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'S AND GILA RESOURCES INFORMATION PROJECT'S CONSOLIDATED REPLY TO RESPONSES FILED BY THE NEW MEXICO ENVIRONMENT DEPARTMENT AND LOS ALAMOS NATIONAL SECURITY, LLC ON AMIGOS BRAVOS'S AND GILA RESOURCES INFORMATION PROJECT'S LOGICAL OUTGROWTH DOCTRINE MEMORANDUM

Pursuant to 20.1.6.207 NMAC and the Revised Order issued on June 29, 2018, Amigos Bravos and Gila Resources Information Project (collectively "AB/GRIP") file this Consolidated Reply to Responses filed by the New Mexico Environment Department ("NMED") and Los Alamos National Security, LLC ("LANS") to AB/GRIP's Exceptions to the Hearing Officer Report Filed April 11, 2018, Exhibit C "Memorandum on Logical Outgrowth and NMED's and the New Mexico Mining Association's New Jointly Proposed Amendment to Section 20.6.2.4103.A, -.B NMAC." Pursuant to the Revised Order issued on June 29, 2018, AB/GRIP's Memorandum is being treated as a Motion to Dismiss.

I. NMED's Originally Proposed Amendment To Section 20.6.2.4103.A, -.B NMAC Did Not Solely Focus On Clarifying NMED's Authority To Regulate Only Vapor Intrusion.

A. Procedural History of NMED's Proposed Regulatory Change.

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. After a procedural Motion to Dismiss filed by the New Mexico Environmental Law Center, NMED withdrew its Petition on April 19, 2017. NMED filed a second Petition on May 1, 2017. NMED's

second Petition proposed amendments to Section 20.6.2.4103.A NMAC, with a new subsection B, as follows:

> A. The vadose zone shall be abated so that water contaminants in the vadose zone shall not be capable of contaminating ground water or surface water, in excess of the standards in Subsections B, [~~and~~] C and D below, through leaching, percolation or as the water table elevation fluctuates.
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> B. Subsurface water contaminants shall be abated to concentrations below those which may with reasonable probability injure human health, animal or plant life or property, or unreasonably interfere with the public welfare or the use of property through percolation, capillary suction, sequestration, phytoextraction, plant uptake, volatilization, advection or diffusion into crops, structures, utility infrastructure, or construction excavations.

NMED Petition, page 35 (May 1, 2017); NMED Petition, page 35 (July 27, 2017); NMED Petition, page 35 (August 7, 2017); NMED Statement of Position; NMED Notice of Intent to Present Technical Testimony, pages 38-46. This is NMED's originally proposed rule filed with this Commission – not the draft rule put out for public comment on June 16, 2016 that NMED argues is the Department's originally proposed rule. NMED Response, page 3.

More importantly, NMED has conceded that it formally petitioned this Commission to adopt its originally proposed rule *in spite of* the New Mexico Mining Association's ("NMMA") request that NMED "not pursue this new subsection." NMED Response, page 4 (citing to NMMA Comments on September 19, 2016 Draft Changes to 20.6.2 NMAC (October 17, 2016)). The procedural history of NMED's originally proposed rule demonstrates that NMED responded to industry concerns regarding a narrow "vapor intrusion rule" by petitioning this Commission to adopt an expansive rule codifying the Department's broad authority over *all* means of subsurface contamination and not solely vapor intrusion. NMED Response, pp. 3-4; pp. 8-9.

Simply put, NMED's June 16, 2016 pre-Petition to Amend 20.6.2 NMAC proposed narrow rule regarding vapor intrusion went from this -

> D. Soil-gas pollution or ground water pollution with a complete exposure pathway through vapor intrusion into occupied structures shall be abated to conform to applicable vapor intrusion screening levels calculated in accordance with the methods and guidelines presented in department technical guidance Risk Assessment Guidance for Site Investigations and Remediation, latest edition.

(NMED Response, page 3) - to a far more expansive rule codifying NMED's broad authority over *all* means of subsurface contamination, not just vapor intrusion - in spite of industry concern regarding NMED's authority to regulate vapor intrusion, as follows:

A. The vadose zone shall be abated so that water contaminants in the vadose zone shall not be capable of contaminating ground water or surface water, in excess of the standards in Subsections B, [~~and~~] C and D below, through leaching, percolation or as the water table elevation fluctuates.

