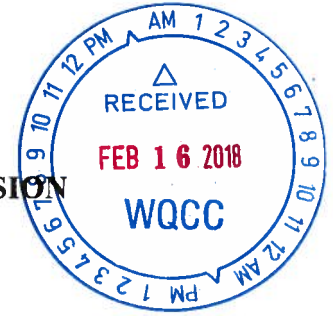


**STATE OF NEW MEXICO
BEFORE THE WATER QUALITY CONTROL COMMISSION**



**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 PROPOSED
STATEMENT OF REASONS**

Introduction

Amigos Bravos and the Gila Resources Information Project (collectively referred to as "AB/GRIP") hereby files this Proposed Statement of Reasons in opposition to the New Mexico Environment Department's ("NMED") proposal to remove the current five-year variance limit and other changes to the current Alternative Abatement Standards regulations ("Proposal" or "Proposed Rule"), and in support of AB/GRIP's proposed amendments to 20.6.2.1210 and - .4103 NMAC. AB/GRIP files contemporaneously with this Proposed Statement its Closing Argument.

PROPOSED FINDINGS OF FACT

I. GROUND WATER IS A PUBLIC RESOURCE

1. Since 1931, ground waters in New Mexico have been "declared to be public waters and to belong to the public." NMSA 1978, Section 72-12-1 & History.
2. New Mexico's ground water is not owned by or does not belong to the owners of private property above ground water. Individuals and entities may use the State's ground water for "beneficial use," subject to appropriate authorization from the State. *Id.*
3. Ground water, in New Mexico, is a public resource. *Id.*

4. 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.
5. Ground 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 (10th Cir. 2006).
6. Water is New Mexico's "most precious resource." NMSA 1978, Section 74-1-12(A).
7. The New Mexico 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.
8. The New Mexico Supreme Court has declared, "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." Kaiser Steel Corp. v. W.S. Ranch Co., 1970-NMSC-043, ¶ 15, 81, N.M. 414, 417.

II. PROCEDURAL HISTORY OF NMED'S PETITION FOR RULEMAKING

9. The New Mexico Environment Department ("NMED") first filed its Petition to Amend the Ground and Surface Water Protection Regulations (20.6.2 NMAC) ("Petition") on March 22, 2017 with this Commission.
10. After a procedural Motion to Dismiss filed by the New Mexico Environmental Law Center ("NMELC"), NMED withdrew its Petition on April 19, 2017.

11. NMED filed a second Petition on May 1, 2017.
12. This Commission set a hearing on NMED's "Corrected Amended Petition" ("Petition") and appointed Erin Anderson as Hearing Officer on August 7, 2017.
13. The hearing on NMED's Petition was scheduled for November 14, 2017.
14. The following parties filed an Entry of Appearance in this matter: City of Roswell; Laun-Dry; Los Alamos National Security, LLC; Amigos Bravos and the Gila Resources Information Project (collectively, "AB/GRIP"); the New Mexico Environmental Law Center ("NMELC"); the New Mexico Mining Association ("NMMA"); William C. Olson; the Dairy Producers of New Mexico ("DPNM") and the Dairy Industry Group for a Clean Environment ("DIGCE") (collectively, "the Dairies" or "Dairy industry"); the New Mexico Municipal League Environmental Quality Association; United States Air Force, Department of Defense ("DOE"); the New Mexico Energy, Minerals and Natural Resources Department ("EMNRD"); Rio Grande Resources Corporation; American Magnesium, LLC; New Mexico Copper Corporation.
15. Parties filed Statements of Position and Proposed Amendments on NMED's Petition on July 27, 2017.
16. NMED filed an "Amended Petition" on July 27, 2017.
17. NMED filed a "Corrected Amended Petition" on August 7, 2017.
18. AB/GRIP filed an Expedited Motion to Stay All Filing Deadlines and Hearing on August 29, 2017.
19. AB/GRIP and NMED filed a Joint Stipulation Regarding Proposed Changes to 20.6.2 NMAC on September 6, 2017.

20. Parties filed a Notice of Intent to Present Technical Testimony on September 11, 2017.
21. Dairy industry filed a Response in Opposition to AB/GRIP's Expedited Motion to Stay All Filing Deadlines and Hearing on September 13, 2017.
22. NMED filed a Response in Opposition to AB/GRIP's Expedited Motion to Stay All Filing Deadlines and Hearing on September 13, 2017.
23. AB/GRIP filed a Consolidated Reply to Dairy industry's and NMED's Responses in Opposition to AB/GRIP's Expedited Motion to Stay All Filing Deadlines and Hearing on September 20, 2017.
24. Hearing Officer Erin Anderson denied AB/GRIP's Expedited Motion to Stay All Filing Deadlines and Hearing on September 25, 2017.
25. AB/GRIP filed a Motion to Dismiss in Part on September 29, 2017.
26. NMED filed a Response in Opposition to AB/GRIP's Motion to Dismiss in Part on October 16, 2017.
27. LANS filed a Response in Opposition to AB/GRIP's Motion to Dismiss in Part on October 16, 2017.
28. NMMA filed a Response in Opposition to AB/GRIP's Motion to Dismiss in Part on October 16, 2017.
29. AB/GRIP filed a Consolidated Reply to NMED, LANS and NMMA Responses on October 24, 2017.
30. Parties filed a Notice of Intent to Present Rebuttal Testimony on October 27, 2017.

31. NMED filed a Notice of Withdrawal of NMED's Proposed Definition of Discharge Permit Amendment and Related Changes to 20.6.2 NMAC on November 7, 2017.
32. NMED filed an Amended Notice of Withdrawal of NMED's Proposed Definition of Discharge Permit Amendment and Related Changes to 20.6.2 NMAC on November 9, 2017.
33. Parties filed a Joint Stipulation Regarding NMED's Notice of Withdrawal of NMED's Proposed Definition of Discharge Permit Amendment and Related Changes to 20.6.2 NMAC on November 13, 2017.
34. The Commission denied AB/GRIP's Motion to Dismiss in Part on November 14, 2017. The Commission issued its Order Denying AB/GRIP's Motion to Dismiss in Part on November 21, 2017.

III. COMMISSION RULEMAKING HEARING

35. The Commission held a public rulemaking hearing in Santa Fe, New Mexico on NMED's Petition over the course of four days, from November 14, 2017 through November 17, 2017.
36. During the Commission's rulemaking hearing on NMED's and industry's proposed removal of the current five-year variance limit, one witness presented technical testimony on behalf of NMED (Kurt Vollbrecht); one witness presented technical testimony on behalf of AB/GRIP (Kathy J. Martin); one witness presented technical testimony on behalf of NMMA (Michael Neumann); William C. Olson presented technical testimony on his own behalf; and one witness presented non-technical testimony on behalf of the Dairy industry (Eric Palla).

