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 TO DISMISS IN PART THE NEW MEXICO ENVIRONMENT DEPARTMENT'S PETITION TO AMEND 20.6.2 NMAC.

Pursuant to 20.1.6.207 NMAC and the Revised Procedural Order issued on June 2, 2017, Amigos Bravos and Gila Resources Information Project ("AB/GRIP") file this *Motion to Dismiss in Part the New Mexico Environment Department's ("NMED") Petition to Amend 20.6.2 NMAC.* Due to the nature of this motion, concurrence was not sought. The Commission should dismiss NMED's *Petition* in part because its proposed amendments to remove the five-year variance limit, to change the current regulatory definition for discharge permit modification, and to add a new agency action of "discharge permit amendment" violate the Water Quality Act.

Introduction.

NMED filed its first *Petition to Amend the Ground and Surface Water Protection Regulations (20.6.2 NMAC)* on March 22, 2017 with the Water Quality Control Commission ("WQCC" or "commission"). After a procedural motion to dismiss filed by the New Mexico Environmental Law Center ("NMELC"), NMED withdrew its *Petition* on April 19, 2017. NMED filed a second *Petition to Amend the Ground and Surface Water Protection Regulations* ("Petition to Amend" or "Petition") on May 1, 2017. NMED then filed an "*Amended Petition*" on July 27, 2017, and a subsequent "*Corrected Amended Petition*" on August 7, 2017. A hearing on NMED's *Petition* has been set for November 14, 2017.

New Mexico Ground and Surface Water Protection Statutory and Regulatory Background.

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

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

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

The Water Quality Act ("WQA" or "Act") is the primary statutory mechanism by which ground water in our state is protected and by which the public can participate in the permitting process for the State's most precious public resource. The objective of the Act is to prevent and abate water pollution. *Bokum Res. Corp. v. N.M. Water Quality Control Comm'n*, 1979-NMSC-090, ¶ 59, 93 N.M. 546. The WQCC's statutory authority and mandate comes from the Water

Quality Act, NMSA 1978, Sections 74-6-1 through 74-6-17 (1967, as amended through 2013)("WQA" or "Act"). To carry out the Act's broad remedial purpose, the Act requires the WQCC to "adopt, promulgate and publish regulations to prevent or abate water pollution in the state." NMSA 1978, Section 74-6-4(E) (2009). It further authorizes the WQCC to adopt regulations to "require persons to obtain from a 'constituent agency...a permit for the discharge of any water contaminant..." that may pollute ground or surface waters of the state. NMSA 1978, Section 74-6-5(A) (2009).

The Act also mandates that the WQCC "adopt water quality standards for surface and ground waters of the state based on credible scientific data and other evidence appropriate under the Water Quality Act." NMSA 1978, Section 74-6-4(D). The Act prohibits NMED and other constituent agencies from permitting any discharge that "would cause or contribute to water contaminant levels in excess of any state or federal standard...at any place of withdrawal of [ground] water for present or reasonably foreseeable future use." NMSA 1978, Section 74-6-5(E)(3) (2009).

The WQA further authorizes the WQCC to promulgate procedures, by regulation, for the "issuance or modification of a permit" and for the "issuance of renewals of permits." NMSA 1978, § 74-6-5(F). The Act expressly authorizes NMED to perform the following actions: deny a permit, terminate a permit, modify a permit, or grant a permit subject to a condition. *See* NMSA 1978, § 74-6-5(M), (N).

Finally, the Act authorizes the following regarding variances, in pertinent part:

[The WQCC] may grant an individual variance from any regulation of the commission whenever it is found that compliance with the regulation will impose an unreasonable burden

NMED is a "constituent agency"; "water contaminant" means "any substance that could alter, if discharged or spilled, the physical, chemical, biological or radiological qualities of water." NMSA 1978, Sections 74-6-2(B) and (K)(1) (2003).

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).

