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, NEW MEXICO MINING ASSOCIATION, AND LOS ALAMOS NATIONAL SECURITY, LLC ON 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.

INTRODUCTION

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 *Consolidated Reply* to *Responses* filed by the New Mexico Environment Department ("NMED"), the New Mexico Mining Association ("NMMA"), and Los Alamos National Security, LLC ("LANS") on AB/GRIP's *Motion to Dismiss in Part the New Mexico Environment Department's ("NMED") Petition to Amend 20.6.2 NMAC*. None of the parties in this proceeding opposed the filing of a consolidated reply.

AB/GRIP's *Motion to Dismiss in Part* is timely and AB/GRIP is entitled to file this *Motion* for the reasons discussed below. Additionally, the New Mexico Water Quality Control Commission ("WQCC") is entitled to consider this *Motion* before the holding of an evidentiary hearing in this matter and should determine whether it has the authority to promulgate certain regulations prior to holding the scheduled four-day evidentiary hearing on NMED's *Petition*.

The Water Quality Act does not authorize the WQCC to promulgate regulations for variances to exceed the duration of a discharge permit and last for the "life of a facility". NMED has expressly stated several times that the Department's proposed regulation is intended to authorize the WQCC to issue variances for "the life of a facility". Furthermore, the Water Quality Act clearly links variances with discharge permits, thereby limiting the duration of a variance to five years. The purpose of a variance is limited to the temporary allowance of ground water pollution. The WQCC has no authority to issue variances from the prescriptive requirements of the Copper Rule and the Dairy Rule if a regulated facility would not be effecting abatement of ground water pollution.

The Water Quality Act also does not authorize the WQCC to promulgate regulations pertaining to when a discharge permit may be modified. The WQCC does not have implied authority to promulgate regulations addressing conditions under which permits may be modified because the Act's Section 74-6-5(M) expressly provides those conditions. Under the doctrine of expressio unius est exclusio alterius (the express mention of one thing excludes all others), the NMED is limited to the prescribed mode provided by the Legislature in Section 74-6-5(M) for modifying a permit, whether NMED determines to modify a permit "unilaterally" or when a permit holder submits a permit modification application.

ARGUMENT

I. AB/GRIP's *Motion To Dismiss In Part* Is Timely.

A. AB/GRIP's Motion Is Timely Pursuant to 20.1.6.207 NMAC And The Procedural Orders Issued In This Matter.

LANS's assertion that AB/GRIP's *Motion to Dismiss in Part* is untimely is without merit for two reasons. LANS *Response*, ¶ 3. First, the WQCC rules for rulemaking ("rules") do not require AB/GRIP to file a motion to dismiss at the time the WQCC determines whether to hold a

hearing on a petition for a regulatory change. 20.1.6.200 NMAC. Therefore, AB/GRIP are not precluded from filing a dispositive motion after the WQCC sets a hearing on a petition for regulatory change. *Id.*

Second, the rules provide that the WQCC "may issue such orders specifying procedures for conduct of the hearing…" if the WQCC determines to hold a public hearing on a petition for regulatory change. 20.1.6.200.D NMAC; *See also* 20.1.6.100.A(1) NMAC. The WQCC issued an order specifying additional procedures for the conduct of the hearing on NMED's *Petition* through its appointed Hearing Officer in this matter, Erin Anderson, on May 31, 2017. The *Procedural Order* issued, and later revised on June 2, 2017, expressly states the following, in pertinent part:

> Any *dispositive motions* shall be filed no later than September 29, 2017, with Response due within 15 days, on October 16, 2017, and a Reply by the moving party, if any, due within 10 days after service of the Response, but no later than October 26, 2017.

Procedural Order, page 2, ¶ VI (May 31, 2017; June 2, 2017) (emphasis added).

The Hearing Officer held a pre-hearing scheduling conference with the parties in this matter, including LANS, regarding additional procedural requirements for the hearing and the associated scheduling order. LANS did not object to the September 29, 2017 filing deadline for dispositive motions at that time nor has LANS filed any written objections to the *Procedural Order* in effect since June 2, 2017. AB/GRIP filed their *Motion to Dismiss in Part* on September 29, 2017, in compliance with the *Procedural Order*. Therefore, AB/GRIP's *Motion* is timely.

