements of the Dairy Rule already exists within the Dairy Rule itself.[4] Vollbrecht Testimony, transcript volume I, page 92, lines 13-24. However, AB/GRIP maintain that the Dairy Rule variance provision most likely violates the Water Quality Act's variance provision. Under Section 20.6.6.18.D NMAC, a regulated entity may request a variance from the prescriptive requirements of the Dairy Rule for more than five years, such as facility design requirements or monitoring requirements. In fact, a variance may be granted from the prescriptive requirements of the Dairy Rule "for the expected useful life of a feature." *Id.* Therefore, NMED's and industry's proposal to open up the current five-year variance limit to allow permanent variances from the prescriptive requirements of the Dairy Rule is unnecessary.

Though the Dairy Rule's variance provision may result in an unfair advantage for the Dairy industry, as alleged by NMED and mining interests, that is a result of a legislative policy decision. Volbrecht Testimony, volume I, pages 93-94; Mining interests legal counsel, Stuart Butzier, page 283, lines 5-7. In 2008, the legislature amended the Water Quality Act, directing the Commission to promulgate regulations for the copper and dairy industries. NMSA 1978, § 74-6-4(K) (2009). The Commission ultimately promulgated the Copper Rule *without* a variance provision and a Dairy rule *with* a variance provision for reasons unknown. If the copper industry wants to be able to obtain variances from the prescriptive requirements of the Copper Rule "for the expected useful life of the feature," then the proper remedy is to amend the Copper Rule itself and not Section 20.6.2.1210 NMAC.

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[4] AB/GRIP does not waive its argument that the Dairy Rule's variance provision may violate the Water Quality Act's variance provision. Martin Testimony, transcript volume II, page 282, lines 1-16. The Dairy Rule's variance provision still stands because it has not yet been legally challenged.

Finally, it is important to note that when NMED and industry refer to the need for permanent variances from "prescriptive requirements" they are not referring to the Copper and Dairy Rules. NMED and industry are actually referring to the prescriptive requirement of water quality standards found at Section 20.6.2.3103 NMAC. Martin Testimony transcript volume I, page 199, lines 20-25, page 200, lines 1-13. NMED's and industry's proposal would be a means of obtaining permanent variances from the water quality standards set forth in Section 20.6.2.3101 NMAC, allowing industry to pollute our groundwater in perpetuity. *Id.* If industry desires a variance from the prescriptive requirements of -.3103 (water quality standards), then the proper remedy is a legislative one and not a regulatory amendment. Only the legislature can amend the Water Quality Act to allow for lifetime variances to pollute our state's most precious public resource.

C. NMED'S and Industry's Proposed Variance Rule Amendments Violate the Water Quality Act.

1. NMED's and industry's proposed removal of the five-year variance limit violates the Water Quality Act's purpose of preventing or abating water pollution.

As previously stated, the Water Quality Act is the primary statutory mechanism by which ground water in our state is protected and by which the public can participate in the permitting process for the State's most precious public resource. The objective of the Act is to *prevent and abate water pollution*. Bokum Res. Corp. v. N.M. Water Quality Control Comm'n, 1979-NMSC-090, ¶ 59, 93 N.M. 546 (emphasis added). NMED has expressly stated numerous times that the purpose of its proposed removal of the current five-year variance limit is to grant variances "for the life of a facility". *See* attached Exhibit C of AB/GRIP's Motion to Dismiss in Part; NMED Notice of Intent to Present Technical Testimony Exhibit 13, page 14, lines 11-12; and NMED Response to AB/GRIP's Motion to Dismiss in Part, page 6. Therefore, under

NMED's proposal, a facility expected to operate for over 100 years could receive a variance to pollute New Mexico's most precious public resource for over 100 years.

NMED's and industry's proposal is directly opposed to the Act's clear mandate of protecting groundwater quality and abating pollution of groundwater within a reasonable period of time. The legislative policy clearly expressed in the Act is that of preventing and abating water pollution, and it is not within the Commission's prerogative to reverse that policy.

2. NMED'S and industry's proposed removal of the five-year variance limit violates the Water Quality Act's "reasonable period of time" requirement.