B. Subsurface water contaminants shall be abated to concentrations below those which may with reasonable probability injure human health, animal or plant life or property, or unreasonably interfere with the public welfare or the use of property through percolation, capillary suction, sequestration, phytoextraction, plant uptake, volatilization, advection or diffusion into crops, structures, utility infrastructure, or construction excavations.

NMED Response, pp. 3-5; NMED Petition, page 35 (May 1, 2017); NMED Petition, page 35 (July 27, 2017); NMED Petition, page 35 (August 7, 2017); NMED Statement of Position; NMED Notice of Intent to Present Technical Testimony, pages 38-46.

Furthermore, the procedural history reflects NMED's intent to protect not just human health from inhalation of toxic vapors, but also animal and plant life, the public welfare and the use of property from *all* means of subsurface contamination. NMED Petitions dated May 1, 2017, page 35; July 27, 2017, page 35; August 7, 2017, page 35; NMED Statement of Position; NMED Notice of Intent to Present Technical Testimony, pages 38-46.

B. NMED's and NMMA's New Jointly Proposed Rule is Not an Exception to NMED's Originally Proposed Rule.

As previously stated in AB/GRIP's Memorandum on Logical Outgrowth and NMED's and NMMA's New Jointly Proposed Rule, the only notice the public had regarding any potential changes to NMED's originally proposed rule was in regards to a *specific exception* for the

mining industry. Hearing Transcript vol. IV, pages 985-986 (emphasis added). NMED's and NMMA's new jointly proposed rule reveals that it is not a specific exception for the mining industry, but rather is a significant erosion of NMED's authority over all means of subsurface contamination. In fact, under the new jointly proposed rule NMED has completely changed its position with regard to the scope and approach to subsurface contaminant regulation as follows:

> A. The vadose zone shall be abated as follows:
>
> 1) [~~so that~~] water contaminants in the vadose zone shall not be capable of contaminating ground water or surface water, in excess of the standards in Subsections B and C below, through leaching, percolation or as the water table elevation fluctuates; and
>
> 2) Any constituent listed in 20.6.2.3103 NMAC or any toxic pollutant in the vadose zone shall be abated so that it is not capable of endangering human health due to inhalation of vapors that may accumulate in structures, utility infrastructure, or construction excavations.

NMED Proposed Statement of Reasons, page 26, paragraph 92.

NMED's and NMMA's new jointly proposed rule expressly states that NMED's only authority over subsurface contamination is vapor intrusion and the associated injury to human health due to inhalation of toxic vapors. Therefore, the new rule serves as the inverse of NMED's original position that it has regulatory authority over *all* means of subsurface contaminantion and over *all* injuries to plants, animals, public welfare and property caused by subsurface contamination. Courts have held that agencies cannot satisfy the logical outgrowth doctrine by repudiating the proposed rule and adopting the inverse in the final rule. CSX Transp., Inc., 584 F.3d 1076, 1080 (citing to Environmental Integrity Project, 425 F.3d 992, 996).

If NMED and NMMA wanted to present this Commission with a specific exception for the mining industry to its originally proposed rule - that would comply with the logical

outgrowth doctrine - they were required to present such an exception at the four-day evidentiary hearing. An example of what a specific exception for the mining industry to NMED's originally proposed rule - that was properly subject to public notice and a four-day public hearing - would look like is as follows:

A. The vadose zone shall be abated so that water contaminants in the vadose zone shall not be capable of contaminating ground water or surface water, in excess of the standards in Subsections B, [~~and~~] C and D below, through leaching, percolation or as the water table elevation fluctuates.

