

**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 NEW MEXICO ENVIRONMENT DEPARTMENT'S
RESPONSE AND DAIRIES' RESPONSE TO MOTION TO STAY ALL FILING
DEADLINES AND HEARING**

Pursuant to 20.1.6.207.E NMAC, Amigos Bravos and Gila Resources Information Project ("AB/GRIP") file this Consolidated Reply to the New Mexico Environment Department's ("NMED") Response and the Dairies' Response to AB/GRIP's Motion to Stay All Filing Deadlines and Hearing. None of the parties to this proceeding oppose AB/GRIP filing a Consolidated Reply.

I. The New Mexico Water Quality Act Provides Statutory Procedural Due Process Rights to Interested Persons Participating in a Water Quality Control Commission Rulemaking Proceeding That Require Some Form of Discovery.

The New Mexico Court of Appeals case, *Earthworks' Oil & Gas Accountability Project v. N.M. Oil Conservation Commission*, makes clear that the "right to receive notice and a hearing before the adoption of a rule is a statutory right." 2016-NMCA-055, 34; 374 P.3d 710. Under the New Mexico Water Quality Act ("WQA"), interested persons are provided several statutory rights, such as notice and the right to be heard, that are the functional equivalent of procedural due process rights. Section 74-6-6(A) of the WQA states that, "No regulation or water quality standard or amendment or repeal thereof shall be adopted until after a public hearing." Section 74-6-6(D) of the WQA provides a right to be heard as follows:

At the hearing, the commission shall allow all interested persons reasonable opportunity to submit data, views or arguments orally or in writing and to examine witnesses testifying at the hearing...

Though the WQA does not expressly provide for discovery in rulemaking, Section 74-6-6(D) permits "interested persons" to submit written information, views or arguments and provides that rulemaking proceedings must be based upon the record. *See* NMSA 1978, Section 74-6-7(A) ("All such appeals shall be upon the record made before the commission..."). It is evident that the New Mexico legislature primarily envisioned the role of participants in a Water Quality Control Commission ("WQCC") rulemaking proceeding as one of adding to the wealth of knowledge available to the WQCC. The statute does not burden "interested persons" with establishing reasons why the WQCC should not adopt a state agency's petition for regulatory change. As a result, the legislature did not expressly provide participants with a means for obtaining information for the purpose of vindicating any particular point of view. The absence of a specific statutory provision for discovery in the WQA does not necessarily mean that the WQCC is not required to provide it.

The rights to receive notice and to be heard under the WQA require the availability of some means of discovery for three reasons. First, in WQCC rulemaking proceedings there is often only an abbreviated testimonial phase. An interested person must therefore have adequate time and a means of obtaining documentary evidence in order to prepare for and to support an effective written presentation or oral argument. Second, because rulemaking proceedings are based on the record, the public interest strongly favors disclosure of any government documents which may lead to a more complete record. Finally, the investigative nature of rulemaking dictates that any improvement in the information gathering process will enhance the policy decision ultimately expressed in the final rule.

AB/GRIP has requested that the Hearing Officer stay all filing deadlines and the hearing to allow adequate time for AB/GRIP to obtain NMED documents relevant to NMED's Petition to Amend 20.6.2 NMAC. Many of the documents AB/GRIP have requested NMED to produce through several New Mexico Inspection of Public Records Act ("IPRA") requests have not been provided either to AB/GRIP or the public. AB/GRIP's rights to notice and to be heard can only be realized in a meaningful way by granting a stay of all filing deadlines and the hearing.

It is important to note that AB/GRIP is merely trying to obtain documents pertinent to NMED's Petition to Amend 20.6.2 NMAC; AB/GRIP is not seeking to engage in more expansive discovery. AB/GRIP appreciates NMED's bringing to light its practice of discharge permit amendments. However, NMED has not been able to provide the requested relevant information and documentation regarding its historical and current practice of discharge permit amendments (as well as for NMED's practice of alternative abatement standards and variances).

For example, NMED's expert Kurt Vollbrecht testified that, "A review of the available scanned reading file of letters issued by NMED reveals that the Department has issued over 330 discharge permit amendments since 2000." NMED's Notice of Intent, Vollbrecht Direct Testimony, page 5, lines 8-9. A spreadsheet summarizing this information was not provided as an exhibit to Mr. Vollbrecht's testimony, and neither were the 330 discharge permit amendment approval letters. This supporting information was also not provided pursuant to AB/GRIP's many IPRA requests or through NMED's initial notice of intent to petition the WQCC for amendments to 20.6.2 NMAC, and NMED's Statement of Reasons accompanying its formal Petition to Amend 20.6.2 NMAC.¹

¹ NMED's expert, Mr. Vollbrecht, also states that the 2006 amendments made to 20.6.2 NMAC "were based on negotiations between a multi-stakeholder group including Concerned Citizens for Nuclear Safety, the New Mexico Environmental Law Center, Citizens for Clean Water, New