37. During the Commission's rulemaking hearing on NMED's and industry's proposed Alternative Abatement Standards rule amendments, one witness presented technical testimony on behalf of NMED (Kurt Vollbrecht); one witness presented technical testimony on behalf of AB/GRIP (Kathy J. Martin); one witness presented technical testimony on behalf of the City of Roswell (Jay Snyder); and William C. Olson presented technical testimony on his own behalf.
38. AB/GRIP offered one expert witness in support of its position on NMED's proposed removal of the current five-year variance limit and on NMED's proposed Alternative Abatement Standards rule amendments: Kathy J. Martin, PE.
39. Ms. Martin is President of Martin Environmental Services, LLC in Norman, Oklahoma. She has a Bachelor of Science in Petroleum Engineering and a Master of Science in Civil Engineering, both from the University of Oklahoma. Her education and professional experience have been focused on state and federal environmental permits related to ground and surface water protection, as well as permitting related to air pollution and odor control. Ms. Martin has performed third-party engineering evaluations of waste management systems for confined animal feeding operations, hundreds of evaluations of the technical and regulatory completeness of permit applications for livestock production waste management systems in twenty-two (22) states in the country, and has developed state environmental regulations for surface impoundments and land application for industrial facilities in Oklahoma. Ms. Martin has also drafted water quality permits for industrial wastewater and oversaw closure of waste lagoons and

impoundments, which involved the assessment of ground water impacts. Additionally, she has served as the Project Officer of the Tar Creek Superfund Site, an abandoned lead and zinc mine in Oklahoma, overseeing the design and implementation of a regional ground water monitoring project. From 2009 to 2015, Ms. Martin worked on the New Mexico “Dairy Rule”, testifying before the Commission on numerous occasions during that rule-making process. Ms. Martin’s experience and credentials are set forth in more detail in her resume, her written direct testimony and her oral testimony. AB/GRIP’s Notice of Intent to Present Technical Testimony, Exhibit A; Martin Testimony, transcript volume I, page 173-178.

IV. STATUTORY AND REGULATORY VARIANCE REQUIREMENTS

40. 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. AB/GRIP’s Motion to Dismiss in Part, page 2.
41. 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.
42. The Commission’s statutory authority and mandate comes from the Act, NMSA 1978, Sections 74-6-1 through 74-6-17 (1967, as amended through 2013) (“WQA” or “Act”).

43. To carry out the Act's broad remedial purpose, the Act requires the Commission 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).

44. 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 Commission] 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) (emphasis added).

45. Section 74-6-4(H) of the Act authorizes the Commission to permit *temporary* 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. *Id.*

46. The Legislature also placed a limit on the duration of variances. The Act 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.*" *Id.* (emphasis added).

47. 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. Water

Quality Act, NMSA 1978, §§ 74-6-1 through 74-6-17 (1967, as amended through 2013).

48. The Commission first promulgated implementing regulations for the Act in 1967.

AB/GRIP's Motion to Dismiss in Part, page 5.

49. In 1968, Regulation No. 5, "Procedure for Requesting a Variance," was promulgated, providing the variance mechanism to regulated entities. *Id.*

50. A few years later, the Commission amended Regulation No. 5 to limit variances to one year. *Id.*

51. 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). *Id.*

52. The five-year variance limit has remained in effect since 1981. *Id.* at page 6.

53. The purpose of a variance is *only* to *temporarily* allow water pollution and to facilitate abatement of water pollution. § 74-6-4(H).

54. 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).

55. Under the plain language of § 74-6-4(H), 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.

56. Under the plain language of § 74-6-4(H), the purpose of a variance 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.” Martin Testimony transcript, pages 195-199.

57. A variance from the prescriptive requirements of the Dairy Rule already exists within the Dairy Rule itself. Vollbrecht Testimony, transcript volume I, page 92, lines 13-24; Section 20.6.6.18.D NMAC.

1. However, the Dairy Rule’s variance provision may be unlawful. Section 20.6.6.18.D NMAC; § 74-6-4(H).

58. 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. Section 20.6.6.18.D NMAC.

59. A variance may be granted from the prescriptive requirements of the Dairy Rule “for the expected useful life of a feature.” *Id.*

60. 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. Vollbrecht Testimony, transcript volume I, page 92, lines 13-24.

61. However, no variance provision from the prescriptive requirements of the Copper Rule exists within the Copper Rule. Section 20.6.7 NMAC.

62. 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. NMSA 1978, Section 74-6-4(K) (2009); Vollbrecht

Testimony, volume I, pages 93-94; Mining interests legal counsel, Stuart Butzier, page 283, lines 5-7.

63. 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).

64. The Commission ultimately promulgated the Copper Rule *without* a variance provision and a Dairy rule *with* a variance provision. Section 20.6.7 NMAC; Section 20.6.6.18 NMAC.

65. If the copper industry wants 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 to allow such variance requests, and not Section 20.6.2.1210 NMAC.

66. The Copper Rule and the Dairy Rule are not the only prescriptive requirements under the Water Quality Act. Martin Testimony, transcript volume I, page 199, lines 20-25, page 200, lines 1-13.

67. The Commission’s water quality standards set forth in Section 20.6.2.3103 NMAC are also prescriptive requirements under the Act. *Id.*

68. The Act does not permit the granting of variances from Section 20.6.2.3103 NMAC “for the expected useful life of the facility.” § 74-6-4(H).

V. NMED'S AND INDUSTRY'S PROPOSED REMOVAL OF THE CURRENT FIVE-YEAR VARIANCE LIMIT DEFICIENCIES

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

69. NMED has proposed removing the Commission's current five-year limit on variances under Section 20.6.2.1210 NMAC. Vollbrecht Testimony, transcript volume I, page 73, lines 21-24.
70. Polluters support NMED's proposed removal of the five-year variance limit. Dairy industry's Notice of Intent to Present Technical Testimony, page 3; NMMA's Notice of Intent to Present Technical Testimony, page 5.
71. 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.
72. Therefore, under NMED's and industry'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. AB/GRIP's Motion to Dismiss in Part, page 6.
73. NMED's proposal is directly opposed to the Act's clear mandate of protecting ground water quality and abating pollution of ground water within a reasonable period of time. §§ 74-6-1 through 74-6-17 (1967, as amended through 2013).

74. 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. *Id.*

75. The Commission has imposed a five-year variance limit because of the purpose of a variance and because of the link between variances and discharge permits. AB/GRIP's Consolidated Reply to Responses Filed by NMED, New Mexico Mining Association, and Los Alamos National Security, LLC on AB/GRIP's Motion to Dismiss in Part, pages 7-9 ("AB/GRIP's Consolidated Reply").

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

76. The Commission first promulgated implementing regulations for the Act in 1967. AB/GRIP's Motion to Dismiss in Part, page 5.

77. In 1968, Regulation No. 5, "Procedure for Requesting a Variance," was promulgated, providing the variance mechanism to regulated entities. *Id.*

78. A few years later, the Commission amended Regulation No. 5 to limit variances to one year. *Id.*

79. 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). *Id.*

80. The current five-year variance limit is due to 1) the purpose of a variance and 2) the link between a variance and a discharge permit. *Id.* at page 6.

81. 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.*” § 74-6-4(H) (emphasis added).

82. Variances provide a *temporary* relief mechanism for regulated entities to avoid strict compliance with regulations. AB/GRIP’s Response, page 9.
83. Ground water pollution generally occurs through a discharge of water contaminants to ground water pursuant to a discharge permit. Martin Testimony, transcript volume I, page 195, lines 4-19; AB/GRIP’s Motion to Dismiss in Part, page 7.
84. 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. Vollbrecht Testimony, transcript volume I, pages 70-128; *see also* NMED’s Exhibit 42 submitted during hearing.
85. 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 quality standards) would be for the duration of the discharge permit. In this context, the Act’s “reasonable period of time” requirement is the five-year duration of a discharge permit. AB/GRIP’s Response, pages 7-9; Section 74-6-5(I).
86. Though the Act does not expressly limit variances to five years under § 74-6-4(H), the rules of statutory construction require § 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; AB/GRIP's Motion to Dismiss in Part, page 8.