B. NMED's Argument That Because AB/GRIP Focused Solely On Variances In the WQCC's Copper Rule Proceeding AB/GRIP Is Precluded From Challenging The WQCC's Authority In This Proceeding Is Irrelevant.

NMED has argued that the WQCC "should reject the attempt of AB/GRIP and their counsel to argue in this proceeding that the Commission does not have authority to promulgate

an express definition for what is already implied in the definition of 'discharge permit modification'" because AB/GRIP focused solely on the issue of variances in the WQCC's Copper Rule proceeding held in 2013. NMED *Response*, page 13. This argument is irrelevant for three reasons. First, the current proceeding before the WQCC is an entirely different proceeding than the Copper Rule proceeding held over four years ago. Second, the matters currently before the WQCC are not the same as those of the Copper Rule proceeding held over four years ago.

Finally, NMED fails to cite to any legal authority supporting its argument that AB/GRIP is precluded from challenging the WQCC's authority to promulgate certain regulations because AB/GRIP focused solely on the issue of variances in an entirely different proceeding with different legal representation over four years ago. When a party fails to provide supporting legal authority for its argument, New Mexico courts presume that none exists. Doe v. Lee, 1984-NMSC-024, ¶ 2, 100 N.M. 764, 764.

II. The WQCC Has The Authority To Consider Dispositive Motions Before Evidentiary Hearings Are Held On Petitions For Regulatory Change.

LANS's reliance on the New Mexico Supreme Court case, New Energy Economy, Inc. v. Shoobridge, 2010-NMSC-049, 149 N.M. 42 ("Shoobridge"), for its assertion that the WQCC cannot consider AB/GRIP's *Motion to Dismiss in Part* until after an evidentiary hearing on the merits of NMED's *Petition* has been conducted is misplaced for the following reasons. LANS *Response*, ¶ 4. First, Shoobridge does not provide that the WQCC is precluded from determining dispositive motions before an evidentiary hearing on a petition for regulatory change is conducted. *Id.*

In Shoobridge, the Dairy Producers of New Mexico, the Public Service Company of New Mexico, and the New Mexico Farm and Livestock Bureau asked the Environmental

Improvement Board ("Board") to not conduct a hearing on a petition for regulatory change filed by New Energy Economy, arguing that the Board did not have the authority under the New Mexico Air Quality Act to do so. 2010-NMSC-049, ¶ 2. The Board ordered briefing on this request from all of the parties and ultimately determined that the Board had the authority to proceed with a hearing. *Id.* at ¶ 3.

The Dairy Producers of New Mexico, along with other parties, then filed a complaint for a declaratory judgment and injunctive relief with the district court. *Id.* The district court granted a preliminary injunction enjoining the Board from completing the rule-making process. *Id.*at ¶ 4. Both the Board and New Energy Economy subsequently petitioned the New Mexico Supreme Court for a writ of superintending control or prohibition and requested a stay of the district court proceedings. *Id.*

The issue before the Supreme Court in Shoobridge was the following: "When the Legislature lawfully delegates authority to a state agency to promulgate rules and regulations, *may a court intervene* to halt proceedings before the agency adopts such rules or regulations?" *Id.* at ¶ 1 (emphasis added). The Supreme Court determined that "a *court* may not intervene in administrative rulemaking proceedings before the adoption of a rule or regulation." *Id.* (emphasis added).

In this matter, AB/GRIP have not asked a court to intervene in the rulemaking proceeding before the WQCC. AB/GRIP have not filed a complaint for declaratory judgment and injunctive relief with a district court. Just like the Dairy Producers of New Mexico in Shoobridge, AB/GRIP have filed a *Motion to Dismiss* with the WQCC, arguing that the WQCC does not have the authority to promulgate certain regulations and, therefore, a hearing should not be held on certain proposed regulations. Shoobridge does not preclude the WQCC from determining

whether it has the authority to promulgate certain regulations before holding an evidentiary hearing on proposed regulatory changes.

Second, LANS fails to cite to any authority providing that the WQCC cannot review motions to dismiss prior to an evidentiary hearing on a petition for regulatory change and that AB/GRIP is not entitled to file dispositive motions in this proceeding. LANS *Response*, ¶¶ 3, 4. Again, when a party fails to provide supporting legal authority for its argument, New Mexico courts presume that none exists. Doe v. Lee, 1984-NMSC-024, ¶ 2, 100 N.M. 764, 764.