B. Subsurface water contaminants shall be abated to concentrations below those which may with reasonable probability injure human health, animal or plant life or property, or unreasonably interfere with the public welfare or the use of property through percolation, capillary suction, sequestration, phytoextraction, plant uptake, volatilization, advection or diffusion into crops, structures, utility infrastructure, or construction excavations

    1) **This does not include plant uptake of contaminants in mine site vegetation covers utilized for remediation/reclamation closure measures.**

Instead, NMED withdrew its originally proposed rule that was properly subject to public notice and a four-day evidentiary hearing and presented a new jointly proposed rule months after the four-day evidentiary hearing and closing of the public record. On its face, the new jointly proposed rule serves to negate the very purpose and intent of NMED's originally proposed rule. NMED Proposed Statement of Reasons, page 26, paragraph 92; NMMA Proposed Statement of Reasons, page 9, paragraph D.

For these reasons, NMED's and NMMA's new jointly proposed rule fails to satisfy the logical outgrowth doctrine and the Water Quality Act's public notice and participation requirements. NMSA 1978, Sections 74-6-4, 74-6-5, 74-6-6; Zen Magnets, LLC v. Consumer Prod. Safety Comm'n, 841 F.3d 1141, 1153 (10th Cir. 2016), 2016 U.S. App. LEXIS 2100, 29 (citing to Beirne v. Sec'y of Dep't of Agric., 645 F.2d 862, 865 (10th Cir. 1981)); Long Island Care at Home v. Coke, 551 U.S. 158 (2007).

II. NMED's And NMMA's New Jointly Proposed Rule Violates This Commission's Rules For Rulemaking, 20.1.6 NMAC.

NMED's and NMMA's new jointly proposed rule also violates Section 20.1.6.304 NMAC, which mandates that *if* the hearing officer allows the record to remain open for a reasonable period of time following the conclusion of the hearing for revised proposed rule language, any revised proposed rule language must be submitted *before the closing of the record.* Section 20.1.6.304 NMAC (emphasis added). In this matter, the hearing officer did not expressly permit parties to submit revised proposed rule language that the parties did not agree to during the hearing (Hearing Transcript vol. IV, page 1027:21-22.), and NMED and NMMA did not submit their revised proposed rule language before the closing of the record. NMED Proposed Statement of Reasons, page 26, paragraph 92; NMMA Proposed Statement of Reasons, page 9, paragraph D. NMED's and NMMA's new jointly proposed rule must therefore be excluded from the Commission's consideration.

III. The Logical Outgrowth Doctrine Applies To NMED's Petition to Amend 20.6.2 NMAC And All Rulemaking Proceedings In New Mexico.

NMED is in agreement with AB/GRIP that the logical outgrowth doctrine applies to this proceeding as a "matter of case law." NMED Response, page 6. This Commission also expressly stated in its public notice that the logical outgrowth doctrine applies to this proceeding. Commission Notice of Hearing (June 17, 2017). Los Alamos National Security, LLC ("LANS"), however, has filed a response to AB/GRIP's Memorandum on Logical Outgrowth Doctrine stating that the logical outgrowth doctrine does not apply to all rulemaking proceedings in New Mexico. LANS Response, page 2-4. LANS's argument is unpersuasive for the following reasons.

First, the New Mexico legislature amended the State Rules Act directing the Office of the Attorney General ("OAG") to promulgate default rules for rulemaking that facilitate public

engagement with the administrative rulemaking process in a transparent, organized, and fair manner. NMSA 1978, Section 14-4-5.8 (as amended through 2017); OAG "Concise Explanatory Statement" for adoption of 1.24.25 NMAC (March 23, 2018). The OAG proceeded to promulgate default rules, which went into effect on April 10, 2018. Section 1.24.25.5 NMAC. The default rules expressly codify the logical outgrowth doctrine "to clarify the scope of a rulemaking in regard to amendments made from the published rule to what was adopted" and to "provide guidance to agencies on when amendments exceed the scope of a rulemaking and might require new notice and rulemaking proceeding." OAG "Concise Explanatory Statement" for adoption of 1.24.25 NMAC (March 23, 2018). The logical outgrowth doctrine applies to all New Mexico rulemaking proceedings through application of the State Rules Act and its implementing regulations (default rules), which codified federal case law. *See* Sections V and VI for further discussion regarding the State Rules Act's and its implementing regulations' applicability to this proceeding and future Commission rulemaking proceedings, pp. 9-13.

