

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
MOTION FOR LEAVE TO FILE EXCEPTIONS TO THE JUNE 29, 2018 HEARING
OFFICER REPORT**

Pursuant to Sections 20.1.6.207, -305 NMAC, Amigos Bravos and the Gila Resources Information Project (collectively "AB/GRIP") move the Hearing Officer for leave to file exceptions to the June 29, 2018 Hearing Officer Report. Pursuant to 20.1.6.207 NMAC, AB/GRIP sought concurrence from counsel for all parties in this matter. The New Mexico Municipal League does not oppose this motion. The following parties stated that a Motion for Leave to File Exceptions was not necessary under Section 20.1.6.305 NMAC: New Mexico Environment Department ("NMED"), the New Mexico Mining Association ("NMMA"), and the Energy, Minerals and Natural Resources Department ("EMNRD"). William C. Olson stated that he does not oppose "any party filing objections to the HO Report as long as deliberations continue as scheduled." RGR, New Mexico Copper Corporation, and American Magnesium, LLC take no position on this Motion. All other parties to this proceeding did not respond.

In support of this motion, AB/GRIP state the following:

1. Parties filed written Closing Arguments and Proposed Findings of Fact and Conclusions of Law on February 16, 2018.

2. The Hearing Officer issued a draft Hearing Officer Report based upon the Parties' written Closing Arguments and Proposed Findings of Fact and Conclusion of Law. See April 2, 2018 Hearing Officer Report and April 11, 2018 Hearing Officer Report.
3. NMED filed a Motion to Withdraw the Hearing Officer's Report and Vacate the Post Scheduling Order on April 26, 2018 with the Hearing Officer.
4. Rio Grande Resources, New Mexico Copper Corporation, and American Magnesium, LLM filed a Joint Motion to Provisionally Extend, From May 7 to June 15, 2018 the Deadline for Parties' Exceptions to the Hearing Officer's Report on May 4, 2018 with the Hearing Officer.
5. Rio Grande Resources, New Mexico Copper Corporation and American Magnesium, LLC filed an Unopposed Motion to Vacate Current Deadline for Parties' Exceptions to the Hearing Officer's Report on May 4, 2018 with the Hearing Officer.
6. The Hearing Officer denied NMED's Motion to Withdraw the Hearing Officer's Report and Vacate the Post Scheduling Order and issued a Revised Scheduling Order on May 4, 2018.
7. Petitioner, NMED, and all of the interested parties filed a Joint Motion to Withdraw the Hearing Officer's Report or, Alternatively, to Waive the Deadline Under 20.6.2.305.C NMAC with the Commission on May 4, 2018.
8. The Commission heard oral argument on the motions on May 8, 2018 and issued its Order denying the Joint Motion to Withdraw the Hearing Officer's Report or, Alternatively, to Waive the Deadline Under 20.6.2.305.C NMAC with the

Commission, retaining the Hearing Officer's draft report, approving NMED and all other parties drafting a Joint Proposed Hearing Officer Report, extending the deadline for parties to submit exceptions to the Hearing Officer's Report to June 15, 2018, and delaying deliberations on NMED's Petition to Amend 20.6.2 NMAC until July or August 2018.

9. The Hearing Officer issued a new Scheduling Order for the Parties' Exceptions to the Hearing Officer's Report on May 31, 2018.
10. AB/GRIP could not stipulate to NMED's proposed revised hearing officer report due to the inclusion of a new rule that was not properly noticed or subject to public hearing. Therefore AB/GRIP filed its exceptions to the April 11, 2018 Hearing Officer Report on June 15, 2018. *See* Exception e, pages 7-9.
11. NMED and all other parties submitted its Joint Proposed Hearing Officer Report on June 15, 2018.
12. The Hearing Officer issued a third draft Hearing Officer Report on June 29, 2018, based upon AB/GRIP's exceptions to the April 11, 2018 Hearing Officer Report and upon NMED and all other parties' Joint Proposed Hearing Officer Report. The Hearing Officer did not provide notice of any deadline for submitting comments or exceptions to the June 29, 2018 Hearing Officer Report pursuant to Section 20.1.6.305.
13. The Water Quality Control Commission has placed deliberations of NMED's Petition to Amend 20.6.2 NMAC on its July 10th and 11th meeting agenda.
14. NMED submitted comments on the June 29, 2018 Hearing Officer Report on July 2, 2018.