III. The WQCC Should, As A Preliminary Matter, Determine Whether It Has The Authority To Promulgate Certain Regulations Before Holding An Evidentiary Hearing On Certain Proposed Regulations.

LANS has argued that the issue of whether the WQCC has the authority to promulgate certain regulations should be dealt with after a full evidentiary hearing on the proposed regulations because the WQCC, "after hearing and considering the evidence and arguments of all of the parties and the general public, may alter the changes [proposed regulations]." LANS *Response*, ¶ 4. This argument is without merit for two reasons. The first reason is that it would be a waste of WQCC resources, NMED resources, public resources, and other party resources to hold a hearing on proposed regulations which the WQCC has no authority to promulgate. The second reason is that no matter how the WQCC may modify a proposed regulation after the holding of an evidentiary hearing, it does not change the fact that the WQCC has no authority to promulgate that regulation.

IV. The Water Quality Act Does Not Authorize The WQCC To Promulgate Regulations Allowing Variances To Exceed The Duration Of Corresponding Discharge Permits.

A. The Water Quality Act Ties Variances To Discharge Permits And Expressly Limits Discharge Permits To Five-Year Terms, Thereby Limiting Variances To Five-Year Terms.

NMED's argument that there is nothing in the language of the Water Quality Act "that ties a variance to the term of a permit" is without merit for the following reasons. NMED *Response*, page 4. First, the Act states that 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 upon any lawful business, occupation or activity." NMSA 1978, Section 74-6-4(H) (emphasis added). Based on the plain language of the Act, a facility would need a variance from a commission regulation *only if* the facility is subject to the commission regulations. A facility is subject to the commission regulations *only if* the facility discharges any water contaminant that may move directly or indirectly into ground water or disposes or reuses refuse or sludge. NMSA 1978, Section 74-6-5(A).

If a facility is a discharger, it is required to obtain a discharge permit. Under Section 20.6.2.3104 NMAC "no person shall cause or allow effluent or leachate to discharge so that it may move directly or indirectly into ground water *unless he is discharging pursuant to a discharge permit* issued by the secretary." (Emphasis added).[1] A facility, therefore, *only* needs a variance from commission regulations pertaining to ground water when it is a discharger and has a discharge permit. This is because the pathway for a variance is a discharge permit. Without a discharge permit, there is no need for a variance. NMED has failed to provide the WQCC with

[1] There are very limited circumstances under which a facility may be exempt from the requirement of obtaining a discharge permit. Those exemptions are found at Section 20.6.2.3105 NMAC.

any example of a facility without a discharge permit needing a variance.[2] Contrary to NMED's assertion, the above cited language of Section 74-6-4(H) clearly links variances with discharges and discharge permits. NMED *Response*, page 4.

Second, the Act expressly limits the duration of discharge permits to five years. Section 74-6-5(I). Though the Act does not expressly limit variances to five years under Section 74-6-4(H), the rules of statutory construction require Sections 74-6-5(I) and 74-6-4(H) to be considered and interpreted in harmony with each other, as a whole, in order to effectuate the Act's purpose of preventing and abating water pollution. Pueblo of Picuris v. N.M. Energy, Minerals and Nat. Res. Dept., 2001-NMCA-084, ¶ 14, 131 N.M. 166, 169. When Sections 74-6-5(I) and 74-6-4(H) are read harmoniously, as a whole, it naturally follows that variances would be limited to the duration of a discharge permit in order to effectuate the Act's purpose of preventing and abating pollution of ground water.

Third, there are two reasons why the current regulations limit variance duration to five years. The first reason is that under the plain language of the Water Quality Act variances are linked with discharge permits and the Act expressly limits discharge permit duration to five years. The second reason is that the Act mandates that the WQCC may only grant a variance on the condition that the facility requesting the variance effect "a particular abatement of water pollution within a reasonable period of time". Section 74-6-4(H). Again, variances provide a *temporary* relief mechanism for regulated entities to avoid strict compliance with regulations while regulated entities determine how to abate ground water pollution. Ground water pollution

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[2] The following are a list of variance petitions submitted to the WQCC and their corresponding discharge permits: Petition 07-02V, DP-455; Petition 11-03V, DP-455 and DP-1341; Petition 12-05V, DP-1568; Petition 12-08V, DP-340; Petition 12-11V, DP-1022; Petition 12-13V, DP-1213; Petition 13-01V, DP-1157; and Petition 13-02V, DP-926.

may come about by a discharge of water contaminants to ground water pursuant to a discharge permit. Because a discharge is permitted for five years, it is reasonable that a variance from commission regulations applicable to that discharge permit would be for the duration of the discharge permit. In this context, the "reasonable period of time" is the five-year duration of a discharge permit.