The WQCC first adopted regulations for the protection of ground and surface water in 1967. Ten years later, the WQCC adopted detailed regulations to control the discharge of water contaminants and prevent ground water pollution. 20.6.2.2 through 20.6.2.3114 NMAC. The commission also adopted numeric human health and other water quality standards for ground water, which are codified at 20.6.2.3103 NMAC. New Mexico's regulations for ground and surface water protection have undergone numerous amendments over the past thirty-six (36) years. Current regulations for facilities to request a discharge permit, modification or renewal can be found at 20.6.2.3106-3114 NMAC. Current regulations for permitted facilities to request a variance from regulations can be found at 20.6.2.1210 NMAC.

ARGUMENT

- I. The Commission Should Dismiss in Part NMED's *Petition to Amend 20.6.2 NMAC*Because Its Proposed Amendment to Remove the Five-Year Limitation of Variances Violates the Water Quality Act.
 - A. Statutory and Regulatory History of Variances.

Section 74-6-4(H) of the Act authorizes the WQCC to permit pollution only on a case-by-case basis, and only after the WQCC has conducted a public hearing at which the petitioner meets a specific statutory burden. Thus, the Legislature clearly understood that water pollution may unfortunately be inevitable given the nature of certain industries and the limits of today's technology and sought to provide a *temporary* relief mechanism for regulated entities. Variances allow industries and others to *temporarily* avoid strict compliance with regulations while the

regulated entity determines how to abate pollution, but only when necessary and justified by site-specific circumstances. Under the Act, variance proceedings are adjudicatory. This assures that due process is provided not only to the regulated entity who wants to avoid regulation, but also to others who may be adversely affected if the variance is granted.

The Legislature also placed a limit on the duration of variances. The WQA states that, "The commission may only grant a variance conditioned upon a person effecting a particular abatement of water pollution within a reasonable period of time." NMSA 1978, Section 74-6-4(H) (emphasis added). Both the face of the Act and its express purpose make clear that the Legislature never intended the issuance of "forever variances" for the life of a permitted facility so that industry could pollute New Mexico's most precious public resource in perpetuity.

Additionally, it is important to note the history behind the enactment of 20.6.2.1210

NMAC and how the WQCC has interpreted "a reasonable period of time." As previously stated, the WQCC first promulgated implementing regulations for the Act in 1967. In 1968, Regulation No. 5, "Procedure for Requesting a Variance," was promulgated, providing the variance mechanism to regulated entities.² A few years later, the WQCC amended Regulation No. 5 to limit variances to one year.³ In 1981, the WQCC aligned the duration of variances with the duration of discharge permits by extending the variance limit from one year to five years. 1-

² New Mexico Commission of Public Records; New Mexico State Records Center and Archives series 5; Administrative Law Division Formerly Known as Rules Division subseries 5.1; Agency Historic Rules Collection sub-series 5.1.177; Rules – Water Quality Control Commission, Box no. 267. *See* Exhibit A.

³ New Mexico Commission of Public Records; New Mexico State Records Center and Archives series 5; Administrative Law Division Formerly Known as Rules Division subseries 5.1; Agency Historic Rules Collection sub-series 5.1.177; Rules – Water Quality Control Commission, Box no. 267. See Exhibit B.

210(D)(9) NMAC (1981).⁴ This is because the WQA does not authorize a variance to exceed the term of a permit. § 74-6-5(I). The five year limit for variances has remained in effect since 1981, though both the Act and 20.6.2 NMAC have undergone numerous amendments over the past thirty-six (36) years.

B. NMED's Proposed Amendment to Remove the Five-Year Variance Limit Violates the Water Quality Act.

Under NMED's recently proposed amendment, a variance could be granted for the "life of a facility." NMED "Hit List for Regulation Changes as discussed on 11/9/2015," attached as Exhibit C (emphasis added); NMED's Notice of Intent to Present Technical Testimony, Exhibit 13, page 14, lines 11-12 (September 11, 2017) ("Implementation of this proposed revision would allow for a variance to be issued in alignment with the *length of time a petitioner intended to operate the facility* for which the variance is sought") (emphasis added). Therefore, 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. There can be no doubt that this violates both the Water Quality Act's purpose of preventing and abating pollution of ground water and the "reasonable period of time" limitation of Section 74-6-4(H).