15. AB/GRIP submit the following exceptions to the June 29, 2018 Hearing Officer Report:

- a. AB/GRIP take exception to the finding that “The Department continued to engage with stakeholders and made edits to the language of its proposed amendments up through October 29, 2017” on the basis that this finding is factually incorrect and not supported by substantial evidence in the record. NMED engaged with a specific stakeholder, NMMA, and made significant changes to its originally proposed amendments to Section 20.6.2.4103 NMAC up through February 16, 2018, well after the closing of the public record in this matter. Hearing Officer Report, page 3, paragraph 6 (June 29, 2018); NMED Closing Argument and Proposed Statement of Reasons, page 26, paragraph 92 (February 16, 2018); NMMA Written Closing Argument and Proposed Statement of Reasons for Proposed Amendments to 20.6.2 NMAC, page 9, paragraph D (February 16, 2018).
- b. AB/GRIP take exception to the finding that “AB/GRIP opposed the Department’s proposed language on variances” on the basis that this finding is factually incorrect and not supported by substantial evidence in the record. Hearing Officer Report, page 37 (June 29, 2018). AB/GRIP oppose in part and support in part NMED’s proposed amendments. AB/GRIP’s Corrected Statement of Position, pages 39-43 (August 8, 2017). AB/GRIP oppose NMED’s proposed amendment to remove the current five-year limit for variances to allow polluters to contaminate ground water and surface water in perpetuity. AB/GRIP support NMED’s proposed

amendments to require petitioners for variances to “state in detail how any water pollution above standards will be abated” and to “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”. *Id.*

- c. AB/GRIP take exception to the finding that “Counsel for AB/GRIP acknowledge[e] lack of testimony in support of AB/GRIP’s proposed language” to the extent that this finding is factually incorrect and not supported by substantial evidence in the record. Hearing Officer Report, page 61 (June 29, 2018). AB/GRIP submitted extensive, substantive rationale and testimony in support of their position on NMED’s proposed amendments to Section 20.6.2.1210 NMAC and for AB/GRIP’s proposed changes to NMED’s amendments in its Statement of Position (July 27, 2017), its Corrected Statement of Position (August 8, 2017), in its Notice of Intent to Present Direct Testimony (September 11, 2017), its Notice of Intent to Present Rebuttal Testimony (October 26, 2017), in its Motion to Dismiss in Part (September 29, 2017) and related briefing (October 24, 2017), in its oral testimony provided at hearing (November 14, 17, 2017), and in its Written Closing Argument and Proposed Findings of Fact and Conclusions of Law (February 16, 2018).

Contrary to the Hearing Officer Report’s finding, counsel for AB/GRIP did not acknowledge lack of testimony and rationale in support of AB/GRIP’s proposed language at the hearing. In fact, the sections of the hearing

transcript cited to in support of this erroneous finding demonstrate that counsel for AB/GRIP properly advocated AB/GRIP's position within the bounds of the commission's rules for rulemaking and properly advised her expert witness to limit oral testimony to the scope of pre-filed written direct and rebuttal testimony, which focused on NMED's proposal to remove the current five-year limit for variances, and to not provide oral testimony pertaining to AB/GRIP's Statement of Position pre-hearing filing that substantively addressed all other proposed amendments to Section 20.6.2.1210 NMAC. In no way is this an acknowledgement that AB/GRIP failed to provide extensive, substantive testimony and rationale in support of AB/GRIP's proposed changes. *See* Hearing Transcript, Volume I, page 155:2 – 156:3, page 186:20-188:10.

- d. AB/GRIP take exception to the finding that "the Commission denied AB/GRIP's Motion to Dismiss the Department's variance proposal, finding that the statute does not limit the Commission to granting variances for periods of 5 years" on the basis that this finding is factually incorrect and not supported by substantial evidence in the record. Hearing Officer Report, page 61 (June 29, 2018). Commissioner Payne's Motion to Deny AB/GRIP's Motion to Dismiss in Part was merely to deny the Motion and address the five-year variance limit at the evidentiary hearing. Commissioner Payne's Motion did not expressly provide that it was a motion to dismiss because the Water Quality Act does not limit the

Commission to granting variances for periods of 5 years. Hearing Transcript, Motion to Dismiss, page 62: 22-23 (November 14, 2017).