B. Under The Water Quality Act's Plain Language, The Purpose Of A Variance Is To Permit Temporary Pollution Of Ground Water.

NMED's and the New Mexico Mining Association's ("NMMA") argument that since the WQCC's adoption of the Copper Rule and the Dairy Rule, "variances have a different role than is contemplated by Movant's [AB/GRIP] argument, which assumes that the purpose of a variance is to allow water pollution" is without merit for the following reasons. NMMA *Response*, page 3; NMED *Response*, page 6.

First, under the Act, the purpose of a variance is *only* to temporarily allow water pollution. Section 74-6-4(H). The Act only authorizes the WQCC to grant variances "conditioned upon a person effecting a particular abatement of water pollution". *Id.* Under this plain language, variances are only to be granted to facilities that are polluting ground water above standards and are striving to become compliant with commission regulations. *Id.* Again, the purpose of a variance is to allow the facility a reasonable period of time to determine how to become compliant with commission regulations pertaining to ground water.

If NMED and NMMA want to authorize the WQCC to grant variances for temporary relief from the prescriptive requirements of the Copper Rule and the Dairy Rule outside of the required condition of a facility effecting abatement, then the proper remedy for NMED and NMMA is to propose a legislative amendment to the Water Quality Act itself.

C. *NMED Has Expressly Stated That Its Intent For Removing The Five-Year Limit On Variances Is To Authorize The WQCC To Grant Variances For The Life Of A Facility.*

NMED incorrectly asserts that AB/GRIP "*speculate* on a variance being granted 'for the life of a facility,'" and that the language proposed by NMED "does not say anything about the 'life of a facility'". NMED *Response*, page 5 (emphasis added). There is no speculation to be had regarding NMED's intent to authorize the WQCC to grant variances for the "life of a facility". NMED has expressly stated in its "Hit List", in its *Direct Testimony* in support of its Petition, and in its *Response* to AB/GRIP's *Motion to Dismiss in Part* that NMED wants to authorize the WQCC to grant variances "for the life of a facility". *See* attached Exhibit C of AB/GRIP's *Motion to Dismiss in Part*; NMED *Notice of Intent to Present Technical Testimony*, Exhibit 13, page 14, lines 11-12; and NMED *Response*, page 6. AB/GRIP is not the only party to this proceeding who has interpreted NMED's express language in this manner. NMMA also views NMED's proposed amendment to remove the five-year limit on variances as a means for the WQCC to grant variances for the "life of a facility". NMMA *Response,* page 3 (A variance for the life of a facility provides regulatory certainty that authorization for construction of a facility will not be changed…).

As stated in AB/GRIP's *Motion*, the Water Quality 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. There can be no doubt that NMED's proposed amendment to current variance regulations 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).

V. The Water Quality Act Does Not Authorize The WQCC To Promulgate Regulations Addressing Conditions Under Which Permits May Be Modified Or Amended.

A. The WQCC Does Not Have Implied Authority To Promulgate Regulations Addressing Conditions Under Which Permits May Be Modified Because The Act's Section 74-6-5(M) Expressly Provides Conditions Under Which Permits May Be Modified.

NMED erroneously argues that the WQCC has implied authority to promulgate regulations addressing conditions under which permits may be modified because, "Statutes are necessarily broad in their wording, as it is not practical for the Legislature to explicitly address every detail of an administrative agency's authority. Thus, there will always be matters that are within the implied authority of an agency." NMED *Response*, page 7. This argument is without merit for the following reasons.

The first reason is that the Legislature expressly provided the criteria for when NMED may modify a permit, whether NMED determines to modify a permit on its own or whether a permitted facility submits an application for permit modification. Section 74-6-5(M). Furthermore, "Where authority is given to do a particular thing and the mode of doing it is prescribed, it is limited to be done in that mode; all other modes are excluded. This is a part of the so-called doctrine of expressio unius est exclusio alterius [the express mention of one thing excludes all others]". Robinson v. Bd. Of Comm'rs, 2015-NMSC-035, 360 P.3d 1186, 1191; Fancher v. Bd. of Comm'rs, 1921-NMSC-039, ¶ 11, 28 N.M. 179, 188. The Legislature gave NMED the authority to modify a permit under the prescribed mode provided in Section 74-6-5(M). Therefore, NMED is limited to modifying a permit pursuant to the prescribed mode in

Section 74-6-5(M). All other modes of modifying a permit that the WQCC have promulgated through regulation are excluded.

