

**STATE OF NEW MEXICO
BEFORE THE WATER QUALITY CONTROL COMMISSION**



**IN THE MATTER OF PROPOSED AMENDMENTS TO
GROUND WATER AND SURFACE WATER
PROTECTION REGULATIONS,
20.6.2 NMAC**

No. WQCC 17-3 (R)

**LAUN-DRY SUPPLY COMPANY'S POSITION WITH STATEMENT OF REASONS
AND ADDITIONAL PROPOSED AMENDMENTS (WITH STATEMENT OF
REASONS) REGARDING THE NMED'S PROPOSED AMENDMENTS
TO REGULATIONS (20.6.2 NMAC)**

Laun-Dry Supply Company ("Laun-Dry"), by and through undersigned counsel, hereby submits its position with statement of reasons and additional proposed amendments and statement of reasons not contained in NMED's Petition to amend certain portions of the Commission's regulations in Title 20, Chapter 6, Part 2, of the New Mexico Administrative Code (NMAC) titled "*Ground and Surface Water Protection*" ("Rules").

INTRODUCTION

On May 1, 2017 the NMED filed its petition to amend certain portions of NMAC 20.6.2 together with its statement of reasons. Thereafter, Hearing Officer Erin Anderson was appointed and on June 2, 2017 issued her revised procedural order requiring Laun-Dry to submit its position and statement of reasons on NMED's proposed amendments on or before July 27, 2017. Undersigned counsel entered its appearance for Laun-Dry on July 27, 2017. The revised procedural order also requires Laun-Dry to submit any proposed amendments and statement of reasons not contained in NMED's petition that are "logical outgrowths of NMED's proposed amendments" on or before July 27, 2017. Laun-Dry submits its position with statement of reasons and proposed further amendments and statement of reasons in support thereof not contained in NMED's petition and states as follows.

**Laun-Dry's position on NMED's Proposed Amendments
& Statement of Reasons**

I. In re 20.6.2.4104 C:

Subsection C of the proposed amended regulation allows for imposition of financial assurance on a Responsible Person in abatement. Laun-Dry is opposed to this amendment. Sub-section C should return to the original, to wit:

"C. If the source of the water pollution to be abated is a facility that operated under a discharge plan, the secretary may require the responsible person(s) to submit a financial assurance plan which covers the estimated costs to conduct the actions required by the abatement plan. Such a financial assurance plan shall be consistent with any financial assurance requirements adopted by the commission."

II. Reason

The proposed strike though of original language broadens the scope of abatement, but it is often likely not feasible for "Mom and Pop" operations in abatement to fund financial assurance. Such operations/Responsible Persons will suffer a negative effect and burden because they often can only "pay as they go" in abatement activities. The original regulation limited the posting of financial assurance upon a causal connection of source to a discharge permit, which is reasonable to allow.

**Laun-Dry's proposed amendments to 20.6.2 NMAC not contained in
NMED's Petition & Statement of Reasons**

I. Proposed additional amendment to 20.6.2.4103 NMAC [additional language in bold].

"20.6.2.4103 ABATEMENT STANDARDS AND REQUIREMENTS:

A. The vadose zone shall be abated so that water contaminants in the vadose zone shall not be capable of contaminating ground water or surface water, in excess of the standards in Subsections B, ~~[and] C and D~~ below, through leaching, percolation or as the water table elevation fluctuates.

B. Subsurface water contaminants shall be abated to concentrations below those which may with reasonable probability injure human health, animal or plant life or property, or unreasonably interfere with the public welfare or the use of property through percolation, capillary suction, sequestration, phytoextraction, plant uptake, volatilization, advection or diffusion into crops, structures, utility infrastructure, or construction excavations.

C. Ground-water pollution at any place of withdrawal for present or reasonably foreseeable future use, where the TDS concentration is 10,000 mg/L or less, shall be abated to meet the standards of

Section 20.6.2.3103 NMAC [conform to the following standards:

~~(1) toxic pollutant(s) as defined in Section 20.6.2.7.T(2) NMAC shall not be present;~~
and

(2) the standards of Section 20.6.2.3103 A, B, or C NMAC shall be met, or background concentration as set forth in 20.6.2.4101.B shall be met. The existing conditions including existing ph as set forth in 20.6.2.3101 and 3103 shall not be used for purposes of abatement pursuant to 20.6.2.4103 NMAC.