Second, the OAG recognized the need to codify the logical outgrowth doctrine in the State Rules Act's implementing regulations for two primary reasons: 1) due to the dearth of New Mexico case law on the doctrine and, 2) the importance of this doctrine in facilitating transparent and fair rulemaking proceedings. *See the only New Mexico case addressing logical outgrowth*, Marbob Energy Corporation v. New Mexico Oil Conservation Commission, D-101-CV-2006-00014, page 4 (citing to United States Supreme Court case Long Island Care at Home, Ltd. v. Coke's holding that "[t]he Court of Appeals have generally interpreted this to mean that the final rule the agency adopts must be 'a logical outgrowth' of the rule proposed." 127 S. Ct. 2339, 2351 (2007)).

Third, contrary to LANS' erroneous assertion that the logical outgrowth doctrine applies only to informal rulemaking (notice and comment rulemaking), federal case law makes clear that the logical outgrowth doctrine also applies to formal rulemaking (notice, comment and a public hearing). Zen Magnets, LLC v. Consumer Prod. Safety Comm'n, 841 F.3d 1141, 1146, 2016 U.S. App. LEXIS 21000, ¶ 7. LANS fails to cite to *any* authority in support of its erroneous contention that the logical outgrowth doctrine does not apply to formal rulemaking proceedings. The New Mexico Supreme Court has made clear that when a party fails to provide supporting authority, the Court assumes that none exist. Doe v. Lee, 1984-NMSC-024, paragraph 2, 100 N.M. 764, 764.

Fourth, New Mexico Courts have repeatedly held that in the absence of clear New Mexico law on an issue, the Courts will look to federal law for guidance. Yount v. Millington, 1993-NMCA-143, ¶ 35, 117 N.M. 95, 103; CIT Grp./Equip. Fin., Inc. v. Horizon Potash Corp., 1994-NMCA-116, ¶ 6, 118 N.M. 665, 667; Phoenix Funding, LLC v. Aurora Loan Servs., LLC, 2017-NMSC-010, ¶ 41, 390 P.3d 174, 184 (internal citations omitted). The New Mexico District Court case addressing the logical outgrowth doctrine relied upon United States Supreme Court case law as guidance in determining whether a final promulgated rule violated the logical outgrowth doctrine. Marbob Energy Corporation v. New Mexico Oil Conservation Commission, D-101-CV-2006-00014, page 4.

For these reasons, the logical outgrowth doctrine without a doubt applies to this proceeding and all New Mexico rulemaking proceedings.

IV. AB/GRIP Provided A Statement Of Support Of NMED's Originally Proposed Amendment To Section 20.6.2.4103.A, -.B NMAC.

NMED has attempted to argue that AB/GRIP have no standing to raise a logical outgrowth challenge to NMED's and NMMA's new jointly proposed rule by claiming that AB/GRIP has never provided comment on NMED's originally proposed amendments to Section 20.6.2.4103.A,

-.B NMAC. NMED Response, pp. 1-2 (June 29, 2018). This argument is unpersuasive for two reasons.

First, AB/GRIP has provided comments on NMED's originally proposed amendments to Section 20.6.2.4103.A, -.B NMAC. AB/GRIP provided a statement of support for NMED's proposed amendments to Sections 20.6.2.4103.A-E NMAC. AB/GRIP Statement of Position on NMED's Petition to Amend 20.6.2 NMAC, p. 47 (July 27, 2017). NMED's argument that AB/GRIP has never provided comment on its originally proposed rule is therefore incorrect.

Second, the logical outgrowth doctrine does not require an interested person to provide any comment on an originally proposed rule in order to challenge a final promulgated rule as violating the logical outgrowth doctrine. Marbob Energy Corporation v. New Mexico Oil Conservation Commission, D-101-CV-2006-00014; Zen Magnets, LLC v. Consumer Prod. Safety Comm'n, 841 F.3d 1141, 1153 (10th Cir. 2016), 2016 U.S. App. LEXIS 2100, 29 (citing to Beirne v. Sec'y of Dep't of Agric., 645 F.2d 862, 865 (10th Cir. 1981)); Long Island Care at Home v. Coke, 551 U.S. 158 (2007).