It is important to note the history behind the enactment of 20.6.2.1210 NMAC and how the Commission has interpreted the statutory "reasonable period of time" requirement. As previously discussed, the Commission first promulgated implementing regulations for the Act in 1967. In 1968, Regulation No. 5, "Procedure for Requesting a Variance," was promulgated, providing the variance mechanism to regulated entities.[5] A few years later, the Commission amended Regulation No. 5 to limit variances to one year.[6] In 1981, the Commission aligned the duration of variances with the duration of discharge permits by extending the variance limit from one year to five years. 1-210(D)(9) NMAC (1981).[7] The current five-year variance limit is due

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[5] New Mexico Commission of Public Records; New Mexico State Records Center and Archives series 5; Administrative Law Division Formerly Known as Rules Division subseries 5.1; Agency Historic Rules Collection sub-series 5.1.177; Rules – Water Quality Control Commission, Box no. 267. *See* Exhibit A of AB/GRIP's Motion to Dismiss in Part.

[6] New Mexico Commission of Public Records; New Mexico State Records Center and Archives series 5; Administrative Law Division Formerly Known as Rules Division subseries 5.1; Agency Historic Rules Collection sub-series 5.1.177; Rules – Water Quality Control Commission, Box no. 267. *See* Exhibit B of AB/GRIP's Motion to Dismiss in Part.

[7] New Mexico Commission of Public Records; New Mexico State Records Center and Archives series 5; Administrative Law Division Formerly Known as Rules Division subseries 5.1; Agency

to 1) the purpose of a variance and 2) the link between a variance and a discharge permit. The five-year limit for variances has remained in effect since 1981.

The Act mandates that the Commission may only grant a variance on the condition that the facility requesting the variance effect "a particular abatement of water pollution *within a reasonable period of time*". Section 74-6-4(H) (emphasis added). Again, variances provide a *temporary* relief mechanism for regulated entities to avoid strict compliance with regulations while regulated entities determine how to abate ground water pollution. Ground water pollution generally occurs through a discharge of water contaminants to ground water pursuant to a discharge permit.[8]

Because a discharge permit is limited to five years, it is reasonable that a variance from Commission regulations applicable to that facility through its discharge permit (such as ground water standards) would be for the duration of the discharge permit. In this context, the "reasonable period of time" is the five-year duration of a discharge permit.

Though the Act does not expressly limit variances to five years under Section 74-6-4(H), the rules of statutory construction require Sections 74-6-5(I) and 74-6-4(H) to be considered and interpreted in harmony with each other, as a whole, in order to effectuate the Act's purpose of preventing and abating water pollution. Pueblo of Picuris v. N.M. Energy, Minerals and Nat. Res. Dept., 2001-NMCA-084, ¶ 14, 131 N.M. 166, 169. When Sections 74-6-5(I) and 74-6-4(H) are read harmoniously, as a whole, it naturally follows that variances would be limited to the

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Historic Rules Collection sub-series 5.1.177; Rules – Water Quality Control Commission, Box no. 267. *See* Exhibit D of AB/GRIP's Motion to Dismiss in Part.

[8] Ground water pollution may also come about by an unauthorized discharge of water contaminants to ground water. NMED has, however, failed to provide any evidence of a regulated entity that has either requested a variance or been granted a variance that did not have an associated discharge permit.

duration of a discharge permit in order to effectuate the Act's purpose of preventing and abating pollution of ground water.

3. Variances are linked with discharge permits that are statutorily limited to five year terms, thereby limiting variances to no more than five years.

AB/GRIP has presented substantial evidence that variances are historically and currently linked with discharge permits that are statutorily limited to five years, thereby limiting variances to no more than five years. Martin Rebuttal Testimony, page 4-6, referencing Exhibits F1, F2 and F5. Evidence submitted by AB/GRIP demonstrates that the legal pathway for a variance is a discharge permit. *Id.* The Commission has historically required NMED to incorporate conditions and requirements of an approved variance into the associated discharge permit. *Id.* at page 5, lines 16-21; page 6, lines 1-3, referencing Exhibit F5. The Commission also requires discharge permits for copper mines to include "any conditions based on a variance issued for the copper mine facility pursuant to 20.6.2.1210 NMAC." Section 20.6.7.10.H NMAC. The discharge permit then becomes the enforcement mechanism for any violation of the variance conditions and requirements. *Id.*; Martin Testimony, transcript volume I, page 190, lines 8-20.