Mr. Vollbrecht's testimony also states that NMED's discharge permit amendments practice "fall into two broad categories..changes to monitoring requirements...and process changes that do not result in significant changes to the quantity, quality, or location of a permitted discharge." *Id.*, lines 11-21. This statement does not appear to be consistent with information obtained from IPRA requests pertaining to NMED's historical and current practice of discharge permit amendments. *See generally*, AB/GRIP's Notice of Intent to Present Technical Testimony, Exhibit A, Written Direct Testimony of Expert Kathy J. Martin and Exhibit D, Spreadsheet of Discharge Permit Amendments. Providing adequate time for NMED to produce documents relevant to its Petition will result in a more complete picture regarding NMED's historical and current use of amendments, variances and alternative abatement standards. It will also result in the production of a more complete administrative record.

Finally, though AB/GRIP concedes that NMED's failure to comply with IPRA requirements is primarily a matter under IPRA, IPRA is not the sole remedy here. The New Mexico Supreme Court found that "hearing officers may issue specific orders with respect to a particular hearing so as to provide additional structure, setting more explicit guidelines beyond what is dictated by statute, rule or guideline...Thus, EIB and WQCC may change the details of their rule-making processes, as long as the *administrative agencies* afford a 'reasonable opportunity' for participation." *New Energy Economy, Inc. v. Vanzi*, 2012-NMSC-005, 17; 274 P.3d 53 ("*Vanzi*") (emphasis added).

Mexico Dairy Producers, the Association of Commerce and Industry, the Oil Conservation Division, Minerals and Natural Resources Department, and the Department." NMED's Notice of Intent, Vollbrecht Direct Testimony, page 7, lines 7-12. NMED did not provide the 2006 WQCC transcript nor any other supporting documentation for this assertion as an exhibit to its Notice of Intent. Furthermore, NMED has not provided the 2006 hearing transcript it so clearly relies upon pursuant to AB/GRIP's July 25, 2017 IPRA request for all hearing transcripts relating to 20.6.2 NMAC.

The WQCC's rules for rulemaking provide AB/GRIP with a remedy pursuant to 20.1.6.100, -207, -300, and -306 NMAC. Contrary to the Dairies' assertion, AB/GRIP is not precluded from seeking a remedy pursuant to the WQCC's rules for rulemaking because AB/GRIP "agreed to the schedule as ordered by the Hearing Officer on June 2, 2017." Dairies' Response, page 1. The Hearing Officer should stay the filing deadlines and hearing to allow NMED adequate time to produce requested information and documentation relevant to its Petition to Amend 20.6.2 NMAC.

II. 20.1.6 NMAC Provides Regulatory Procedural Due Process Rights to Interested Persons Participating in a Water Quality Control Commission Rulemaking Proceeding That Require Some Form of Discovery.

The WQCC's rules for rulemaking require the petitioner in this matter, a constituent agency under the WQA, to disclose information on which its proposed rule has been based and which may be used to reach a final regulatory determination. 20.1.6.200.B NMAC ("The petition...shall include a statement of reasons..."). The rules at 20.1.6.300.B NMAC mandate that the "hearing officer shall conduct the hearing so as to provide a reasonable opportunity for all persons to be heard...". Under 20.1.6.100.A(1) NMAC, the WQCC may authorize a hearing officer to "issue procedural orders that either impose additional procedural requirements or simplify the procedures provided in this part." Furthermore, rule 20.1.6.306.D NMAC, "Deliberation and Decision," provides the following:

If, during the course of its deliberations, the commission determines that additional testimony or documentary evidence is necessary for a proper decision on the proposed regulatory change, the commission may, *consistent with the requirements of due process*, reopen the hearing for such additional evidence only.

Id. (emphasis added). Again, being heard includes being provided with access to the agency documents relevant to NMED's Petition to Amend 20.6.2 NMAC. The WQCC's rules for rulemaking support providing some means for discovery.

The WQCC's rules for rulemaking clearly acknowledge procedural due process rights of interested persons in a rulemaking proceeding. The rules also implement the statutory rights of adequate notice and a reasonable, meaningful opportunity to be heard. Therefore, the rules cited above afford AB/GRIP a remedy regarding NMED's production of documents relevant to NMED's Petition. Under 20.1.6.207 NMAC, AB/GRIP may file a Motion to Stay All Filing Deadlines and Hearing in this matter so that the Hearing Officer can provide NMED with adequate time to produce all relevant documents pertaining to its Petition. The Hearing Officer can also ensure that AB/GRIP and other interested persons are afforded the statutory and regulatory right to be heard.

III. Fundamental Fairness Requires that All Deadlines and the Hearing Be Stayed So That Interested Persons May Have a Reasonable and Meaningful Opportunity to Be Heard in This Rulemaking Proceeding.