Additionally, the WQA provides that a variance "may not be extended or renewed unless a new petition is filed and *a public hearing is held*." *Id.* (emphasis added). Therefore, when a facility submits a petition for an initial variance, renewal or extension of a variance, a public hearing *must* be held. Under NMED's proposed amendment to remove the five-year limit for

⁴ New Mexico Commission of Public Records; New Mexico State Records Center and Archives series 5; Administrative Law Division Formerly Known as Rules Division subseries 5.1; Agency Historic Rules Collection sub-series 5.1.177; Rules – Water Quality Control Commission, Box no. 267. See Exhibit D.

variances, NMED would instead conduct an *internal administrative review* of the "forever variance" every 5 years to determine compliance and continuance of the variance. 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. The statutory requirement of holding a public hearing for variance issuance, renewal or extension cannot be changed by regulatory amendment. "If there is a conflict or inconsistency between statutes and regulations promulgated by an agency, the language of the statutes prevail," and not the language of the regulation. *Jones v. Empl. Serv. Div. of Human Serv. Dep't*, 1980-NMSC-120, ¶ 3, 95 N.M. 97, 98.

The removal of the five-year variance limit would have a number of consequences resulting in violation of the WQA. First, a variance would outlive a discharge permit. This is not permitted under the Act. Second, the removal of the five-year variance limit would authorize NMED to eliminate the mandatory holding of a public hearing on petitions for variances (whether new petitions, extension petitions, or renewal petitions) by issuing variances "for the life of the facility". This too violates the Act.

Third and finally, NMED's proposed amendments to conduct a five-year internal compliance and continuance review of a "forever variance" and to allow any person to request a hearing on the five-year compliance review report fail to remedy the unlawfulness of its proposed removal of the five-year variance limit. Requests for a public hearing on a five-year variance compliance and continuance report would not be mandatory under NMED's proposed amendments, thereby violating the Act.

II. The Commission Should Dismiss in Part NMED's Petition to Amend 20.6.2 NMAC
Because Its Proposed Amendments to Change the Current Regulatory Definition
of Discharge Permit Amendment and to Add a New Agency Action Violate the
Water Quality Act.

A. Statutory Authority for Discharge Permit Modifications and Amendments.

The WQA expressly authorizes NMED to perform the following actions: deny a permit, terminate a permit, *modify* a permit, or grant a permit subject to a condition. *See* NMSA 1978, § 74-6-5(M), (N). (emphasis added). Section 74-6-5(M) of the Act provides the following criteria for when a permit can be modified:

A permit may be terminated or *modified* by the constituent agency that issued the permit prior to its date of expiration *for any of the following causes*:

- 1) Violation of any condition of the permit;
- 2) Obtaining the permit by misrepresentation or failure to disclose fully all relevant facts;
- 3) Violation of any provisions of the WQA or any applicable regulations, standard of performance or water quality standards;
- 4) Violation of any applicable state or federal effluent regulations or limitations; or
- 5) Change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge
- *Id.* (emphasis added). The section therefore provides a definition for permit modification as follows:

A permit modification results from the violation of any condition of the permit, from obtaining the permit by misrepresentation or failure to disclose fully all relevant facts; from violation of any provisions of the WQA or any applicable regulations, standard of performance or water quality standards; from violation of any applicable state or federal effluent regulations or limitations; or from a change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge.

Because the Act already provides the criteria for when a permit may be modified, and thereby a definition for permit modification, the Act does not authorize the WQCC to do so through the promulgation of regulations. The Legislature clearly did not intend for the WQCC to promulgate regulations specifying when a permit may be modified. If it had, the Legislature

would have expressly stated that intent in the Act, similar to the New Mexico Air Quality

Control Act and the New Mexico Solid Waste Act. Under the New Mexico Air Quality Control

Act, the Legislature expressly authorized the environmental improvement board to promulgate

regulations that require "specification of the conditions under which the operating permit may be

terminated, modified or revoked and reissued." NMSA 1978, Section 74-2-7(B)(11)(c). And

under the New Mexico Solid Waste Act, the Legislature expressly authorized the board to "adopt

regulations setting forth procedures and requirements for the director's review and action on a

permittee's application to modify a permit." NMSA 1978, Section 74-9-25.