NMED has failed to provide in their direct and rebuttal written testimony and exhibits, as well as in their oral testimony at hearing, any evidence of a facility without a discharge permit needing a variance, that has requested a variance, or that has been granted a variance. In fact, after careful review of all known requests for variances and orders granting variances, the Commission appears to have never been asked to grant a variance for a facility or entity that did not already have a discharge permit. Of the eleven IPRA response files reviewed that are related to variance requests before the Commission, all eleven facilities that were requesting a variance had discharge permits. Martin Rebuttal Testimony, page 5, lines 9-15, referencing Exhibit E;

Martin Testimony, transcript volume I, page 193, lines 21-25, page 194, lines 1-19.[9]

4. Alternative abatement standards are not a type of variance under Section 74-6-4(H) of the Water Quality Act.

NMED has argued the following, in pertinent part:

> Also, alternative abatement standards *are a type of variance* that the Commission addresses in the existing abatement regulations that are not necessarily related to permits and are not restricted to five years. In granting such alternative standards, the Commission has recognized that the reasonable period of time for them is typically in perpetuity, given their nature and the purpose.

Vollbrecht Testimony, volume I, page 80, lines 16-23 (emphasis added). NMED fails to provide any legal authority in support of this assertion. In fact, the Water Quality Act and its implementing regulations make clear that an alternative abatement standard is not a type of variance for three reasons.

First, the Act requires the Commission to "adopt, promulgate and publish regulations to prevent or abate water pollution." Section 74-6-4(E). This provision is the source of the Commission's authority to promulgate regulations pertaining to abatement and alternative abatement standards. The Commission has defined "abate" or "abatement" as "the investigation, containment, removal or other mitigation of water pollution." Section 20.6.2.7.B NMAC. "Alternative" is defined as, "One or the other of two things; giving an option or choice; allowing a choice between two or more things or acts to be done." Black's Law Dictionary.

The Commission has permitted the use of alternative abatement standards, under extremely limited circumstances, for the water quality standards set forth in Section 20.6.2.3103

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[9] AB/GRIP's expert has conceded that there are "very limited circumstances under which a facility may be exempt from the requirement of obtaining a discharge permit. Those exemptions are found at Section 20.6.2.3105 NMAC." Martin Rebuttal Testimony, page 5, footnote 4. NMED, however, has still failed to provide any evidence that a facility exempt from discharge permit requirements has either requested a variance or been granted a variance pursuant to Section 74-6-4(H) and Section 20.6.2.1210 NMAC. Hence, a situation where a variance is not associated with a discharge permit remains purely hypothetical.

NMAC. The mechanism of alternative abatement standards requires a regulated entity to still conduct abatement, but to a lesser standard than that identified in Section -3103 NMAC. Section 20.6.2.4103.F NMAC. Whereas a variance, pursuant to Section 74-6-4(H), permits a regulated entity to avoid compliance, in its entirety, with a Commission regulation. A variance from the water quality standards set forth in Section -3103 NMAC would allow a regulated entity to avoid abatement entirely, albeit for a limited period of time. Section 74-6-4(H).

Second, if the Legislature intended for alternative abatement standards to be a type of variance it would have expressly stated so in the Act and would have authorized the Commission to promulgate regulations for these two mechanisms pursuant to one provision.

Third, the Commission has historically treated these two mechanisms separately. Martin Testimony transcript, volume II, page 276, lines 10-25; page 277, lines 3-21. Regulations for alternative abatement standards were promulgated pursuant to Section 74-6-4(E) of the Act and can be found at Section 20.6.2.4103.F NMAC. Regulations for variances were promulgated pursuant to Section 74-6-4(H) of the Act and can be found at Section 20.6.2.1210 NMAC.

NMED's expert also testified at hearing that there are "at least 30 such sites that are under abatement that do not have discharge permits. Those facilities could request a variance from the Commission's abatement regulations." Vollbrecht Testimony, transcript volume I, page 80, lines 12-15. NMED then submitted Exhibit 42, "Sites Under Abatement With No Discharge Permit" during the hearing pursuant to AB/GRIP's request. *Id.* at page 90, lines 10-21. Exhibit 42 does not support NMED's assertion that 1) alternative abatement standards are a type of variance, and 2) that the Commission has granted variances for sites without a discharge permit. This exhibit simply identifies sites currently under abatement that do not have a discharge permit. *Id.* NMED has failed to provide substantial evidence of sites without discharge permits

that have received variances from the Commission. *Id.* NMED has merely provided a hypothetical situation to justify its proposed rule change.