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

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

88. 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.

89. Evidence submitted by AB/GRIP demonstrates that the legal pathway for a variance is a discharge permit. *Id.*

90. 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.

91. The Commission 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.

92. The discharge permit then becomes an enforcement mechanism for any violation of the variance conditions and requirements. *Id.*; Martin Testimony, transcript volume I, page 190, lines 8-20.

93. 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. Vollbrecht Testimony, transcript volume I, pages 70-128; *see also* NMED's Exhibit 42 submitted during hearing.

94. 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. 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.

95. 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. Vollbrecht Testimony, transcript volume I, pages 70-128; *see also* NMED's Exhibit 42 submitted during hearing.

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

96. 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. Vollbrecht Testimony, transcript volume I, pages 70-128.

97. The Water Quality Act and its implementing regulations make clear that an alternative abatement standard is not a type of variance for three reasons.
98. First, the Act requires the Commission to “adopt, promulgate and publish regulations to prevent or abate water pollution.” NMSA 1978, 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.
99. “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.
100. 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 NMAC. Section 20.6.2.4103 NMAC.
101. The mechanism of alternative abatement standards requires a regulated entity to still conduct abatement, but to a lesser standard than that identified in Section 20.6.2.3101 NMAC. Section 20.6.2.4103.F NMAC.

102. Whereas a variance, pursuant to § 74-6-4(H), permits a regulated entity to avoid compliance, in its entirety, with a Commission regulation. § 74-6-4(H).
103. A variance from the water quality standards set forth in Section 20.6.2.3103 NMAC would allow a regulated entity to avoid abatement entirely, albeit for a limited period of time. *Id.*
104. 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 § 74-6-4(H). *Id.*
105. 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.
106. 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.
107. 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.
108. 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.

109. 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.

110. This exhibit simply identifies sites currently under abatement without a discharge permit. It does not identify sites without discharge permits that have received variances. *Id.*

111. NMED has failed to provide substantial evidence of sites without discharge permits that have received variances from the Commission. *Id.*

112. Therefore, NMED has failed to provide substantial evidence that variances are not linked with discharge permits.

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

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

113. The Act provides that a variance cannot be granted without the holding of a public hearing. § 74-6-4(H).

114. 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.*; Martin Testimony, transcript volume I, page 248, lines 14-18.

115. Under NMED’s and industry’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 (emphasis added).

116. NMED's and industry's proposed internal review does not require a mandatory public hearing be held on the five-year variance compliance report, violating the Act's hearing requirements. § 74-6-4(H).

117. 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. *Id.*; AB/GRIP Opening Statement, transcript volume I, page 169, lines 4-19, page 172, lines 1-9.

118. The statutory public hearing requirement 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. § 74-6-4(C); Jones v. Empl. Serv. Div. of Human Serv. Dep't, 1980-NMSC-120, ¶ 3, 95 N.M. 97, 98; § 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").

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

119. NMED's and industry's proposed five-year internal administrative review of a variance compliance report would also chill public participation in the permitting process.

120. 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. § 74-6-4(H); Section 20.6.2.1210 NMAC.

121. Under NMED's and industry'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; Martin Testimony, transcript volume II, page 310, lines 21-25, page 311, lines 1-4.

122. NMED's and industry'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 technical completeness of a five-year variance compliance report. *Id.*

123. 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 and industry's proposal, automatic public hearings would become discretionary. Vollbrecht Testimony, transcript volume I, page 94, lines 16-19; 23-25, page 95, line 1; page 97, lines 13-19.

124. A discretionary hearing would chill public participation by placing a new, onerous burden on the public to demonstrate why a public hearing should be held on NMED's proposed five-year variance compliance report. Martin testimony,

transcript volume I, page 249, lines 12-16; Martin Testimony, transcript volume II, page 310, lines 21-25, page 311, lines 1-4.

125. It is clear that the legislature intended for the public to play a key role in variance proceedings. NMSA 1978, § 74-6-4(H).

126. 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 Env'tl. 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.

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

127. 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.

128. A variance holder would be given unlimited discretion to determine what it considers to be a new fact or changed circumstance. *Id.* at page 99, lines 18-25, page 100, lines 1-11.

129. NMED would not be determining what information in the proposed variance compliance report constitutes a new fact or changed circumstance. *Id.*; Commissioner Dunbar statement, transcript volume II, page 303, line 10.

130. 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.
131. 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.*
132. 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 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.
133. 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. Martin Testimony, transcript volume I, page 261, lines 19-25, page 262, lines 1-4; Vollbrecht Testimony, transcript volume I, page 100, lines 2-16.
134. 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.

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

135. NMED's and industry's proposed removal of the current five-year variance limit and its replacement with an administratively reviewed five-year variance compliance report also violates the Water Quality Act.

136. 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. *Id.*

137. § 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); Vollbrecht Testimony, volume IV, page 832, lines 20-22.

138. The Act does not authorize the Commission to delegate its review and approval authority for variances to NMED. *Id.*; § 74-6-4(F).

139. 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. § 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.

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

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

140. 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).
141. 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).
142. Furthermore, the Commission's decision may be overturned when the decision is not supported by substantial evidence in the record. §74-6-7(B).
143. 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).
144. NMED has failed to provide any evidence in support of its proposed

removal of the current five-year variance limit. Vollbrecht Testimony, transcript volume I, pages 70-128. As such, NMED did not carry its burden.

145. 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.

146. 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.

147. 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.

148. 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.*; see generally, NMED NOI to Present Technical Testimony, NMED NOI to Present Rebuttal Testimony.

149. Furthermore, NMED's example of how the current five-year variance limit 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. 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.

150. 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.

ii. Industry's proposed variance rule amendments are not supported by substantial evidence.

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

151. 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. Palla Testimony, transcript volume I, pages 134-161.

152. 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.

153. 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.

154. 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. AB/GRIP's Closing Argument, page 19.

155. 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.

156. 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.

157. Mr. Palla also testified at the hearing that "life on a farm and a little common sense" qualified him as an expert regarding variances. *Id.* at page 141, lines 19-20.

158. Mr. Palla demonstrated that he did not understand and could not articulate basic concepts and terminology used in his own pre-filed written testimony. *Id.*, pages 134-168.
159. 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.
160. 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.
161. 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.
162. 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. *See generally*, dairy industry’s Notice of Intent to Present Technical Testimony and Notice of Intent to Present Rebuttal Testimony; Palla Testimony, transcript volume I, pages 134-168.

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

163. The New Mexico Mining Association (“NMMA” or “mining industry”)

presented Michael Neumann as their expert witness at the hearing. Neumann Testimony, transcript volume II, pages 329-334.

164. 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.

165. 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.

166. 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. AB/GRIP's Closing Argument, page 21.

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

167. 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.

§ 74-6-4(E).