The WQA, however, does authorize the WQCC to promulgate procedures, by regulation, for *notice of* the "issuance or modification of a permit," the "issuance of renewals of permits," NMSA 1978, Section 74-6-5(F) (emphasis added), and NMED's decision to modify a permit. NMSA 1978, Section 74-6-5(N). Finally, the Act authorizes the WQCC to provide, by regulation, "[a] schedule of fees for permits, not exceeding the estimated cost of investigation and issuance, *modification* and renewal of permits." NMSA 1978, Section 74-6-5(K) (emphasis added).⁵

Even though the Act already defines what a discharge permit modification is, the WQCC confusingly promulgated a different definition that conflicts with Section 74-6-5(M). Under 20.6.2.7.P NMAC, a discharge permit modification means:

[a] change to the requirements of a discharge permit that result from a change in the location of the discharge, a significant increase in the quantity of the discharge, a significant change in the quality of the discharge; or as required by the secretary."

⁵ The Act may also authorize the WQCC to promulgate regulations for how a permitted facility may request a discharge permit modification, pursuant to NMSA 1978, Section 74-6-5(H). Regulations pertaining to how a permitted facility may request a discharge permit modification can be found at 20.6.2.3106 NMAC. Regulations pertaining to the public notice of discharge permit modification requests can be found at 20.6.2.3108 NMAC. Regulations pertaining to public notice of NMED's decision to modify a permit can be found at 20.6.2.3109 NMAC.

The WQCC's regulatory definition severely narrows the statutory definition for permit modification. Again, "If there is a conflict or inconsistency between statutes and regulations promulgated by an agency, the language of the statutes prevail," and not the language of the regulation. *Jones v. Empl. Serv. Div. of Human Serv. Dep't*, 1980-NMSC-120, ¶ 3; 95 N.M. 97, 98.

B. NMED's Proposed Amendment to Change the Current Regulatory Definition for Discharge Permit Modification Violates the Water Quality Act.

NMED has proposed changing the current regulatory definition for discharge permit modification. Because the Act already defines what a discharge permit modification is and does not authorize the WQCC to promulgate regulations defining permit modification or specifying the criteria for when a permit may be modified, both the current and NMED's proposed definition for permit modification are unlawful. § 74-6-5(M); NMSA 1978, Section 74-6-4(C) (the commission "[s]hall not adopt or promulgate a standard or regulation that exceeds a grant of rulemaking authority").

C. NMED's Proposed Amendment to Add a New Agency Action for Discharge Permit Amendment Violates the Water Quality Act.

NMED has also proposed an amendment to add a new agency action to 20.6.2 NMAC. This new agency action is referred to as a "discharge permit amendment" and is not currently authorized under the WQA. Again, the WQA expressly authorizes NMED to perform only the following actions: deny a permit, terminate a permit, *modify* a permit, or grant a permit subject to a condition. *See* NMSA 1978, § 74-6-5(M), (N). (emphasis added). The statutory definition of "modification" found in § 74-6-5(M) does not state that an "amendment" is a type of "modification." If the Legislature had intended to create a two-tiered system of "major" and "minor" modifications it would have expressly done so, like it did in the New Mexico Hazardous

Waste Act. See NMSA 1978, Section 74-4-4.2(H), (I). The proposed agency action and definition both clearly violate the WQA because they exceed the authority of the WQCC under the Act. The proposed agency action and definition also violate the current regulatory definition for discharge permit modification. The current definition for modification does not state that an "amendment" is a type of modification that does not require similar public notice, comment and hearing opportunities. 20.6.2.7.P NMAC.

Finally, NMED concedes that it has been approving changes to permits that constitute a modification under both the statutory and regulatory definitions without the required public notice, comment, or hearing. See NMED's Statement of Reasons For Proposed Amendments to 20.6.2 NMAC, reason #3 (May 1, 2017); NMED's Notice of Intent to Present Technical Testimony, Exhibit 13, page 5, lines 8-11 (September 11, 2017); AB/GRIP's Notice of Intent to Present Technical Testimony, Exhibit A. The WQCC has no statutory authority to legitimize NMED's unlawful practice.