5. NMED's and industry's proposed removal of the five-year variance limit violates the Water Quality Act's public participation requirements.

a. The Water Quality Act requires a public hearing for issuance, extension, renewal or continuance of a variance.

The Act provides that a variance "may not be *extended or renewed* unless a new petition is filed and *a public hearing is held.*" Section 74-6-4(H) (emphasis added). Therefore, when a facility submits a petition for an initial variance, renewal, extension or continuance of a variance, a public hearing *must* be held. *Id.* Under NMED's proposed amendment to remove the five-year variance limit, NMED would instead conduct an *internal administrative review* of a variance issued for the "life of a facility" every 5 years to determine compliance and continuance of the variance. Vollbrecht Testimony, transcript volume I, page 73, lines 21-25, page 74, lines 1-9. NMED's proposed internal review does not require that any public hearing be held on the five-year variance compliance report, which directly contradicts the Act's hearing requirements. NMSA 1978, § 74-6-4(H). This proposed internal review would be the functional equivalent of a variance renewal or extension, and therefore a public hearing must be held on any decisions to continue, renew or extend a variance. AB/GRIP Opening Statement, transcript volume I, page 169, lines 4-19, page 172, lines 1-9.

The statutory requirement of holding a public hearing for variance issuance, renewal, extension or continuance cannot be changed by regulatory amendment. "If there is a conflict or inconsistency between statutes and regulations promulgated by an agency, the language of the statutes prevail," and not the language of the regulation. Jones v. Empl. Serv. Div. of Human Serv. Dep't, 1980-NMSC-120, ¶ 3, 95 N.M. 97, 98.

b. NMED's and industry's proposal would chill public participation.

NMED's proposed five-year internal administrative review of a variance compliance report would also chill public participation in the permitting process. Under the Act and its implementing regulations found at Section 20.6.2.1210 NMAC, the public is guaranteed the right to be heard and to present evidence and witnesses every five years – the current five-year variance limit results in an automatic public hearing every five years, without the public having to request a public hearing.

Under NMED's proposed amendment, a new onerous burden would be placed on the public to hold variance petitioners accountable. Martin Testimony, transcript volume I, page 185, lines 2-18. NMED's proposal would have the Department simply conduct an administrative completeness review of a variance holder's five-year variance compliance report and not proceed to conduct a technical review of the five-year variance compliance report in order to verify the information provided. As Commissioner Dunbar stated during the hearing, "...it seems like that's where the responsibility ends." Transcript volume II, page 303, line 10. NMED's proposal, therefore, would place a new burden on the public to evaluate the veracity of a five-year variance compliance report.

Furthermore, even if a member of the public requests a public hearing on NMED's proposed five-year variance compliance report a public hearing does not have to be held. Under NMED's proposal, automatic public hearings become discretionary. Vollbrecht Testimony, transcript volume I, page 94, lines 16-19; 23-25, page 95, line 1; page 97, lines 13-19.

The Water Quality Act and its implementing regulations are replete with references to public input.[10] It is clear that the legislature intended for the public to play a key role in variance proceedings. NMSA 1978, § 74-6-4(H). New Mexico Courts have also made clear that NMED's and industry's attempts to chill public participation in variance proceedings would not withstand legal challenge. In re Rhino Envtl. Servs., 2005-NMSC-024, ¶ 23, 138 N.M. 133, 139, 117 P.3d 939, 945; Communities for Clean Water v. New Mexico Water Quality Control Commission, 2017 N.M. App. LEXIS 115.

c. NMED's and industry's proposal fails to provide transparency, thereby limiting public participation.

NMED's and industry's proposal also fails to provide transparency by allowing the variance holder to select what information it would provide in the proposed five-year variance compliance report. Under NMED's and industry's proposal, the variance holder could simply submit a one-sentence variance compliance report to NMED stating that there are no new facts or changed circumstances warranting a public hearing. *Id.* at page 100, lines 2-11. A variance holder would be given unlimited discretion to determine what it considers to be a new fact or changed circumstance and not NMED. *Id.* at page 99, lines 18-25, page 100, lines 1-11.