168. 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 administratively within the Department does not meet the criteria for Commission rule promulgation for the following reasons:

169. *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. 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. AB/GRIP's Closing Argument, page 22.

170. *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 ninety (90) percent of New Mexico's population depends on groundwater as the primary source of drinking water. 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. *Id.*

171. *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. NMED and industry also failed to demonstrate how regulated facility operations remain static over a five-year period. *Id.* at pages 22-23.

172. *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. *Id.* at 23.

173. *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. *Id.*

174. *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. *Id.*

175. *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. *Id.*

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

176. "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.

177. 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").

178. 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.”

179. 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.

180. 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”).

VI. JUSTIFICATION FOR ADOPTING AB/GRIP’S PROPOSED AMENDMENTS TO THE VARIANCE RULE, SECTION 20.6.2.1210 NMAC.

181. AB/GRIP has presented substantial evidence in support of its proposed amendments to Section 20.6.2.1210 NMAC. AB/GRIP’s Statement of Position with Proposed Changes, page 39-43; AB/GRIP’s Notice of Intent to Present Rebuttal Testimony; Martin Testimony, transcript volume I, pages 173-204; Martin Testimony, transcript volume II, pages 325.

182. AB/GRIP’s proposal meets the criteria for Commission rule promulgation for the following reasons:

183. *Character and degree of injury to or interference with health, welfare, environment and property.* AB/GRIP's proposal would protect health, welfare, environment and property. In New Mexico, ground water is public property. Maintaining the current five-year variance limit and clarifying the criteria by which the Commission may grant a variance request will result in the protection of this State's most precious public resource. AB/GRIP's Corrected Statement of Position with Proposed Changes, pages 39-43.
184. *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 ninety (90) percent of New Mexico's population depends on groundwater as the primary source of drinking water. AB/GRIP's proposal maintains the current variance holder's burden of proof to demonstrate that ground water standards are not being exceeded and that abatement of groundwater pollution is occurring within a reasonable period of time. AB/GRIP's proposal protects the social and economic value of public participation in the permitting process and protects the social and economic value of this state's most precious public resource – ground water – by maintaining the current five-year variance limit and public participation requirements. *Id.*
185. *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. The Commission has previously found that the five-year variance limit is technically practicable and economically reasonable. AB/GRIP's proposal relies on the Commission's previous findings of technical practicability and economic reasonableness of the five-year variance limit.

186. *Successive uses, including but not limited to domestic, commercial, industrial, pastoral, agricultural, wildlife and recreational uses.* AB/GRIP's proposal would protect successive uses of ground water by maintaining the current five-year variance limit, which requires abatement of ground water pollution within a reasonable period of time and protects public participation in variance petition proceedings. *Id.*
187. *Feasibility of a user or a subsequent user treating the water before a subsequent use.* AB/GRIP's proposal protects the future user of ground water by maintaining the current five-year variance limit, which requires abatement of ground water pollution within a reasonable period of time and protects public participation in variance petition proceedings. *Id.*
188. *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.
189. *Federal water quality requirements.* AB/GRIP's proposal improves upon the current variance regulation by clarifying that a variance must comply with existing federal regulations. *Id.*
190. AB/GRIP's proposal also provides uniformity of the variance mechanism

among New Mexico Statutes by incorporating language from the New Mexico Solid Waste Act variance regulations. *Id.*

191. For these reasons, the Commission adopts AB/GRIP's proposal as follows:

20.6.2.1210 VARIANCE PETITIONS:

A. Any person seeking a variance pursuant to NMSA 1978, Section 74-6-4(H) shall do so by filing a written petition with the commission. The petitioner may submit with his petition any relevant documents or material which the petitioner believes would support his petition. Petitions shall:

- (1) state the petitioner's name and address;
- (2) state the date of the petition;
- (3) describe the facility or activity for which the variance is sought;
- (4) state the address or description of the property upon which the facility is located;
- (5) describe the water body, watercourse, or aquifer affected by the discharge for which the variance is sought;
- (6) identify the regulation of the commission from which the variance is sought;
- (7) state in detail the extent to which the petitioner wishes to vary from the regulation;
- (8) state why the petitioner believes that compliance with the regulation will impose an unreasonable burden upon his activity; and
- (9) state in detail how any water pollution above standards will be abated; and
- (10) state the period of time for which the variance is desired including all reasons, data, reports and any other information demonstrating that such time period is justified and reasonable.

B. The variance petition shall be reviewed in accordance with the adjudicatory procedures of 20 NMAC 1.3 and shall be reviewed for compliance with existing federal regulations.

C. The commission may grant the requested variance, in whole or in part, may grant the variance subject to conditions, or may deny the variance. The commission shall not grant a variance for a period of time in excess of five years.

D. For variances associated with a discharge permit or abatement plan, the existence and nature of the variance shall be disclosed in all public notices applicable to the discharge permit or abatement plan.

E. The commission shall deny the variance petition unless the petitioner establishes evidence that:

(1) application of the regulation would result in an arbitrary and unreasonable taking of the applicant's property or would impose an undue economic burden upon any lawful business, occupation or activity; and

(2) granting the variance will not result in any condition injurious to public health, safety or welfare or the environment.

F. No variance shall be granted until the commission has considered the relative interests of the applicant, other owners of property likely to be affected, and the general public.

G. Variance or renewal of a variance shall be granted for time periods and under conditions consistent with reasons for the variance but within the following limitations:

(1) if the variance is granted on the grounds that there are no practicable means known or available for the adequate prevention of degradation of the environment or the risk to the public health, safety or welfare, it shall continue only until the necessary means for the prevention of the degradation or risk become known and available;

(2) if the variance is granted on the grounds that it is justified to relieve or prevent hardship of a kind other than that provided for in Paragraph (1) of this subsection, it shall not be granted for more than one year.

I. An order of the commission is final and bars the petitioner from petitioning for the same variance without special permission from the commission. The commission may consider, the development of new information and techniques to provide significantly different justification for a second petition. If the petitioner, or his authorized representative, fails to appear at the public hearing on the variance petition, the commission shall not proceed with the hearing and the petition shall be denied. A variance may not be extended or renewed unless a new petition is filed and processed in accordance with the procedures established by this section.

VII. NMED'S PROPOSED ALTERNATIVE ABATEMENT STANDARDS RULE AMENDMENTS.

192. NMED has proposed a number of changes to Section 20.6.2.4103.E and -
.F regarding alternative abatement standards. Vollbrecht Testimony, volume IV,
page 831, lines 7-9.

193. NMED's proposed changes regarding alternative abatement standards
regulations are primarily structural, with two substantive changes to Section
20.6.2.4103 NMAC. *Id.* at lines 12-13.

194. NMED's first proposed substantive change to Section 20.6.2.4103.E(2),

(3) NMAC pertains to review and approval of technical infeasibility requests. *Id.* at lines 14-25, page 832, lines 1-5.

195. NMED's second proposed substantive change to Section 20.6.2.4103.E(1) NMAC pertains to the frequency of sampling required for a technical infeasibility determination. The Department's proposed changes will maintain the existing requirements with respect to the minimum number of sampling events, which is eight, but it would extend the period of time over which those eight sampling events would occur. Under the current rule, a statistically valid decrease cannot be demonstrated by fewer than eight consecutive quarters. This translates to a minimum requirement of eight consecutive sampling events over a period of two years. NMED's proposal would require eight consecutive sampling events over a period of four years. *Id.* at lines 6-8.