The Legislature also expressly provided that the WQCC only has the authority to promulgate regulations pertaining to public notice and participation regulations for permit modification applications, fees for permit modification applications, and notice of NMED decisions pertaining to permit modification applications. Sections 74-6-5(F), (G),(K), and (N).[3] Because the Legislature expressly identified specific authority the WQCC has for promulgation of specific types of regulations, the Water Quality Act is clearly not an example of a statute being "necessarily broad in [its] wording." NMED *Response*, page 7. The Legislature explicitly addressed the details of the WQCC's authority regarding discharge permit modifications. Sections 74-6-5(F),(G),(H),(K), and (N).

Because the Legislature crafted the Water Quality Act with such specificity as to the WQCC's authority regarding promulgation of regulations pertaining to discharge permit modifications, NMED's application of the implied authority doctrine is misplaced. Any implied authority the WQCC may have for promulgation of regulations pertaining to discharge permit modifications is severely restrained by the express language of the Water Quality Act pertaining to discharge permit modifications and the doctrine of expressio unius est exclusio alterius.

The second reason why NMED's argument is without merit is because NMED's concept of implied authority is overly broad. "While the execution, implementation and interpretation of

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[3] 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.

a statute is a legitimate function of implied power...*altering or adding provisions to existing legislation is not.*" Harvey E. Yates Co. v. Powell, 1996 U.S. Dist. LEXIS 16598, 10 (10th Cir. September 6, 1996) (remanded on other grounds in Harvey E. Yates Co. v. Powell, 98 F. 3d 1222 (October 21, 1996) (emphasis added). Again, the Legislature expressly provided the criteria for when NMED may modify a permit, whether NMED determines to modify a permit on its own or whether a permitted facility submits an application for permit modification. Section 74-6-5(M). The current regulatory definition of discharge permit modification, as well as NMED's proposed amendments, alters or adds provisions to this existing legislation, resulting in a usurpation of a legislative function not permitted by the doctrine of implied authority. Harvey E. Yates Co. v. Powell, 98 F. 3d 1222, 1239 (10th Cir. October 21, 1996).

Additionally, the current Section 20.6.2.7.P NMAC and NMED's proposed amendments impose a limitation on permit modifications which the Legislature did not prescribe. Under Section 20.6.2.7.P NMAC, a discharge permit modification currently 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."

Id. (Emphasis added).

The WQCC's regulatory definition severely narrows the statutory definition for permit modification in the following way. The Act expressly provides that a permit may be modified if there is a "violation *of any condition* of the permit". Section 74-6-5(M) (emphasis added). A discharge plan is comprised of a variety of conditions. For example, NMED may impose conditions for the installation, use, and maintenance of effluent monitoring devices, for a closure plan, and for sampling and analytical techniques. Section 20.6.2.3107 NMAC. A discharge plan does not solely consist of conditions pertaining to discharge volume, quantity and location.

However, both the current regulatory definition of discharge permit modification and NMED's proposed amendment to the current regulatory definition impose a severe limitation on when permit modifications may be granted, which the Legislature did not prescribe, by limiting "violation of *any condition* of the permit" to *only* violations of conditions pertaining to discharge location, volume and quantity. Section 20.6.2.7.P NMAC. The doctrine of implied authority does not permit the WQCC to impose a limitation on permit modifications which the Legislature did not prescribe. Rainbo Baking Co. of El Paso, Tex. v. Comm'r of Revenue, 1972-NMCA-139, ¶ 10, 84 N.M. 303, 306.

B. The Act's Section 74-6-5(F) Does Not Authorize The Commission To Promulgate Regulations Addressing Conditions Under Which Permits May Be Modified Or Amended.