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[10] *See* NMSA 1978, Section 74-6-4(H) (1993) (Holding of a public hearing before any variance may be granted); NMSA 1978, Section 74-6-4(K) (2009) (Regulations adopted for particular industries "shall incorporate an opportunity for public input and stakeholder negotiations"); NMSA 1978, Section 74-6-5(F) (directing the WQCC to develop procedures that "ensure that the public…whose water may be affected shall receive notice of each application for issuance, renewal or modification of a permit"); Section 74-6-5(G) ("No ruling shall be made on any application for a permit without opportunity for a public hearing"); NMSA 1978, Section 74-6-6(A) (1993) ("No regulation or water quality standard or amendment or repeal thereof shall be adopted until after a public hearing"); *See also*, e.g., Section 20.1.3.7.A(12) NMAC, Section 20.1.3.16.C NMAC, Section 20.1.3.17.F NMAC, Section 20.1.3.18.D NMAC, Section 20.1.3.19.B(2) NMAC, and Section 20.1.3.20.B(1) NMAC (Hearing Officer shall conduct an adjudicatory hearing "so as to provide a reasonable opportunity for all interested persons to be heard").

Information is central to evaluation of the proposed five-year variance compliance report, not only for agency officials to make good decisions, but also for the public to participate in an informed, meaningful way. Martin Testimony, transcript volume I, page 185, lines 19-25; page 191, lines 21-25, page 192, lines 1-11; Vollbrecht Testimony, transcript volume I, page 99, lines 2-17. In order to properly monitor variance compliance, the public needs access to information upon which the variance holder is relying for its variance compliance report. This need for information applies to both before and after issuance of a variance. *Id.*

NMED's and industry's proposal is especially concerning because the five-year variance compliance report would be the basis for the public to determine compliance and whether a request for a public hearing should be made. Martin Testimony, transcript volume I, page 251, lines 2-22; page 252, lines 16-21. By giving the variance holder unfettered discretion regarding information to be included in the variance compliance report, NMED would be enabling industry's efforts to preclude public participation and monitoring. NMED's proposal would also undermine its ability to determine whether to request a public hearing on the variance compliance report, as well as the Commission's ability to determine whether to grant a request for a public hearing on the variance compliance report. *Id.* at page 97, lines 20-25, page 98, lines 1-8.

6. NMED's and industry's proposed internal administrative review of variance compliance reports exceeds the Commission's authority under the Water Quality Act.

NMED's and industry's proposed removal of the current five-year variance limit and its replacement with a five-year variance compliance report review also violates the Water Quality Act. Under NMED's and industry's proposal, the department would conduct a five-year variance compliance review and determine whether the variance should continue. This internal

administrative review is the functional equivalent of a variance renewal or extension petition review and is not permitted under the Act. NMSA 1978, § 74-6-4(H) makes clear that only the Commission has review and approval authority for variance issuance, extension and renewal. *Compare* NMSA 1978, § 74-6-4(H) (authorizes *only* the Commission to review and approve variance issuance, continuance, renewal or extension petitions) *with* NMSA 1978, § 74-6-5(A) (authorizes the Commission to delegate its review and approval authority of discharge permits to constituent agency NMED).

The Act does not authorize the Commission to delegate its review and approval authority for variances to NMED. *Id.* Under NMED's and industry's proposal, NMED would be reviewing and approving the proposed five-year variance compliance report – the functional equivalent of a variance continuance, renewal, or extension decision – and not the Commission. Therefore, NMED's proposal would be an unlawful delegation of authority. NMSA 1978, § 74-6-4(H); AB/GRIP counsel, transcript volume I, page 169, lines 4-9, page 172, lines 1-9; Old Abe Co. v. N.M. Mining Comm'n, 1995-NMCA-134, ¶ 31, 121 N.M. 83, 94; Kerr-McGee Nuclear Corp. v. N.M. Water Quality Control Comm'n, 1982-NMCA-015, ¶ 23, 98 N.M. 240, 246-247.

D. NMED's and Industry's Proposed Removal of the Current Five Year Variance Limit Is Not Supported by Substantial Evidence.