196. The City of Roswell proposed to give the Secretary of the Environment Department the discretion to determine the number and frequency of sampling events required for demonstrating technical infeasibility. Snyder Testimony, transcript volume III, page 796, lines 2-7.

197. AB/GRIP proposed to increase the number of sampling events required from eight to a minimum of ten for demonstrating technical infeasibility. Martin Testimony, transcript volume IV, page 869, lines 2-9.

198. AB/GRIP's justification for their proposal is that technical infeasibility should be demonstrated by a statistically valid extrapolation of the decrease of any water contaminant over the remainder of a twenty (20) year period with parametric statistics. Therefore, at a minimum, ten (10) data points should be

provided to allow for substantially more sophisticated conclusions than could be provided with non-parametric statistics (or only eight (8) data points). AB/GRIP's Statement of Position with Proposed Changes to NMED's Petition, page 48.

199. EPA guidance makes clear that if the number of sampling events is less than ten, one cannot get a confidence level of more than ten percent. Requiring a minimum of ten sampling events results in a better confidence interval, increasing the quality of the statistical analysis. Martin Testimony, transcript volume IV, page 869, lines 5-9, page 2-11.
200. NMED and the City of Roswell failed to provide any substantial evidence in support of their proposals regarding the current Section 20.6.2.4103.E(1). Vollbrecht Testimony, volume IV, pages 831-861; Snyder Testimony, transcript volume III, pages 789-800, transcript volume IV, pages 812-830.
201. The City of Roswell also proposed to give the Secretary of the Environment Department the discretion to determine the number and frequency of sampling events required for demonstrating completeness of abatement. Snyder Testimony, transcript volume III, page 796-798.
202. Under the City of Roswell's proposal, the Secretary of the Environment Department could require a facility in abatement to provide only one sampling event for demonstrating completeness of abatement. Martin Testimony, transcript volume IV, page 16-24.
203. EPA Guidance recommends a minimum of eight sampling events to evaluate completion of abatement. *Id.* at page 873, lines 24-25.

204. The City of Roswell presented no substantial evidence in support of its proposal. Snyder Testimony, transcript volume III, page 796-798.

205. Therefore, the Commission rejects the City of Roswell's proposal and maintains the current rule requiring a minimum of eight sampling events to demonstrate completeness of abatement.

VIII. JUSTIFICATION FOR ADOPTING AB/GRIP'S PROPOSED AMENDMENTS TO THE ALTERNATIVE ABATEMENT STANDARDS RULE, SECTION 20.6.2.1210 NMAC.

206. AB/GRIP provided substantial evidence in support of their proposal to increase the current minimum eight consecutive quarterly sampling events to a minimum of ten consecutive quarterly sampling events over the period of four years for a technical infeasibility determination and a completeness of abatement determination. Martin Testimony, transcript volume IV, page 866, lines 2-25, page 867, lines 1-15 (referencing three exhibits to Ms. Martin's pre-filed written Rebuttal Testimony: the March 2009 EPA Statistical Analysis of Groundwater Monitoring Data at RCRA Facilities, Unified Guidance; the July 2014 EPA Groundwater Statistics Tool User's Guide; and the August 2014 EPA Memorandum, Transmittal of the Recommended Approach for Evaluating Completion of Groundwater Restoration Remedial Actions at a Groundwater Monitoring Well and the Groundwater Statistics Tool).

207. AB/GRIP's proposal meets the criteria for Commission rule promulgation found in § 74-6-4(E) for the following reasons:

208. *Character and degree of injury to or interference with health, welfare, environment and property.* AB/GRIP's proposal would protect health, welfare,

environment and property. In New Mexico, ground water is public property. Increasing the number of consecutive sampling events from eight to ten for a technical infeasibility determination and a completeness of abatement determination will result in the protection of this State's most precious public resource. Martin Testimony, transcript volume IV, page 866, lines 2-25, page 867, lines 1-15 (referencing three exhibits to Ms. Martin's pre-filed written Rebuttal Testimony: the March 2009 EPA Statistical Analysis of Groundwater Monitoring Data at RCRA Facilities, Unified Guidance; the July 2014 EPA Groundwater Statistics Tool User's Guide; and the August 2014 EPA Memorandum, Transmittal of the Recommended Approach for Evaluating Completion of Groundwater Restoration Remedial Actions at a Groundwater Monitoring Well and the Groundwater Statistics Tool).

209. *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 ninety (90) percent of New Mexico's population depends on groundwater as the primary source of drinking water. AB/GRIP's proposal protects the social and economic value of this state's most precious public resource – ground water – by increasing the number of consecutive sampling events from eight to ten for a technical infeasibility determination and a completeness of abatement determination. *Id.*

210. *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.* The Commission finds that increasing the number of consecutive sampling events from eight to ten for a technical infeasibility determination and a completeness of abatement determination is technically practicable and economically reasonable.
211. *Successive uses, including but not limited to domestic, commercial, industrial, pastoral, agricultural, wildlife and recreational uses.* AB/GRIP's proposal would protect successive uses of ground water by increasing the number of consecutive sampling events from eight to ten for a technical infeasibility determination and a completeness of abatement determination, which increases the confidence level of such determinations.
212. *Feasibility of a user or a subsequent user treating the water before a subsequent use.* AB/GRIP's proposal protects the future user of ground water by increasing the number of consecutive sampling events from eight to ten for a technical infeasibility determination and a completeness of abatement determination maintaining, which increases the confidence level of such determinations.
213. *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.

214. *Federal water quality requirements.* AB/GRIP's proposal has no negative impact on federal water quality requirements for regulated facilities.

215. The Commission therefore adopts AB/GRIP's proposed amendments as follows:

F. **Alternative Abatement Standards:** If a responsible person abating water pollution pursuant to an approved abatement plan is unable to fully meet the abatement standards set forth in Subsections A, B and C of this section the responsible person may propose alternative abatement standards.

(1) At any time after the implementation of an approved Stage 2 abatement plan, a responsible person may file a petition with the commission seeking approval of an alternative abatement standard based on compliance with the standard set forth in Subsections A, B and C of this section is technically infeasible, as demonstrated by a statistically valid extrapolation of the decrease in concentration of any water contaminant over the remainder of a twenty (20) year period, such that projected future reductions during that time would be less than 20 percent of the concentration at the time technical infeasibility is proposed. A statistically valid decrease cannot be demonstrated by fewer than ten (10) consecutive sampling events. Sampling events demonstrating a statistically valid decrease shall be collected with a minimum of ninety (90) days between sampling events, and shall not span a time period greater than four (4) years, and at least one of the following criteria:

(a) compliance with the standard set forth in Subsections A, B and C of this section is not feasible by the maximum use of commercially available abatement technology;

(b) compliance with the standard set forth in Subsections A, B and C of this section is not feasible by the maximum use of technology within the economic capability of the responsible person; or

(c) there is no reasonable relationship between the economic and social costs and benefits of attainment of the standard set forth in Subsections A, B and C of this section.