CONCLUSION

"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. Accordingly, the WQCC cannot adopt NMED's proposed amendments discussed above because they violate the Water Quality Act's fundamental purpose, which is to prevent and abate water pollution, and the Act itself for the above-discussed reasons.

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"). Because NMED's proposed amendments violate the WQA, the Commission should grant AB/GRIP's Motion to Dismiss in Part.

Dated: September 29, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Motion to Dismiss in Part was served on September 29th, 2017 via electronic mail to the following:

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Amendment No. 4

Regulation No. 5 - Procedure for Requesting a Variance

I. APPLICATION. Applications for variances pursuant to Section 75-39-4 G, N.M.S.A. 1953 Comp., shall be addressed in writing to the Chairman of the Commission and shall contain the following information:

Regulation from which a variance is sought;

Name of applicant;

Date of application;

Date of applicant;

Date of application;

Date of application;

Date of applicant;

Date of applica

Reasons or justifications for the variance;
Period of time for which variance is desired.

- II. COMMISSION ACTION. The Commission shall act upon the variance application within 30 days after receipt, and shall inform the applicant of its decision in writing, the decision to be served personally or by registered mail. If the application is denied, in whole or in part, the denial shall include a statement explaining the grounds for the action, together with a copy of this regulation.
- III. PROCEDURE FOR REVIEW. An applicant dissatisfied with Commission action upon an application for variance may secure administrative review thereof by filing a request for review with the Commission in writing within 30 days after the entry of the Commission's decision.

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After written request for hearing has been filed, the Commission shall notify the applicant by certified mail return receipt requested or by personal service of the hearing. The notice shall include the time, place, date of the hearing, which time shall be not less than 10 nor more than 30 days from the date of filing of the request for hearing, provided that the Commission may for good cause or upon request of the applicant set the hearing for a later date.

Hearings shall be conducted in Santa Fe, provided, however, that upon stipulation of the Commission and the applicant the hearing may be conducted elsewhere.

- IV. CONDUCT OF THE HEARING. Hearings for administrative review of Commission action on applications for variance shall be conducted by at least a quorum of the Commission members or by a Hearing Officer designated by the Commission. A complete record of the proceedings shall be kept, but the Commission need not arrange to transcribe shorthand notes or sound recordings unless the hearing is conducted by a Hearing Officer or the transcript is requested by a party. In the latter case the cost of any transcript shall be borne by the applicant.
 - V. PROCEDURES -- EVIDENCE. In the conduct of review proceedings:
- A. irrelevant, incompetent, immaterial, or unduly repetitious evidence shall be excluded. The rules of evidence as applied in non-jury civil cases in the District Courts of New Mexico shall be followed. When necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not admissible thereunder may be admitted, except where precluded by statute, if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs.

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The Commission shall give effect to the rules of privilege recognized by law. Objections to evidentiary offers may be made, and should be noted in the record. No greater exclusionary effect shall be given any rule or privilege than would obtain in an action in court. Subject to these requirements, when a hearing will be expedited and the interests of the parties will not be prejudiced substantially, any part of the evidence may be received in written form;

- B. all evidence, including any records, investigation reports and documents in the possession of the Commission, of which it desires to avail itself as evidence in making a decision, shall be offered and made a part of the record in the proceeding, and no other factual information or evidence shall be considered, except as provided in Paragraphs C and D of this section. Documentary evidence may be received in evidence in the form of copies of excerpts, or by specific citation to page numbers in published documents;
- C. the parties and the Commission shall have the right to call and examine witnesses, to introduce exhibits, to cross-examine witnesses who testify, and to submit rebuttal evidence;
- D. official notice may be taken of all facts of which judicial notice may be taken and of other facts within the specilized knowledge of the Commission, but whenever the Commission take official notice of a fact, the noticed fact and its source shall be stated at the earliest practicable time, but before the final report or decision, and any party shall on timely request be afforded an opportunity to show the contrary;
- E. the experience, technical competence, and specialized knowledge of the commission and its staff may be utilized in the evaluation of the evidence;