V. The New Mexico State Rules Act And Its Implementing Default Rules For Rulemaking Apply To This Proceeding.

While statutes should be applied prospectively absent clear legislative intent, "a statute does not operate retroactively from the mere fact that it relates to antecedent events." GEA Integrated Cooling Tech. v. State Taxation & Revenue Dep't, 2012-NMCA-010, ¶ 20, 268 P.3d 48, 55. New Mexico courts have further held that a statute is only retroactive "if it impairs vested rights or requires new obligations, imposes new duties, or affixes new diasabilities to past transactions. Id. at ¶ 18, 53.

NMED and LANS have argued that the recent amendment to the State Rules Act directing the OAG to promulgate default rules for rulemaking, and the resulting default rules, do not apply

to NMED's Petition to Amend 20.6.2 NMAC because NMED initiated this rulemaking proceeding on May 1, 2017, before the OAG's default rules took effect on April 10, 2018. NMED Response, pp.6-7; LANS Response, page 5. NMED and LANS ignore the "well-settled rule" that "a statute does not operate retroactively from the mere fact that it relates to antecedent events." GEA Integrated Cooling Tech., 2012-NMCA-010, ¶ 20, 268 P.3d 48, 55.

In an ongoing process where no final action has yet occurred, such as this rulemaking proceeding, it is necessary to determine "the most logical place to attach the point of retroactivity," as a new regulation may be retroactive in relation to the initial stages of a rulemaking proceeding but may apply prospectively to later actions in the pending rulemaking proceeding. City of Albuquerque v. State ex rel. Vill. Of Los Ranchos de Albuquerque, 1991-NMCA-015, ¶ 42, 111 N.M. 608, 618. To determine at what point the OAG's default rules apply prospectively to this pending rulemaking proceeding, one must consider legislative intent, public policy considerations evident from the statute, and the nature of the rulemaking process itself. Id. at ¶ 37, 67.

The legislative intent and public policy of the State Rules Act and the OAG's implementing default rules are expressly stated: "to facilitate public engagement with the administrative rulemaking process in a transparent, organized, and fair manner." NMSA 1978, Section 14-4-5.8; 1.24.25.8 NMAC. The recent amendment to the State Rules Act expressly directed the OAG to adopt default procedural rules "no later than January 1, 2018." NMSA 1978, § 14-4-5.8. The Legislature clearly intended to have in place a state-wide standard for public participation in all state rulemaking proceedings by early 2018 so that rulemaking proceedings would be transparent, organized, and fair.

Furthermore, the nature of this rulemaking proceeding also supports application of the OAG's default rules to this proceeding. Unlike an adjudicatory proceeding, there are no

substantive rights in a rulemaking proceeding. In fact, this Commission may terminate a rulemaking at any time because there are no vested rights in a rulemaking proceeding. NMSA 1978, Section 14-4-5(C). As previously stated, New Mexico courts have held that a statute is only retroactive "if it impairs vested rights or requires new obligations, imposes new duties, or affixes new diasabilities to past transactions. Id. at ¶ 18, 53. Application of the OAG's default rules, in particular Section 1.24.25.14 NMAC, does not impair any vested rights because there are none in a rulemaking proceeding, and it does not require new obligations or impose new duties on the parties. Section 1.24.25.14 NMAC actually serves to provide clarity to this Commission's directive that this rulemaking proceeding be bound by the logical outgrowth doctrine and associated case law. Commission Notice of Public Hearing (June 17, 2017); Section 1.24.25.14 NMAC. The purpose of Section 1.24.25.14 NMAC is to "provide guidance to agencies on when amendments [made friom the published rule] exceed the scope of a rulemaking and might require new notice and rulemaking proceeding." OAG's "Concise Explanatory Statement", page 2 (March 23, 2018). It therefore cannot be argued that application of the default rules imposes new obligations or duties on a proceeding already bound by the logical outgrowth doctrine through this Commission's Public Notice of Hearing and through extensive case law.