1. NMED's proposed removal of the current five-year variance limit is not supported by substantial evidence.

The Commission's decision to adopt a regulation must be based on substantial evidence. "Substantial evidence supporting administrative agency action is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." Oil Transportation Co. v. New Mexico State Corporation Commission, 110 N.M. 568, 571, 798 P.2d 169, 172 (1990). The agency must consider all evidence in the record. Perkins v. Department of Human Services, 106

N.M. 651, 654, 748 P.2d 24, 27 (Ct. App. 1987). Furthermore, the Commission's decision may be overturned when the decision is not supported by substantial evidence in the record. Section 74-6-7(B) NMSA 1978.

As petitioner, NMED bears the burden of proof in this rulemaking and must demonstrate that there is substantial evidence supporting adoption of its proposed amendments. Matter of D'Angelo, 105 N.M. 391, 393, 733 P.2d 360, 362 (1986); Foster v. Board of Dentistry, 103 N.M. 776, 777, 714 P.2d 580, 581 (1986). NMED has failed to provide any evidence in support of its proposed variance rule amendments. As such, NMED did not carry its burden.

NMED counsel stated at the beginning of the hearing, "As you will hear in the Department's testimony in this rule-making, the five-year limit is unduly restrictive and impractical for certain variances." NMED counsel, transcript volume I, page 23, lines 12-14. NMED expert, Kurt Vollbrecht, proceeded to testify to the following, in pertinent part:

> The current rule requires that a facility go through a full hearing before the Commission every five years, even if nothing has changed. This is a significant burden on the Commission, the entity requesting the variance, and the Department, that is unnecessary if nothing has changed…In the case of a variance from the requirement of a prescriptive rule, such as the Copper Rule or Dairy Rule, the time and effort associated with a variance – with a variance hearing every five years is inconsistent with the scope of the variance.

Vollbrecht Testimony, transcript volume I, page 74, lines 22-25, page 75, lines 1-17.

NMED did not provide any evidence supporting the following conclusions: 1) that the current five-year variance limit and accompanying mandatory public hearing is a burden on the Commission, the entity requesting the variance and the Department; 2) that regulated facility operations and financial assurance remain static over five years, resulting in no changes in facts or circumstances; and 3) the time and effort associated with a variance hearing specific to variance requests from the prescriptive requirements of the Dairy Rule or Copper Rule.

Vollbrecht Testimony, transcript volume I, pages 70-128. NMED could have provided a cost and time analysis to demonstrate any burden on the Department's resources under the current rule and to demonstrate ease of that burden under its proposed amendment, but the Department failed to do so. *Id.*; s*ee generally*, NMED NOI to Present Technical Testimony, NMED NOI to Present Rebuttal Testimony.

Furthermore, NMED's example of how the current variance rule is burdensome for certain types of variances, such as from the prescriptive requirements of the Dairy Rule, actually demonstrates that the Department's proposal is unnecessary. As previously discussed, the Dairy Rule already has a variance provision of its own and allows regulated entities to request a variance for the "expected useful life of a feature" well beyond five years. Section 20.6.6.18 NMAC. NMED's expert conceded that the Department's proposed amendment is unnecessary for variances from the Dairy Rule's prescriptive requirements, *Id.* at page 93, lines 3-8, and that the Copper Rule could be amended to allow for variances from its prescriptive requirements in lieu of amending Section 20.6.2.1210 NMAC. *Id.* at page 93, lines 23-25, page 94, lines 1-12.

2. Industry's proposed removal of the current five-year variance limit is not supported by substantial evidence.

a. The dairy industry failed to provide substantial evidence in support of its proposed amendments.

The Dairy Producers of New Mexico and the Dairy Industry Group For a Clean Environment ("dairy industry") presented Eric Palla as their expert witness at the hearing. The dairy industry supports NMED's proposed variance rule amendments and has put forth a few suggestions on how to clarify or improve upon NMED's proposal. *See generally*, dairy industry's Notice of Intent to Present Technical Testimony and Notice of Intent to Present Rebuttal Testimony. However, the dairy industry also failed to present any substantial evidence

in support of its conclusion that the current variance rule is burdensome on the dairy industry and that NMED's proposed amendment is necessary for the dairy industry. *Id.*; Palla Testimony, transcript volume I, pages 134-168. Like NMED, the dairy industry could have provided a cost and time analysis of the current and proposed rule to demonstrate its conclusions, yet it failed to do so.

