

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
WRITTEN OBJECTION TO THE NEW MEXICO ENVIRONMENT DEPARTMENT'S
PROPOSED SECOND PROCEDURAL ORDER**

Amigos Bravos and the Gila Resources Information Project (collectively, "AB/GRIP"), submit a written objection to the New Mexico Environment Department's ("NMED") proposed *Second Procedural Order* submitted with the Hearing Officer in this matter on October 27, 2017.

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

1. The New Mexico Water Quality Control Commission's ("WQCC") rules for rulemaking ("rules") provide that the WQCC "may issue such orders specifying procedures for conduct of the hearing...as may be necessary *and appropriate to fully inform the commission of the matters at issue* in the hearing or control the conduct of the hearing." Section 20.1.6.200.D NMAC (emphasis added).
2. NMED's proposed ten (10) minute limit on expert testimony is neither "necessary nor appropriate to fully inform the commission of the matters at issue in the hearing." NMED's proposed ten (10) minute limit serves to confuse the WQCC on the matters at issue, prohibit the WQCC from weighing the public interest in NMED's Petition, preclude the creation of a complete administrative record, and chill public participation in this rulemaking proceeding. Oral summaries of pre-filed written direct and rebuttal expert testimony is necessary and appropriate to fully inform the WQCC of the matters at

issue in the hearing scheduled from November 14, 2017 through at least November 17, 2017. Furthermore, providing a reasonable amount of time to present oral summaries of pre-filed written expert testimony is necessary and appropriate to fully inform the WQCC of the matters at issue. Allowing AB/GRIP only ten (10) minutes of oral testimony on the issues of variances and discharge permits/modifications is unreasonable and inappropriate for the following reasons.

3. First, AB/GRIP are the only parties to this proceeding who oppose NMED's proposed changes to current regulations pertaining to variances and discharge permit modifications/amendments. The Water Quality 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) (emphasis added). AB/GRIP are the only community organizations in this matter that are informing the WQCC on the public interest in NMED's *Petition to Amend 20.6.2 NMAC*. To unnecessarily and inappropriately limit AB/GRIP's extensive expert oral testimony to ten (10) minutes would serve to prohibit the WQCC from weighing the public interest in making its determination regarding NMED's *Petition to Amend 20.6.2 NMAC* and confuse the issues before the WQCC.
4. Second, AB/GRIP are the only parties that have filed extensive direct and rebuttal expert testimony on the issues of variances and discharge permit modifications/amendments. (Direct Testimony is forty-seven (47) pages with sixty-six (66) supporting exhibits; Rebuttal Testimony is thirty-four (34) pages with one hundred and eight (108) supporting exhibits). AB/GRIP are also the only parties to have filed a dispositive motion on these two issues. It is clear that NMED's proposed amendments to variance regulations and to

discharge permit modifications/amendments are the most contentious issues in this matter. Additionally, the Water Quality Act mandates that no regulation shall be adopted until after a public hearing and that the WQCC “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...” NMSA 1978, Section 74-6-6(D) (emphasis added); *See also* the WQCC’s rules for rulemaking at Section 20.1.6.300B NMAC. This right to be heard is not an either/or proposition. AB/GRIP have the right to be heard through both pre-filed written testimony *and* through oral testimony at the evidentiary hearing. Again, due to the extensive expert testimony filed and the fact that AB/GRIP are the only parties to inform the WQCC as to the public interest in NMED’s *Petition*, it is unnecessary, inappropriate and unreasonable to limit AB/GRIP’s expert testimony to a mere ten (10) minutes on the two most contentious issues in this matter.

5. Third, NMED, in its proposed *Second Procedural Order*, state that the purpose of its proposed order is to “provide a reasonable opportunity for all persons to be heard without making the hearing unreasonably lengthy or cumbersome, or *burdening the record with unnecessary repetition*,” citing to Section 20.1.6.300.B NMAC. NMED’s proposed *Second Procedural Order*, introductory paragraph (October 27, 2017) (emphasis added). It is clear under the Water Quality Act that the “unnecessary repetition” referred to in Section 20.1.6.300.B NMAC was not intended to prohibit AB/GRIP from providing a reasonable, adequate oral summary of their pre-filed written testimony simply because AB/GRIP were required to file pre-written expert testimony. The “unnecessary repetition” language most likely refers to numerous parties providing the same oral testimony one after the other. In that instance, the WQCC could issue a procedural order

limiting that repetitive testimony of numerous parties so as to avoid unnecessary repetition. Again, in this matter, AB/GRIP are the only parties representing the public interest and the only parties that are opposing NMED's proposed amendments to variance regulations and discharge permit modification/amendment regulations. The "unnecessary repetition" that NMED relies upon for its proposed *Second Procedural Order* is not what the WQCC's rules are intended to limit.

6. Finally, the New Mexico Supreme Court has made clear that rulemaking proceedings "are intended to be inclusive, encouraging broad public participation." Vanzi, 2012-NMSC-005, ¶ 16, 274 P.3d 53. NMED's proposed ten (10) minute limit on expert testimony provided by the only two community groups in this matter does not result in inclusive rulemaking. To limit AB/GRIP's oral expert testimony on the two most contentious issues in this matter would chill public participation in this rulemaking proceeding.
7. For these reasons, AB/GRIP object to NMED's proposed ten (10) minute time limit on expert oral testimony and request that the Hearing Officer impose a reasonable, appropriate time limit on expert oral testimony. AB/GRIP contend that a minimum of thirty (30) minutes for oral expert testimony per issue would satisfy the Water Quality Act, the Act's implementing regulations, and New Mexico case law.

Dated: October 30, 2017

Respectfully submitted,

New Mexico Environmental Law Center

By: _____

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

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Written Objection was served on October 30th, 2017 via electronic mail to the following:

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

New Mexico Environment
Department
Office of General Counsel
Lara Katz
John Verheul
Lara.Katz@state.nm.us
John.Verheul@state.nm.us
P.O. Box 5469
Santa Fe, New Mexico 87502

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

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

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

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

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

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

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

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

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

Stuart R. Butzier
Christina C. Sheehan
American Magnesium, LLC
Rio Grande Resources Corporation
New Mexico Copper Corporation
P.O. Box 2168
Albuquerque, NM 87103-2168
stuart.butzier@modrall.com
christina.sheehan@modrall.com



Jaimie Park, Attorney for AB/GRIP