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- F. any party shall at all times have the right to be represented by counsel, provided that such counsel is duly licensed to practice law in the State of New Mexico and is in good standing; and
- G. if a person who has requested a hearing does not appear and no continuance has been granted, the Commission may hear the evidence of such witnesses as may have appeared, and the Commission may proceed to consider the matter and dispose of it on the basis of the evidence before it.
- VI. DECISION OF THE COMMISSION. The final decision of the Commission, after administrative review, shall be in writing and shall be entered within 60 days after the hearing. Parties shall be notified either personally or by mail of any decisions or Order. A copy of the decision or Order shall be delivered or mailed forthwith to each party or to his attorney of record.

Adopted by the New Mexico
Water Quality Control Commission
This 11th Day of June
1968 Anno Domini at Santa Fe,
New Mexico

Regulation No. 5 - Procedures for Requesting a Variance--Hearing

I. DEFINITION. -- As used in this regulation, "petitioner" means a person seeking a variance from a regulation of the commission pursuant to Section 75-39-4 (G), NMSA, 1953 Comp.

II. PETITIONS .--

A. Any person seeking a variance from a regulation of the commission pursuant to Section 75-39-4 (G), NMSA, 1953 Comp., shall do so by filing a written petition with the commission.

B. 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 or water course affected by the discharge;
- (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 regulation will impose an unreasonable burden upon his activity; and
- (9) state the period of time for which the variance is desired.



- C. The petitioner may submit with his petition any relevant documents or material which the petitioner believes would support his petition.
- III. ACTION BY COMMISSION. -- Within fifteen (15) days after the receipt of the petition by the commission, the commission shall notify the petitioner by certified mail of the date, time, and place of the public hearing.

IV. NOTICE. --

- A. At least fifteen (15) days prior to each hearing date, the commission shall publish notice of the date, time, place and subject of the variance hearing in a newspaper of general circulation in the county in which the facility is located and in a newspaper of general circulation in the state. The notice shall also state the water course or water body affected.
- B. The commission shall maintain a file of persons interested in variance hearings and shall make a reasonable effort to notify them by mail of the date, time, place, and subject of scheduled public hearings.
 - V. HEARINGS--ACTION BY COMMISSION-WRITTEN ORDER.--
- A. Public hearings shall be held not less than twenty
 (20) days nor more than sixty (60) days from the date the commission
 mails the notice of the hearing to the petitioner.
- B. Public hearings shall be held in Santa Fe unless the commission and the petitioner agree upon another site in the state.
- C. The commission may designate a hearing officer to take evidence at the hearing.

- D. A record shall be made at each hearing, the cost of which shall be borne by the Health and Social Services Department. Transcript costs shall be paid by those persons requesting transcripts. If the hearing is conducted by a hearing officer designated by the commission, a transcript shall be prepared and the cost of providing transcripts to the commission members shall be borne by the Health and Social Services Department.
- E. In variance hearings, the technical rules of evidence and the rules of civil procedure shall not apply, but the hearings shall be conducted so that all relevant views are amply and fairly presented without undue repetition. The commission may require reasonable substantiation of statements or records tendered and may require any view to be stated in writing when the circumstances justify.
- F. The commission shall allow all persons a reasonable opportunity at a hearing to submit written and oral evidence and arguments and to introduce exhibits.
- G. The commission shall allow reasonable cross-examina tion of persons who testify at a hearing by persons who have submitted a written request to do so. Requests must be submitted to the chairman of the commission by 4:00 p.m. on the day before each hearing.
- H. The petitioner and the commission shall have the right to call and examine witnesses, introduce exhibits, and cross-examine anyone who testifies.