Additionally, the dairy industry's expert testimony lacked any credibility. Mr. Palla submitted a resume demonstrating his qualifications as an "expert" as follows:

1) Raised on Family Farm in Clovis, NM
2) Bachelor of Science Degree in Ag-Business from Texas A&M University
3) Married Megan Stock 1997
4) 1997 returned to family dairy farm
5) Current operations partner in family farm

Dairy industry Notice of Intent to Present Technical Testimony, Exhibit B.

Mr. Palla failed to demonstrate that he had any personal experience with the variance petition process, with interpreting and applying Commission regulations, and with the technical justifications of the current rule and of NMED's proposal. Palla Testimony, transcript volume I, pages 134-168. Mr. Palla did not understand and could not articulate basic concepts and terminology used in his own pre-filed written testimony. For example, the dairy industry proposed a "materiality test" for when a public hearing could be held on the five-year variance compliance report under NMED's proposal. Dairy industry Notice of Intent to Present Technical Testimony, page 4. Mr. Palla could not define "materiality" and could not provide the criteria for determining "materiality." Palla Testimony, transcript volume I, page 148, lines 22-25, page 149, lines 1-3. Mr. Palla was also unable to define what "substantially influenced" meant in relation to his proposed "materiality test." *Id.* at page 149, lines 17-22.

The dairy industry also proposed limiting who could request a public hearing on a variance compliance report under NMED's proposal to "Only those persons who would have standing to appeal a permit decision." Dairy industry's Notice of Intent to Present Technical Testimony, page 4. Mr. Palla did not explain what the legal term "standing" means in either pre-filed written testimony or at the hearing and did not provide any substantial evidence supporting why the Commission should approve this amendment. *Id.*

b. The Mining Industry Failed to Provide Substantial Evidence in Support of Its Proposed Amendments.

The New Mexico Mining Association ("NMMA" or "mining industry") presented Michael Neumann as their expert witness at the hearing. The mining industry also supports NMED's proposed variance rule amendments and has put forth a few suggestions on how to clarify or improve upon NMED's proposal. *See generally*, NMMA's Notice of Intent to Present Technical Testimony and Notice of Intent to Present Rebuttal Testimony. However, the mining industry also failed to present any substantial evidence in support of its conclusion that the current variance rule is burdensome on the mining industry and that NMED's proposal is necessary for the mining industry. *Id.*; Neumann Testimony, transcript volume II, pages 329-334. Like NMED, the mining industry could have provided a cost and time analysis of the current and proposed rule to demonstrate its conclusions, yet it failed to do so.

E. NMED's and Industry's Proposed Removal of the Five-Year Variance Limit Does Not Satisfy the Statutory Criteria for Rule Promulgation.

In adopting regulations, the Commission shall give weight it deems appropriate to all relevant facts and circumstances, including:

> (1) character and degree of injury to or interference with health, welfare, environment and property;
> (2) the public interest, including the social and economic value of the sources of water contaminants;

(3) technical practicability and economic reasonableness of reducing or eliminating water contaminants from the sources involved and previous experience with equipment and methods available to control the water contaminants involved;

(4) successive uses, including but not limited to domestic, commercial, industrial, pastoral, agricultural, wildlife and recreational uses;

(5) feasibility of a user or a subsequent user treating the water before a subsequent use;

(6) property rights and accustomed uses; and

(7) federal water quality requirements.

NMSA 1978, § 74-6-4(E).

NMED's and industry's proposal to remove the current five-year variance limit and replace it with a five-year variance compliance review to be conducted internally and administrative within the Department does not meet the criteria for Commission rule promulgation for the following reasons:

1) *Character and degree of injury to or interference with health, welfare, environment and property*. As proposed, NMED's and industry's rule would interfere with health, welfare, environment and property. In New Mexico, ground water is public property. Approximately ninety (90) percent of the people in New Mexico rely on ground water for drinking water, and approximately ten (10) percent of the population obtain their drinking water from private supply systems that are not subject to the federal drinking water standards. N.M. Mining Association v. N.M. Water Quality Control Comm'n, 2007-NMCA-10, ¶ 23, 141 N.M. 41, 49. Allowing the issuance of variances "for the life of a facility," or in other words in perpetuity, would result in substantial pollution to this State's most precious public resource in perpetuity.