Furthermore, Section 20.1.6.306.F NMAC expressly states that, “The commission’s written decision is the official version of the commission’s action, and the reasons for that action. Other written or oral statements by commission members are not recognized as part of the commission’s official decision or reasons.” *Id.* The Commission’s written decision of its vote to deny AB/GRIP’s Motion to Dismiss in Part merely states, “AB/GRIP’s motion to dismiss is hereby denied” and provides no rationale for the decision. WQCC 17-03(R) Pleading Log 94 (November 21, 2017). Therefore, any oral statements made by Commissioners during deliberations on AB/GRIP’s Motion to Dismiss in Part cannot be recognized by the Hearing Officer “as part of the commission’s official decision or reasons.” Section 20.1.6.306.F NMAC.

- e. AB/GRIP take exception to pages 110-114 of the June, 29, 2018 Hearing Officer Report to the extent that it is factually incorrect, fails to accurately reflect the procedural history of proposed amendments to Section 20.6.2.4103 NMAC, and is not supported by substantial evidence in the record. NMED did not present the following proposed rule change to Section 20.6.2.4103 NMAC in its Petition to Amend 20.6.2 NMAC, in its Notices of Intent to Present Technical Testimony, or at the four-day hearing for the Commission’s consideration:

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.

Hearing Officer Report, page 110 (June 29, 2018).

In fact, NMED presented the following proposed rule change to Section 20.6.2.4103 NMAC:

- 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 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; Hearing Transcript, Volume IV, pages 900-966, pages 985-988 (November 17, 2017).

AB/GRIP affirm their position that NMED and NMMA's new jointly proposed rule provided on page 110 of the June 29, 2018 Hearing Officer

Report was not properly noticed or subject to a public hearing and is not a logical outgrowth of NMED's originally proposed rule change. See AB/GRIP Exceptions to the April 11, 2018 Hearing Officer Report, Exhibit C.

Dated: July 6, 2017

Respectfully submitted,

New Mexico Environmental Law Center

By:  _____

Jaimie Park
Douglas Meiklejohn
Eric Jantz
Jonathan Block
Charles de Saillan
1405 Luisa St., Suite 5
Santa Fe, NM 87505
(505) 989-9022
Attorneys for Amigos Bravos & GRIP

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Motion for Leave to File Exceptions to the June 29, 2018 Hearing Officer Report was served on July 6, 2018 via electronic mail to the following:

Ms. Pam Castaneda, Administrator
Water Quality Control Commission
Room N-2168, Runnels Building
1190 St. Francis Dr.
Santa Fe, NM 87505
Pam.Castaneda@state.nm.us

Pete Domenici
Lorraine Hollingsworth
320 Gold St. SW, Ste. 1000
Albuquerque, NM 87102
pdomenici@domicilaw.com
lhollingsworth@domicilaw.com

New Mexico Environment
Department
Office of General Counsel
Lara Katz
John Verheul
Lara.Katz@state.nm.us
John.Verheul@state.nm.us

Lou Rose
Karie Olson
P.O. Box 2307
Santa Fe, NM 87504
lrose@montand.com
kolson@montand.com

Timothy A. Dolan
Office of Laboratory Counsel
P.O. Box 1663, MS A187
Los Alamos, NM 87544
tdolan@lanl.gov

William C. Olson
14 Cosmic Way
Lamy, NM
billjeanie.olson@gmail.com

Michael Bowen
Executive Director
1470 St. Francis Drive
Santa Fe, NM 87505
nmma@comcast.net

Dalva L. Moellenberg
Gallagher & Kennedy, P.A.
1239 Paseo de Peralta
Santa Fe, NM
DLM@gknet.com

William Brancard
Cheryl Bada
1220 South St. Francis Dr.
Bill.Brancard@state.nm.us
Cheryl.Bada@state.nm.us

Michael L. Casillo
1500 W. Perimeter Rd., Suite 1500
Joint Base Andrews, MD 20762
michael.l.casillo2.civ@mail.mil

Russell Church, President
NMML EQA Subsection
NM Municipal League
P.O. Box 846
Santa Fe, NM 87504
rchurch@redriver.org



Jaimie Park
NMELC Staff Attorney