(2) A petition for alternative abatement standards shall specify, in addition to the information required by Subsection A of 20.6.2.1210 NMAC the following:

(a) the water contaminant for which the alternative abatement standard is proposed;

(b) the alternative abatement standard proposed;

(c) the three-dimensional body of water pollution for which approval is sought;

(d) a summary of all actions taken to abate water pollution to standards; and

(f) other information as deemed necessary, which may include a transport, fate and risk assessment in accordance with accepted methods.

(3) The commission may approve an alternative abatement standard if the petitioner demonstrates that:

(a) at least one of the criteria set forth in Paragraph 1 of Subsection F of this Section has been met;

(b) the proposed alternative abatement standard is technically achievable and cost-benefit justifiable; and

(c) compliance with the proposed alternative abatement standard will not create a present or future hazard to public health or undue damage to property.

(4) An alternative abatement standard shall only be granted after a public hearing, as required by NMSA 1978 (as amended by NMSA 1978, Section 74-6-17), Section 74-6-4(H) of the Water Quality Act.

(5) The commission shall review petitions for alternative abatement standards in accordance with the procedures for review of variance petitions provided in the commission's adjudicatory procedures, 20.1.3 NMAC.

CONCLUSIONS OF LAW

I. GROUND WATER IS A PUBLIC RESOURCE

2. Since 1931, ground waters in New Mexico have been "declared to be public waters and to belong to the public." NMSA 1978, Section 72-12-1 & History.
3. New Mexico's ground water is not owned by or does not belong to the owners of private property above ground water. Individuals and entities may use the State's ground water for "beneficial use," subject to appropriate authorization from the State. *Id.*
4. Ground water, in New Mexico, is a public resource. *Id.*
5. 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.

6. Ground 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 (10th Cir. 2006).
7. Water is New Mexico's "most precious resource." NMSA 1978, Section 74-1-12(A).
8. The New Mexico 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.
9. The New Mexico Supreme Court has declared, "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." Kaiser Steel Corp. v. W.S. Ranch Co., 1970-NMSC-043, ¶ 15, 81, N.M. 414, 417.

II. STATUTES, REGULATIONS AND ADOPTION OF PROPOSED AMENDMENTS

A. Commission Rulemaking

10. This case is to consider NMED's Petition to Amend 20.6.2 NMAC, as proposed by the Department under the Water Quality Act.
11. 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).

12. The Commission has the authority to adopt proposed amendments to 20.6.2 NMAC pursuant to NMSA 1978, Section 74-6-4.
13. The decisions of the Commission with regard to adoption of proposed amendments to 20.6.2 NMAC shall not be (1) arbitrary, capricious or an abuse of discretion, (2) unsupported by the substantial evidence in the record, or (3) otherwise not in accordance with the law. NMSA 1978, Section 74-6-7(B).
14. In adopting proposed amendments to 20.6.2 NMAC, 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; (2) 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, Section 74-6-4(E).
15. 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).

16. 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).
17. 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."
18. "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.
19. 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").
20. 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").

B. Commission Adoption of Proposed Amendments to Section 20.6.2.1210 NMAC

21. 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. NMSA 1978, Sections 74-6-1 through 74-6-17 (1967, as amended through 2013).
22. 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.
23. The Commission’s statutory authority and mandate comes from the Act, NMSA 1978, Sections 74-6-1 through 74-6-17 (1967, as amended through 2013) (“WQA” or “Act”).
24. To carry out the Act’s broad remedial purpose, the Act requires the Commission 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).
25. 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 Commission] 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) (emphasis added).

26. Section 74-6-4(H) of the Act authorizes the Commission to permit temporary pollution of ground water 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. *Id.*
27. The purpose of a variance is *only* to temporarily allow water pollution and to facilitate abatement of water pollution. *Id.* (emphasis added).
28. The Legislature also placed a limit on the duration of variances. The Act 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.*” *Id.* (emphasis added).
29. 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. Water Quality Act, NMSA 1978, §§ 74-6-1 through 74-6-17 (1967, as amended through 2013); § 74-6-4(H).
30. 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).
31. Under the plain language of § 74-6-4(H), 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.

32. Under the plain language of § 74-6-4(H), the purpose of a variance 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.” Martin Testimony transcript, pages 195-199.
33. A variance from the prescriptive requirements of the Dairy Rule already exists within the Dairy Rule itself. Vollbrecht Testimony, transcript volume I, page 92, lines 13-24; Section 20.6.6.18.D NMAC.
34. The Dairy Rule variance provision may violate the Water Quality Act. Section 20.6.6.18.D NMAC; § 74-6-4(H).
35. 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. Section 20.6.6.18.D NMAC.
36. A variance may be granted from the prescriptive requirements of the Dairy Rule “for the expected useful life of a feature.” *Id.*
37. The Copper Rule and the Dairy Rule are not the only prescriptive requirements under the Water Quality Act. Martin Testimony, transcript volume I, page 199, lines 20-25, page 200, lines 1-13.
38. The Commission’s water quality standards set forth in Section 20.6.2.3103 NMAC are also prescriptive requirements under the Act. *Id.*
39. The Act does not permit the granting of variances from Section 20.6.2.3103 NMAC “for the expected useful life of the facility.” § 74-6-4(H).

40. NMED's proposal is directly opposed to the Act's clear mandate of protecting ground water quality and abating pollution of ground water within a reasonable period of time. §§ 74-6-1 through 74-6-17 (1967, as amended through 2013).
41. 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. *Id.*
42. The Commission has imposed a five-year variance limit because of the purpose of a variance and because of the link between variances and discharge permits. AB/GRIP's Consolidated Reply to Responses Filed by NMED, New Mexico Mining Association, and Los Alamos National Security, LLC on AB/GRIP's Motion to Dismiss in Part, pages 7-9 ("AB/GRIP's Consolidated Reply"); Sections 74-6-4(H) and 74-6-5(I); Section 20.6.2.1210.C NMAC.
43. Though the Act does not expressly limit variances to five years under § 74-6-4(H), the rules of statutory construction require § 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; AB/GRIP's Motion to Dismiss in Part, page 8.
44. When § 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 duration of a discharge permit in order to effectuate the Act's purpose of preventing and abating pollution of ground water. *Id.*

45. 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.
46. Evidence submitted by AB/GRIP demonstrates that the legal pathway for a variance is a discharge permit. *Id.*
47. 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.
48. The Commission 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.
49. The discharge permit then becomes an enforcement mechanism for any violation of the variance conditions and requirements. *Id.*; Martin Testimony, transcript volume I, page 190, lines 8-20.
50. 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. Vollbrecht Testimony, transcript volume I, pages 70-128; *see also* NMED’s Exhibit 42 submitted during hearing.
51. The Water Quality Act and its implementing regulations make clear that an alternative abatement standard is not a type of variance for three reasons.

52. First, the Act requires the Commission to “adopt, promulgate and publish regulations to prevent or abate water pollution.” NMSA 1978, 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.
53. “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.
54. 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 NMAC. Section 20.6.2.4103 NMAC.
55. The mechanism of alternative abatement standards requires a regulated entity to still conduct abatement, but to a lesser standard than that identified in Section 20.6.2.3101 NMAC. Section 20.6.2.4103.F NMAC.
56. Whereas a variance, pursuant to § 74-6-4(H), permits a regulated entity to avoid compliance, in its entirety, with a Commission regulation. § 74-6-4(H).
57. A variance from the water quality standards set forth in Section 20.6.2.3103 NMAC would allow a regulated entity to avoid abatement entirely, albeit for a limited period of time. *Id.*
58. 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 § 74-6-4(H). *Id.*

59. 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.