SEARING SHOWN

Ud/Alasa

A petitioner may represent himself at the hearing or be represented by any other individual. The commission may grant the requested variance, in whole or in part, or may deny the variance. Any action taken by the commission shall be by written order entered within sixty (60) days after the hearing. A copy of the order shall be mailed to the petitioner. All persons appearing or represented at the hearing shall be mailed notice of the commission's action. The commission shall not grant a variance for a period of time in excess of one year. Orders of the commission shall: state the petitioner's name and address; (1) (2) state the date the order is made; (3) describe the facility for which the variance is sought; identify the regulation of the commission from (4) which the variance was sought; state the decision of the commission; (5) if a variance is granted, state the period of time for which it is granted; and state the reasons for the commission's decision. (7) The commission shall maintain a file of all orders made by the commission. The file shall be open for public inspection. EFFECT OF ORDER OF COMMISSION--FAILURE TO APPEAR AT HEARINGS . --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, among -8other things, the development of new information and techniques to be sufficient justification for a second petition.

- B. If the petitioner, or his authorized representative, fails to appear at the public hearing on the variance petition, the commission shall proceed with the hearing on the basis of the petition.
- C. A variance may not be extended or renewed unless a new petition is filed and processed in accordance with the procedures established by this regulation.

VII. TIMELINESS .--

- A. When the last day for performing an act falls on Saturday, Sunday, or a legal, state, or national holiday, the performance of the act is timely if performed on the next succeeding day which is not a Saturday, Sunday, or a legal, state or national holiday.
- B. Except as provided in subsection V (G), all matters required to be filed or mailed under this regulation are timely if deposited in the United States mail on or before the required date.

Adopted by the New Mexico
Water Quality Control Commission
This 29th day of September
1970 Anno Domini at Santa Fe,
New Mexico

01 2 10 82 130 04

Attendees: Michelle Hunter, Kurt Vollbrecht, All Furmall, Greg Huey, Steve Huddleson, Nancy McDuffy, Kate Herrell

- Streamline PN-1 Process last revised in 2006 to incorporate 2 PN periods. Discuss with Loch and Andri current requirements are on NMED side and figure how to further reduce those efforts?
- Updating WQCC Standards: As and TCE lower, FE, MG increase?. Provide a grace
 period for those sites currently in abatement to achieve new standards (2 years?).
 Discuss with Dennis McQuillin how this was approached for Ur in 2006.....Compare
 constituents regulated under PSTB to what is regulated under WQCC should be
 comprehensive for both. Compare Department, WQCC, PSTB, and MCLs
- Add Vapor language into abatement regulations (4000 series). Review the timing structure for completing Stage 1 and entering into Stage 2 (only currently have 120 days in-between and this is not enough time). Review difference between the Department TI waiver and the AAS - these should be more similar than different. Also look at Institutional controls and how thee play into these 2 items.
- Can we suspend a DP for a certain length of time? (Statue change) probably cannot address at this time...
- Can we make a simple renewal if nothing changes just a formal letter indicating such instead of reapplying? This would be particularly helpful for municipality WWTFs that rarely change. Use current copper ruling for amendments to incorporate language by defining an amendment as a volume change only of less than 10%. If over 10% then it is considered a modification!
- 6. Beneficial re-use of Domestlc WW provide rule change and set appropriate standards
 for Domestic WW re-use only. For all other (ASR, Industrial) incorporate language of
 "Enforceable guidance" look at current language used in the Mining Act (MMD) and FA
 and have guidance updated every 5 years or so.
- VRP have department regs are easier to change than WQCC regs. VRP PN: cannot be 1 piece of paper that is 1000 dollars! Look at website, e-mail?
- Financial Assurance rules fook at other States for guidance?
- Variances remove the 5 year period of approval for variances make then the life of the facility upon approval by the Department. Review them internally every 5 years. See Copper rule for language.
- Abatement Plan/Appeat Process talk to Ali about current issues with these rules. And Justin Ball.