2) *The public interest, including the social and economic value of the sources of water contaminants*. The Constitution declares that "water and other natural resources of this state" are "of fundamental importance to the public interest, health, safety and the

general welfare." N.M. Const. art. XX, § 21. Again, groundwater is a public resource and approximately 90 percent of New Mexico's population depends on groundwater as the primary source of drinking water. N.M. Mining Association v. N.M. Water Quality Control Comm'n, 2007-NMCA-10, ¶ 23, 141 N.M. 41, 49. NMED's and industry's proposal shifts the burden of proof from the variance holder to the public to prove that groundwater standards are being exceeded and that abatement of groundwater pollution is not occurring within a reasonable period of time. Under NMED's and industry's proposal to remove the current five-year variance limit, groundwater pollution would likely be extensive, occur in perpetuity, and cause substantial harm to the public and the State through the loss of water resources.

3) *Technical practicability and economic reasonableness of reducing or eliminating water contaminants from the sources involved and previous experience with equipment and methods available to control the water contaminants involved.* NMED and industry did not provide any evidence regarding economic reasonableness of the proposed variance rule amendments. NMED and industry also did not provide any evidence regarding economic burdens to the Department, the Commission, and industry under the current variance rule. NMED's and industry's proposal also does not take into consideration the economic expense of abating ground water pollution that would occur under their proposal.

4) *Successive uses, including but not limited to domestic, commercial, industrial, pastoral, agricultural, wildlife and recreational uses.* NMED's and industry's proposed removal of the five-year variance limit and issuance of permanent variances would allow

intentional pollution of ground water in perpetuity. Therefore, NMED's and industry's proposal does not protect successive uses.

5) *Feasibility of a user or a subsequent user treating the water before a subsequent use.* NMED's and industry's proposal would allow intentional pollution of ground water in perpetuity. There is no consideration of treatment by subsequent users.

6) *Property rights and accustomed uses.* In addressing property rights, it is important to note that a person or regulated entity does not have the right to contaminate ground water in excess of ground water quality standards. Ground water is public property and is protected as a public resource.

7) *Federal water quality requirements.* NMED's and industry's proposed variance rule amendments is proposed for adoption under state statutes for prevention of water pollution and is not directly linked to federal water quality requirements.

F. The Commission Does Not Have Authority to Promulgate NMED's and Industry's Proposed Removal of the Current Five-Year Variance Limit.

"Statutes create administrative agencies, and agencies are *limited to the power and authority that is expressly granted and necessarily implied by statute*." In re PNM Elec. Servs., 1998-NMSC-17, ¶ 10, 125 N.M. 302. The Water Quality Act does not authorize the Commission to promulgate rules that would violate the Act. NMSA 1978, § 74-6-4(C); State ex rel. Stapleton v. Skandera, 2015-NMCA-044, ¶ 8, 346 P.3d 1191 ("the administrative agency's discretion may not justify altering, modifying, or extending the reach of a law created by the Legislature"). Furthermore, the Commission's rulemaking authority is limited by NMSA 1978, Section 74-6-12, which states that in adopting regulations "reasonable degradation of water

quality resulting from beneficial use shall be allowed. Such degradation shall not result in impairment of water quality to the extent that water quality standards are exceeded."

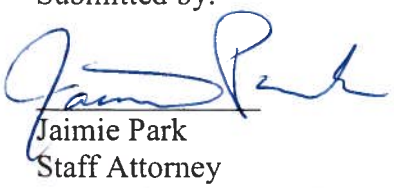
Accordingly, the WQCC cannot adopt NMED's and industry's proposed removal of the current five-year variance limit because it would result in exceedance of water quality standards and would not result in abatement of ground water pollution within a reasonable period of time, thereby violating 1) the Water Quality Act's fundamental purpose, which is to prevent and abate water pollution, and 2) the Act's variance provision.

IV. CONCLUSION

The Commission may reject any petition, or parts thereof, regardless of whether NMED or another party submits it. NMSA 1978, Section 74-6-6(B) (the Commission's "denial of...a petition shall not be subject to judicial review"); NMSA 1978, Section 74-6-9(F) (providing that constituent agencies, such as NMED, may "on the same basis as any other person, recommend and propose regulations and standards for promulgation by the commission"). For the above stated reasons, the Commission should reject NMED's and industry's proposed removal of the current five-year limit and adopt AB/GRIP's proposal provided in AB/GRIP's concurrently filed Statement of Reasons.

Dated: February 16, 2018

Submitted by:



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Closing Argument was served on February 16, 2018 via electronic mail to the following:

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