NMED erroneously asserts that Section 74-6-5(F) of the Act contains an authorization to promulgate regulations addressing conditions under which permits may be modified or amended similar to those expressly provided in the New Mexico Solid Waste Act and the New Mexico Air Quality Act. NMED *Response*, page 9. Under the Water Quality Act, Section 74-6-5(F) states the following:

> The commission shall by regulation develop procedures that ensure that the public, affected governmental agencies and any other state whose water may be affected shall receive *notice* of each application for issuance, renewal, or modification of a permit. *Public notice* shall include:
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> (1) for issuance or modification of a permit:
> (a) notice by mail to adjacent and nearby landowners; local, state and federal governments; land grant organizations; ditch associations; and Indian nations, tribes or pueblos;
> (b) posting at a place conspicuous to the public and near the discharge or proposed discharge site; and
> (c) a display advertisement in English and Spanish in a newspaper of general circulation in the location of the discharge or proposed discharge; provided, however, that the advertisement shall not be displayed in the classified or legal advertisement sections; and

(2) for issuance of renewals of permits:
(a) notice by mail to the interested public, municipalities, counties, land grant organizations, ditch associations and Indian nations, tribes or pueblos; and
(b) a display advertisement in English and Spanish in a newspaper of general circulation in the location of the discharge; provided, however, that the advertisement shall not be displayed in the classified or legal advertisement sections.

Id. (Emphasis added).

This section clearly authorizes the WQCC to only promulgate regulations addressing *public notice* of permit modification applications. It does not authorize the WQCC to promulgate regulations addressing the criteria for when a permit may be modified, as argued by NMED. The WQCC promulgated public notice and participation regulations pursuant to its authority in Section 74-6-5(F). These public notice and participation regulations for permit modification applications can be found at Section 20.6.2.3108 NMAC.

C. The Act's Section 74-6-5(M) Is Not Limited To NMED "Unilaterally Modifying A Permit" And Allows Permit Holders To Request A Permit Modification.

1) The Criteria For When NMED May Modify a Permit Under Section 74-6-5(M) Is Not Limited To NMED "Unilateral Modifications of a Permit".

NMED, LANS and NMMA have erroneously argued that the criteria for when NMED may modify a permit contained in Section 74-6-5(M) of the Water Quality Act only applies to "unilateral modifications of a permit". NMED *Response*, pages 13-15; LANS *Response*, ¶ 5; NMMA *Response*, pages 4-5. Under the plain language rule of statutory construction, the plain language of Section 74-6-5(M) does not state that the criteria only applies when NMED makes a "unilateral modification of a permit". Section 74-6-5(M). As NMMA has pointed out in its response, "The primary indicator of the Legislature's intent is the text of the statute." NMMA *Response*, page 2 (citing to Tri-State Generation and Transmission Assoc., Inc. v. D'Antonio, 2012-NMSC-039, ¶ 18). If the Legislature had intended the criteria for when NMED may

modify a permit to apply only to "unilateral modifications" then the plain language of the statute would expressly say so. Section 74-6-5(M) applies to when NMED determines to modify a permit, whether that determination is made by NMED on its own or whether a permitted facility submits an application for permit modification.

2) Section 74-6-5(M) Does Not Preclude Permit Holders From Requesting a Permit Modification.

NMMA erroneously asserts that, "If Movants [AB/GRIP] were correct that Subsection M of Section 74-6-4 describes the exclusive criteria for 'modification' of a permit, then it follows that the Water Quality Act would not allow for a permit holder to initiate any changes to a discharge permit." NMMA *Response*, page 5. The Water Quality Act clearly contemplates permit holders submitting applications for permit modifications with NMED. For example, Section 74-6-5(F) authorizes the WQCC to promulgate notice requirements for permit modification *applications*, and Section 74-6-5(G) provides that an opportunity for a public hearing must be provided for permit modification *applications*. Section 74-6-5(K) authorizes the WQCC to promulgate fees for permit modification *applications* and Section 74-6-5(N) authorizes the WQCC to promulgate regulations for the notice of NMED decisions regarding permit modification *applications*.

As previously stated above, Section 74-6-5(M) provides the criteria for when NMED may modify a permit, whether NMED determines to modify a permit on its own or whether a permit holder submits an application for a permit modification. For example, if a permit holder wants to increase its discharge volume, which would result in a violation of one of its current permit conditions, then the permit holder may submit an application for a modification. NMED could then modify the current permit, on the permit holder's request, to allow for an increased volume in discharge because the requested discharge increase would result in the violation of a

condition of the current permit. However, applications for permit modifications are subject to public notice, comment and opportunity for a public hearing under Section 74-6-5(G) before NMED may approve them.