The New Mexico Supreme Court in *Vanzi* stated that, "Rule-making hearings are intended to be inclusive, encouraging broad public participation." *Vanzi*, 2012-NMSC-005, 16; 274 P.3d 53. Additionally, as the petitioner for a regulatory change, NMED not only causes a hearing to occur, but also, pursuant to the WQCC's rules for rulemaking, "sets the stage for a rule-making proceeding by proposing the specific language of a rule and taking responsibility for creating the transcript of the hearing, which will be relied upon in any later appeals." *Id.* at 18.

Therefore, NMED bears the burden of making available all information generated during a pre-notice of proposed rulemaking, all supporting documents necessary and relevant to its Petition, and the scientific basis for its Petition. That is not a burden imposed upon AB/GRIP or any other interested person in this proceeding as the Dairies and NMED have argued. Dairies' Response, page 1; NMED's Response, page 6. Placing the burden on the public to gather

information and documentation relevant to an administrative agency's Petition for regulatory change does not encourage broad public participation and does not result in inclusive rulemaking.

If the Hearing Officer determines that the statutory rights of notice and opportunity to be heard under the WQA do not require some form of discovery, then fundamental fairness certainly requires NMED to produce all documents - not merely select documents - relevant to its Petition and to provide them to the public. AB/GRIP and other interested persons cannot effectively and meaningfully advocate its position on NMED's Petition without reviewing all NMED documents relevant to the Petition to Amend 20.6.2 NMAC.

IV. AB/GRIP Will Be Prejudiced If All Filing Deadlines and Hearing Are Not Stayed in This Matter.

The Water Quality Act and the WQCC's rules for rulemaking mandate that rulemaking proceedings are based upon a record. NMSA 1978, Section 74-6-7(A); *see generally* 20.1.6 NMAC. The New Mexico Court of Appeals can only set aside the WQCC's rulemaking actions if it is found to be: "1) arbitrary, capricious or an abuse of discretion; 2) not supported by substantial evidence in the record; or 3) otherwise not in accordance with law." NMSA 1978, Section 74-6-7(B). In order for the Court of Appeals to make this determination, a complete administrative record is required. Denying AB/GRIP's Motion will preclude the formation of a complete administrative record. That, in turn, significantly prejudices AB/GRIP and other interested persons from challenging a final rule pursuant to the WQA's Section 74-6-7. It also deprives a reviewing court of the record needed to make a decision.

Additionally, the WQA affords AB/GRIP and other interested persons the right to cross-examine the petitioner's experts. NMSA 1978, Section 74-6-6(D). Meaningful cross-examination of expert witnesses requires NMED to provide information and documentation its experts rely

upon. Denying AB/GRIP's Motion will prohibit effective, meaningful cross-examination of NMED expert witnesses.

The creation of an incomplete administrative record and the prohibition of meaningful cross-examination of NMED expert witnesses prejudices AB/GRIP and will violate the WQA. The Act mandates that, "In making regulations, the commission shall give weight it deems appropriate to all relevant facts and circumstances, including...the public interest." NMSA 1978, Section 74-6-4(E)(2). The WQCC will not be able to weigh the public interest in this rulemaking if AB/GRIP and the public have been denied their statutory and regulatory rights of adequate notice, meaningful opportunity to be heard, and effective cross-examination.

V. The Petitioner and the Other Parties In this Matter Will Not Be Prejudiced By Granting AB/GRIP's Motion.

NMED, the Petitioner in this matter, and all other parties will not be prejudiced by staying the filing deadlines and hearing to allow for the production of a complete administrative record. In fact, NMED and all other parties will benefit greatly from the production of a complete administrative record in that the WQCC will have before it a wealth of knowledge to make an informed decision, based upon substantial evidence in the record.

VI. Conclusion.

For the above stated reasons, AB/GRIP request that the Hearing Officer stay all filing deadlines and the hearing set in this matter until NMED has produced requested information and documentation relevant to its Petition to AB/GRIP and other interested persons. Contrary to NMED's assertion, it has not provided all documents relied upon in its NOI – either as exhibits or pursuant to AB/GRIP's many IPRA requests. NMED's Response, page 5.

In the alternative, AB/GRIP request that the Hearing Officer strike the following portions of NMED's expert testimony that rely upon documentation NMED has not provided:

- Kurt Vollbrecht direct testimony, page 4, lines 21-23;
- Kurt Vollbrecht direct testimony, page 5, lines 1-21;
- Kurt Vollbrecht direct testimony, page 6, lines 1-25;
- Kurt Vollbrecht direct testimony, page 7, lines 1-12;
- Kurt Vollbrecht direct testimony, page 8, lines 20-22;
- Kurt Vollbrecht direct testimony, page 10, lines 15-23.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

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