60. 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.

61. 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.

62. The Act provides that a variance cannot be granted without the holding of a public hearing. § 74-6-4(H).

63. 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.*; Martin Testimony, transcript volume I, page 248, lines 14-18.

64. NMED's and industry's proposed alternative five-year variance compliance report 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. Vollbrecht Testimony, transcript volume I, page 73, lines 21-25, page 74, lines 1-9; AB/GRIP Opening Statement, transcript volume I, page 169, lines 4-19, page 172, lines 1-9.

65. The statutory mandatory public hearing requirement 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. § 74-6-4(C); Jones v. Empl. Serv. Div. of Human Serv. Dep’t, 1980-NMSC-120, ¶ 3, 95 N.M. 97, 98; 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”).

66. It is clear that the legislature intended for the public to play a key role in variance proceedings. NMSA 1978, § 74-6-4(H).
67. 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 Env’tl. 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.
68. 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. § 74-6-4(H).
69. Section 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); Vollbrecht Testimony, volume IV, page 832, lines 20-22.

70. The Act does not authorize the Commission to delegate its review and approval authority for variances to NMED. *Id.*; § 74-6-4(F).

71. 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. § 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.

72. 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.

73. 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.

74. Additionally, the dairy industry's expert testimony lacked any credibility. *Id.*

75. 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.

76. 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 administratively within the Department does not meet the criteria for Commission rule promulgation found in Section 74-6-4(E) for the following reasons:

77. *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. 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, violating the Water Quality Act. §74-6-4(H); § 74-6-12(F); AB/GRIP's Closing Argument, page 22.

78. *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.

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.

79. 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. NMED and industry also failed to demonstrate how regulated facility operations remain static over a five-year period.

80. 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.

81. *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.
82. *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.
83. *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.
84. The Commission 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.
85. AB/GRIP has presented substantial evidence in support of its proposed amendments to Section 20.6.2.1210 NMAC. AB/GRIP's Statement of Position with Proposed Changes, page 39-43; AB/GRIP's Notice of Intent to Present Rebuttal Testimony; Martin Testimony, transcript volume I, pages 173-204; Martin Testimony, transcript volume II, pages 325.

86. AB/GRIP's proposed amendments to Section 20.6.2.1210 NMAC meets the criteria for Commission rule promulgation for the following reasons:

87. *Character and degree of injury to or interference with health, welfare, environment and property.* AB/GRIP's proposal would protect health, welfare, environment and property. In New Mexico, ground water is public property. Maintaining the current five-year variance limit and clarifying the criteria by which the Commission may grant a variance request will result in the protection of this State's most precious public resource. AB/GRIP's Corrected Statement of Position with Proposed Changes, pages 39-43.

88. *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. AB/GRIP's proposal maintains the current variance holder's burden of proof to demonstrate that ground water standards are not being exceeded and that abatement of groundwater pollution is occurring within a reasonable period of time. AB/GRIP's proposal protects the social and economic value of public participation in the permitting process and protects the social and economic value of this state's most precious public resource – ground water – by maintaining the current five-year variance limit and public participation requirements. *Id.*

89. *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.* The Commission has previously found that the five-year variance limit is technically practicable and economically reasonable. AB/GRIP's proposal relies on the Commission's previous findings of technical practicability and economic reasonableness of the five-year variance limit. *Id.*
90. *Successive uses, including but not limited to domestic, commercial, industrial, pastoral, agricultural, wildlife and recreational uses.* AB/GRIP's proposal would protect successive uses of ground water by maintaining the current five-year variance limit, which requires abatement of ground water pollution within a reasonable period of time and protects public participation in variance petition proceedings. *Id.*
91. *Feasibility of a user or a subsequent user treating the water before a subsequent use.* AB/GRIP's proposal protects the future user of ground water by maintaining the current five-year variance limit, which requires abatement of ground water pollution within a reasonable period of time and protects public participation in variance petition proceedings. *Id.*
92. *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.

93. *Federal water quality requirements.* AB/GRIP's proposal improves upon the current variance regulation by clarifying that a variance must comply with existing federal regulations. *Id.*

94. AB/GRIP's proposal also provides uniformity of the variance mechanism among New Mexico Statutes by incorporating language from the New Mexico Solid Waste Act variance regulations. *Id.*

C. Commission Adoption of Proposed Amendments to Section 20.6.2.4103 NMAC

95. NMED and the City of Roswell failed to provide any substantial evidence in support of their proposals regarding the current Section 20.6.2.4103.E(1). Vollbrecht Testimony, volume IV, pages 831-861; Snyder Testimony, transcript volume III, pages 789-800, transcript volume IV, pages 812-830.

96. AB/GRIP provided substantial evidence in support of their proposal to increase the current minimum eight consecutive quarterly sampling events to a minimum of ten consecutive quarterly sampling events over the period of four years. Martin Testimony, transcript volume IV, page 866, lines 2-25, page 867, lines 1-15 (referencing three exhibits to Ms. Martin's pre-filed written Rebuttal Testimony: the March 2009 EPA Statistical Analysis of Groundwater Monitoring Data at RCRA Facilities, Unified Guidance; the July 2014 EPA Groundwater Statistics Tool User's Guide; and the August 2014 EPA Memorandum, Transmittal of the Recommended Approach for Evaluating Completion of Groundwater Restoration Remedial Actions at a Groundwater Monitoring Well and the Groundwater Statistics Tool). Therefore, the Commission adopts AB/GRIP's proposed change.

97. EPA guidance makes clear that if the number of sampling events is less than ten,

one cannot get a confidence level of more than ten percent. Requiring a minimum of ten sampling events results in a better confidence interval, increasing the quality of the statistical analysis. Martin Testimony, transcript volume IV, page 869, lines 5-9, page 2-11.

98. EPA Guidance recommends a minimum of eight sampling events to evaluate completion of abatement. *Id.* at page 873, lines 24-25.

99. The City of Roswell presented no substantial evidence in support of its proposal to remove the current requirement of eight consecutive sampling events to demonstrate completeness of abatement. Snyder Testimony, transcript volume III, page 796-798.

100. Therefore, the Commission rejects the City of Roswell's proposal and maintains the current rule requiring a minimum of eight sampling events to demonstrate completeness of abatement.

101. AB/GRIP's proposal meets the criteria for Commission rule promulgation found in § 74-6-4(E) for the following reasons:

216. *Character and degree of injury to or interference with health, welfare, environment and property.* AB/GRIP's proposal would protect health, welfare, environment and property. In New Mexico, ground water is public property. Increasing the number of consecutive sampling events from eight to ten for a technical infeasibility determination and a completeness of abatement determination will result in the protection of this State's most precious public resource. Martin Testimony, transcript volume IV, page 866, lines 2-25, page 867, lines 1-15 (referencing three exhibits to Ms. Martin's pre-filed written

Rebuttal Testimony: the March 2009 EPA Statistical Analysis of Groundwater Monitoring Data at RCRA Facilities, Unified Guidance; the July 2014 EPA Groundwater Statistics Tool User's Guide; and the August 2014 EPA Memorandum, Transmittal of the Recommended Approach for Evaluating Completion of Groundwater Restoration Remedial Actions at a Groundwater Monitoring Well and the Groundwater Statistics Tool).