D. The Current Regulatory Definition For "Discharge Permit Modification" Does Not Implicitly Recognize The Authority Of The Department To Issue Other Types Of Minor Changes Without Going Through The Full Public Notice Process And Does Not Imply A Definition For "Discharge Permit Amendment".

As previously discussed, the WQCC does not have the authority under the Water Quality Act to promulgate regulations pertaining to when NMED may modify a permit. NMED also does not have the authority to issue "other types of minor changes without going through the full public notice process" under Section 20.6.2.7.P NMAC. NMED *Response*, page 9. Again, Section 20.6.2.7.P NMAC is unlawful as it exceeds the authority of the WQCC and conflicts with Section 74-6-5(M) of the Act. In the alternative, presuming that Section 20.6.2.7.P NMAC does not violate the Act, NMED's argument that "the current regulatory definition for discharge permit modification implicitly recognizes the authority of the Department to issue other types of minor changes without going through the full public notice process" is without merit for the following reasons.

New Mexico courts have provided substantial guidance on statutory and regulatory construction. The New Mexico Supreme Court has held, "When construing statutes, [the] guiding principle is to determine and give effect to legislative intent." New Mexico Indus. Energy Consumers v. N.M. Pub. Regulation Comm'n, 2007-NMSC-053 ¶ 20, 142 N.M. 533, 539. To determine legislative intent, courts "first [look] to the plain language of the statute, giving the words their ordinary meaning, unless the Legislature indicates a different one was intended." *Id.* This Court has also held that if "there is no ambiguity in the plain language of a

statute, and where no absurd or unreasonable result will occur," the courts "apply the plain meaning rule and refrain from further statutory construction." Martinez v. Cornejo, 2009-NMCA-011 ¶ 11, 146 N.M. 223, 227. The canons of statutory construction are also applied to regulatory construction by the courts. Albuquerque Bernalillo Co. Water Util. Auth v. N.M. Public Regulation Comm'n, 2010-NMSC-013, ¶ 51, 148 N.M. 21, 39 (*citing* Johnson v. N.M. Oil & Conservation Comm'n, 1999-NMSC-021, 127 N.M. 120).

Under Section 20.6.2.7.P NMAC, a discharge permit modification means the following:

> [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.

Id.

Applying the plain language rule of construction to Section 20.6.2.7 NMAC, if a change to the requirements of a discharge permit do not result from a change in the location of a discharge, or a significant increase in the quantity of the discharge, or a significant change in the quality of the discharge, then the change is not a modification. The regulatory construction stops there. Based on the plain language, anything that does not result in change in location, quantity or quality of a discharge is not a modification. The plain language rule of regulatory construction does not permit an implied definition of other terms within the express definition of discharge permit modification.

Therefore, the plain language of Section 20.6.2.7.P NMAC clearly does not "implicitly recogniz[e] the authority of the Department to issue other types of minor changes without going through the full public notice process." NMED *Response*, page 9. Contrary to NMED's assertion, the definition for discharge permit modification also does not contain the "implicit counterpart" of discharge permit amendment under any rule of regulatory construction. NMED

Response, 3. NMED cites to no rule of regulatory construction supporting its contention that definitions and counterparts may be implied and embedded in the express definitions of other terms. Again, when legal authority is not provided in support of an argument, it is presumed that no such authority exists. Doe v. Lee, 1984-NMSC-024.

CONCLUSION

For the above reasons, AB/GRIP request that the WQCC dismiss NMED's proposed regulations pertaining to variances and to discharge permit modifications and amendments. AB/GRIP further request that the WQCC set a hearing on this Motion prior to the evidentiary hearing scheduled to commence on November 14, 2017, and not on the morning of the hearing.

This Motion is a preliminary matter and if the WQCC grants this Motion the scope of the hearing would be significantly narrowed. AB/GRIP's out-of-state expert witness would no longer be needed to testify at hearing on these contested proposed regulations.

Dated: October 24, 2017

Respectfully submitted,

New Mexico Environmental Law Center

By: _____

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing *Consolidated Reply* was served on October 24, 2017 via electronic mail to the following:

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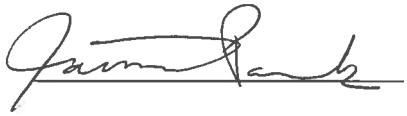

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