The legislative intent and public policy of the State Rules Act and its implementing regulations found at 1.24.25 NMAC, along with the nature of rulemaking proceedings, demonstrate that application of the OAG's default rules to this pending rulemaking proceeding is not a retroactive application, but rather a prospective application to an ongoing rulemaking in which this Commission has yet to adopt any final rules. Based on the circumstances of this pending rulemaking proceeding, the OAG's default rules began to prospectively apply on April 10, 2018. Section 1.24.25.5 NMAC.

VI. The Default Rules Ror Rulemaking, 1.24.25 NMAC, Apply To Future Commission Rulemaking Proceedings.

The State Rules Act ("SRA" or "the Act"), states that "each agency may adopt its own procedural rules, or continue in effect existing rules, *which shall provide at least as much opportunity for participation by parties and members of the public as is provided in the procedural rules adopted by the attorney general.*" NMSA 1978, Section 14-4-5.8 (emphasis added). While the Act does not require that all agencies adopt the OAG's default procedural rules, all rule-making procedures must meet the default standard for public participation. If rulemaking procedures do not provide as much opportunity for public participation as the default rules, they cannot be in compliance with the statute. Id.

Having previously adopted rule-making procedures does not necessarily exempt the Commission from following the default procedure; both the Act and its implementing regulations state that "agencies may adopt these default rules … or continue to use their existing rules, *so long as those rules satisfy the requirements of the State Rules Act and provide as much opportunity for public participation as provided by these rules.*" Id.; Section 1.24.25.8.B NMAC (emphasis added). The express objective of the Act and default rules is to "facilitate public engagement with the administrative rulemaking process in a transparent, organized, and fair manner." Section 1.24.25.6 NMAC. If the Commission's current procedural rules fail to meet this objective then they are not in compliance with the Act and its default rules. The Act makes clear that, "No rule is valid or enforceable if it conflicts with statute. A conflict between a rule and a statute is resolved in favor of the statute." NMSA 1978, Section 14-4-5.7.A.

This Commission's rules for rulemaking do not mirror the default rules and fail to provide as much opportunity for public participation as provided by the default rules. *Compare* 20.1.6 NMAC *with* 1.24.25 NMAC. Specifically, this Commission's rules for rulemaking fail to include

a codification of the logical outgrowth doctrine, which is included in the default rules at Section 1.24.25.14.C NMAC.

Section 1.24.25.14.C NMAC provides the following:

> The agency may adopt, amend or reject the proposed rule. Any amendments to the proposed rule must fall within the scope of the current rulemaking proceeding. *Amendments that exceed the scope of the noticed rulemaking may require a new rulemaking proceeding*. Amendments to a proposed rule may fall outside of the scope of the rulemaking based on the following factors:
>
> 1) Any person affected by the adoption of the rule, if amended, could not have reasonably expected that the change from the published proposed rule would affect the person's interest;
> 2) Subject matter of the amended rule or the issues determined by that rule are different from those in the published proposed rule; or
> 3) Effect of the adopted rule differs from the effect of the published proposed rule.

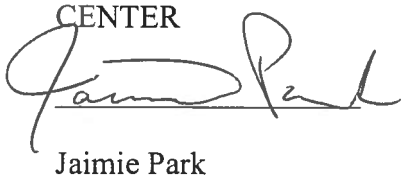
Id. (emphasis added). This default rule provides more opportunity for parties and members of the public than the Commission's rules for rulemaking by requiring a new rulemaking proceeding for amendments to an originally proposed rule that exceed the scope of the noticed rulemaking. The Commission's rules for rulemaking therefore conflict with the Act's requirement of existing agency rules providing *as much opportunity* for participation by parties and members of the public *as is provided in the default rules*. NMSA 1978, § 14-4-5.8, § 14-4-5.7.A. The default rules therefore apply to all future Commission rulemaking proceedings until the Commission's rules for rulemaking comply with the State Rules Act and its default rules.

VII. Conclusion.

For the above discussed reasons, AB/GRIP request this Commission to exclude NMED's and NMMA's new jointly proposed rule from Commission consideration and deliberation.

DATED: July 16, 2018

NEW MEXICO ENVIRONMENTAL LAW CENTER



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