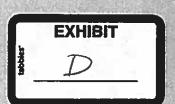


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for perjury or for giving a false statement. STATE COMMISSION OF PUBLIC RECORDS & ARCHIVES 1-210. VARIANCE PETITIONS.--

- A. Any person seeking a variance from a regulation of the commission pursuant to Section 74-6-4(G) NMSA 1978, 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:
- 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 or watercourse affected by the discharge;
- 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 the period of time for which the variance is desired.
- B. Within sixty days after the receipt of the petition by the commission, the commission shall review the petition to determine whether to grant or deny a public hearing on the petition. Within fifteen days after commission determination to grant or deny a public hearing, the commission shall notify the petitioner by certified mail of the determination. If



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- the commission refuses to grant a public hearing, then the petition shall be denied.
 - C. If the commission grants a public hearing, at least thirty days prior to each hearing date, the commission shall publish notice of the date, time, place and subject of the variance hearing in a newspaper of general circulation in the county in which the facility is located and in a newspaper of general circulation in the state. The notice shall also state the watercourse or water body affected. The commission shall maintain a file of persons interested in variance hearings and shall make a reasonable effort to notify them by mail of the date, time, place and subject of scheduled public hearings.
 - D. 1. Public hearings shall be held not less than thirty days nor more than ninety days from the date the commission mails the notice of granting the hearing to the petitioner.
 - 2. Public hearings shall be held in Santa Fe unless the commission and the petitioner agree upon another site in the state.
 - 3. The commission may designate a hearing officer to take evidence at the hearing.
 - 4. A record shall be made at each hearing, the cost of which shall be borne by the Environmental Improvement Division. Transcript costs shall be paid by those persons requesting transcripts. If the hearing is conducted by a hearing officer designated by the commission, a transcript shall be prepared and the cost of providing transcript to the commission members shall be borne by the Environmental Improvement Division.
 - 5. In variance hearings, the technical rules of evidence and the rules of civil procedure shall not apply, but the hearings shall be conducted so that all relevant views are amply and fairly presented without undue repetition. The commission may require reasonable substantiation of statements or records tendered and may require any view to be stated in writing when the circumstances justify.

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- 6. At the hearing, all interested persons shall be given a reasonable chance to TAME GOMMISSION OF data, views or arguments orally or in writing to RECHIVES examine witnesses testifying at the hearing.
- 7. A petitioner may represent himself at the hearing or be represented by any other individual.
- 8. The commission may grant the requested variance, in whole or in part, may grant the variance subject to conditions, or may deny the variance. Any action taken by the commission shall be by written order entered within sixty days after the hearing. A copy of the order shall be mailed to the petitioner. All persons appearing or represented at the hearing who so request shall be mailed notice of the commission's action.
- 9. The commission shall not grant a variance for a period of time in excess of five years.
 - 10. Orders of the commission shall:
 - (a) state the petitioner's name
- (b) state the date the order is made;
- (c) describe the facility for which the variance is sought;
- (d) identify the regulation of the commission from which the variance was sought;
- (e) state the decision of the commission;
- (f) if a variance is granted, state the period of time for which it is granted; and
- (g) state the reasons for the commission's decision.
- 11. The commission shall maintain a file of all orders made by the commission. The file

and address:

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shall be open for public inspection.

- E. An order of the commission is final and bars the petitioner from petitioning for the same variance without special permission from commission. The commission may consider, among other things, the development of new information techniques to be sufficient justification for a second If the petitioner, or his authorized petition. representative, fails to appear at the public hearing on the variance petition, the commission shall proceed with the hearing on the basis of the petition. 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.
- F. When the last day for performing an act falls on Saturday, Sunday or a legal, state or national holiday, the performance of the act is timely if performed on the next succeeding day which is not a Saturday, Sunday, or a legal, state or national holiday. All matters required to be filed or mailed under this section are timely if deposited in the United States mail on or before the required date.

PART 2

Water Quality Control

2-100. APPLICABILITY OF REGULATIONS. -- The requirements of Section 2-101 and 2-102 of these regulations shall not apply to any discharge which is subject to a permit under the National Pollutant Discharge Elimination System of P.L. 92-500; provided that any discharger who is given written notice of National Pollutant Discharge Elimination System permit violation from the administrator of the Environmental Protection Agency and who has not corrected the violation within thirty days of receipt of said notice shall be subject to Section 2-101 and 2-102 of these regulations until in compliance with the National Pollutant Discharge Elimination System conditions; provided further that nothing in these regulations shall be construed as a deterrent to action under Section 74-6-11 NMSA, 1978.