102. *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. AB/GRIP’s proposal protects the social and economic value of this state’s most precious public resource – ground water – by increasing the number of consecutive sampling events from eight to ten for a technical infeasibility determination and a completeness of abatement determination. *Id.*
103. *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.* The Commission finds that increasing the number of consecutive sampling events from eight to ten for a technical infeasibility determination and a completeness of abatement determination is technically practicable and economically reasonable.

104. *Successive uses, including but not limited to domestic, commercial, industrial, pastoral, agricultural, wildlife and recreational uses.* AB/GRIP's proposal would protect successive uses of ground water by increasing the number of consecutive sampling events from eight to ten for a technical infeasibility determination and a completeness of abatement determination, which increases the confidence level of such determinations.
105. *Feasibility of a user or a subsequent user treating the water before a subsequent use.* AB/GRIP's proposal protects the future user of ground water by increasing the number of consecutive sampling events from eight to ten for a technical infeasibility determination and a completeness of abatement determination maintaining, which increases the confidence level of such determinations.
106. *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.
107. *Federal water quality requirements.* AB/GRIP's proposal has no negative impact on federal water quality requirements for regulated facilities.

THE COMMISSION HEREBY ORDERS:

NMED's and industry's proposed removal of the current five-year variance limit is hereby denied. The Commission hereby adopts AB/GRIP's proposed amendments to Section 20.6.2.1210 NMAC as follows:

20.6.2.1210 VARIANCE PETITIONS:

A. Any person seeking a variance pursuant to NMSA 1978, Section 74-6-4(H) shall do so by filing a written petition with the commission. The petitioner may submit with his petition any relevant documents or material which the petitioner believes would support his petition. Petitions shall:

- (1) state the petitioner's name and address;
- (2) state the date of the petition;
- (3) describe the facility or activity for which the variance is sought;
- (4) state the address or description of the property upon which the facility is located;
- (5) describe the water body, watercourse, or aquifer affected by the discharge for which the variance is sought;
- (6) identify the regulation of the commission from which the variance is sought;
- (7) state in detail the extent to which the petitioner wishes to vary from the regulation;
- (8) state why the petitioner believes that compliance with the regulation will impose an unreasonable burden upon his activity; and
- (9) state in detail how any water pollution above standards will be abated; and
- (10) state the period of time for which the variance is desired including all reasons, data, reports and any other information demonstrating that such time period is justified and reasonable.

B. The variance petition shall be reviewed in accordance with the adjudicatory procedures of 20 NMAC 1.3 and shall be reviewed for compliance with existing federal regulations.

C. The commission may grant the requested variance, in whole or in part, may grant the variance subject to conditions, or may deny the variance. The commission shall not grant a variance for a period of time in excess of five years.

D. For variances associated with a discharge permit or abatement plan, the existence and nature of the variance shall be disclosed in all public notices applicable to the discharge permit or abatement plan.

E. The commission shall deny the variance petition unless the petitioner establishes evidence that:

- (1) application of the regulation would result in an arbitrary and unreasonable taking of the applicant's property or would impose an undue economic burden upon any lawful business, occupation or activity; and
- (2) granting the variance will not result in any condition injurious to public health, safety or welfare or the environment.

F. No variance shall be granted until the commission has considered the relative interests of the applicant, other owners of property likely to be affected, and the general public.

G. Variance or renewal of a variance shall be granted for time periods and under conditions consistent with reasons for the variance but within the following limitations:

(1) if the variance is granted on the grounds that there are no practicable means known or available for the adequate prevention of degradation of the environment or the risk to the public health, safety or welfare, it shall continue only until the necessary means for the prevention of the degradation or risk become known and available;

(2) if the variance is granted on the grounds that it is justified to relieve or prevent hardship of a kind other than that provided for in Paragraph (1) of this subsection, it shall not be granted for more than one year.

I. An order of the commission is final and bars the petitioner from petitioning for the same variance without special permission from the commission. The commission may consider, the development of new information and techniques to provide significantly different justification for a second petition. If the petitioner, or his authorized representative, fails to appear at the public hearing on the variance petition, the commission shall not proceed with the hearing and the petition shall be denied. A variance may not be extended or renewed unless a new petition is filed and processed in accordance with the procedures established by this section.

NMED's and industry's proposed amendments to Section 20.6.2.4103 NMAC are hereby denied. The Commission hereby adopts AB/GRIP's proposed amendments as follows:

F. Alternative Abatement Standards: If a responsible person abating water pollution pursuant to an approved abatement plan is unable to fully meet the abatement standards set forth in Subsections A, B and C of this section the responsible person may propose alternative abatement standards.

(1) At any time after the implementation of an approved Stage 2 abatement plan, a responsible person may file a petition with the commission seeking approval of an alternative abatement standard based on compliance with the standard set forth in Subsections A, B and C of this section is technically infeasible, as demonstrated by a statistically valid extrapolation of the decrease in concentration of any water contaminant over the remainder of a twenty (20) year period, such that projected future reductions during that time would be less than 20 percent of the concentration at the time technical infeasibility is proposed. A statistically valid decrease cannot be demonstrated by fewer than ten (10) consecutive sampling events. Sampling events demonstrating a statistically valid decrease shall be collected with a minimum of ninety (90) days between sampling events, and shall not span a time period greater than four (4) years, and at least one of the following criteria:

(a) compliance with the standard set forth in Subsections A, B and C of this section is not feasible by the maximum use of commercially available abatement technology;

(b) compliance with the standard set forth in Subsections A, B and C of this section is not feasible by the maximum use of technology within the economic capability of the responsible person; or

(c) there is no reasonable relationship between the economic and social costs and benefits of attainment of the standard set forth in Subsections A, B and C of this section.

(2) A petition for alternative abatement standards shall specify, in addition to the information required by Subsection A of 20.6.2.1210 NMAC the following:

(a) the water contaminant for which the alternative abatement standard is proposed;

(b) the alternative abatement standard proposed;

(c) the three-dimensional body of water pollution for which approval is sought;

(d) a summary of all actions taken to abate water pollution to standards; and

(f) other information as deemed necessary, which may include a transport, fate and risk assessment in accordance with accepted methods.

(3) The commission may approve an alternative abatement standard if the petitioner demonstrates that:

(a) at least one of the criteria set forth in Paragraph 1 of Subsection F of this Section has been met;

(b) the proposed alternative abatement standard is technically achievable and cost-benefit justifiable; and

(c) compliance with the proposed alternative abatement standard will not create a present or future hazard to public health or undue damage to property.

(4) An alternative abatement standard shall only be granted after a public hearing, as required by NMSA 1978 (as amended by NMSA 1978, Section 74-6-17), Section 74-6-4(H) of the Water Quality Act.

(5) The commission shall review petitions for alternative abatement standards in accordance with the procedures for review of variance petitions provided in the commission's adjudicatory procedures, 20.1.3 NMAC.

Dated: February 16, 2018

Respectfully Submitted,

By: 

Jaimie Park
Staff Attorney
NMELC

CERTIFICATE OF SERVICE

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

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