D. Surface-water pollution shall be abated to conform to the Water Quality Standards for Interstate and Intrastate streams in New Mexico (20.6.4 NMAC).

E. Subsurface-water and surface-water abatement shall not be considered complete until a minimum of eight (8) consecutive quarterly samples from all compliance sampling stations approved by the secretary meet the abatement standards of Subsections A, B, ~~and~~ C, and D of this section. of this section. Abatement of water contaminants measured in solid-matrix samples of the vadose zone shall be considered complete after one-time sampling from compliance stations approved by the secretary. Surface water pollution shall be abated to conform to the Water Quality Standards for Interstate and Intrastate Streams in New Mexico (20.6.4 NMAC)......”

II. Reason

Proposed 20.6.2.3103 NMAC illustrates a continuing inadequacy not addressed by the proposed amendment as “existing condition” is not defined under the regulations. But the regulations define “Background” at 20.6.2.7 B (1) NMAC as,

“ ‘Background’ means, for purposes of ground-water abatement plans only and for no other purposes in this part or any other regulations including but not limited to surface-water standards, the amount of ground-water contaminants naturally occurring from undisturbed geologic sources or water contaminants which the responsible person establishes are occurring from a source other than the responsible person's facility; this definition shall not prevent the secretary from requiring abatement of commingled plumes of pollution, shall not prevent responsible persons from seeking contribution or other legal or equitable relief from other persons, and shall not preclude the secretary from exercising enforcement authority under any applicable statute, regulation or common law” *Id.*

20.6.2.7 B (1) NMAC shows Background is explicitly part of the standard that is required to be achieved for purposes of ground-water abatement plans. Background is in law and practice tied to TCE standards under the regulations. Thus, the proposed amendment provides a mechanism to replace an undefined term (existing condition) with a defined term “Background” under NMAC 20.6.2.4103 as it is understood

that “existing condition” is a term of art that has been used interchangeably with “back ground” under NMED abatement activities. In like manner, the proposed amendment provides further clarity as to defining Background in relation to exceeding standards annunciated under subsection A, B, and C of 20.6.2.3103 NMAC. Finally, the proposed prohibition on completing abatement on the bases of meeting the standards under subsection A, B, or C protects a Responsible Person’s ability and right to establish sources of contamination are from a source other than the responsible person’s facility, and protects a Responsible Person’s ability and right to seek contribution or other legal or equitable relief from other persons pursuant to 20.6.2.7 B (1) NMAC.

I. Proposed additional amendment of 20.6.2.7 (R) (2) NMAC.

Responsible person

20.6.2.7 (R) (2) NMAC states that a “**responsible person**” means a person who is required to submit an abatement plan or who submits an abatement plan pursuant to this part.” *Id.* The term responsible person is used at least 44 times in the regulations, including in the definition of Background (*supra*). The term is explicitly tied to facility owner/operator throughout the regulations, but the definition as currently stated is ambiguous and inadequate and the following amendment is thus proposed:

“A ‘responsible person’ means a facility owner or operator, transporter or person potentially responsible for or contributing to an unauthorized discharge or other contamination and required to submit an abatement plan or who submits an abatement plan pursuant to this part.”

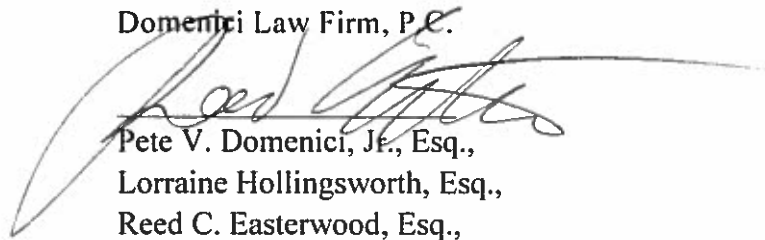
II. Reason

The current definition should not be ambiguous or overly broad and thus run afoul of traditional notions of fair play, notice, and adequate due process. In addition to facility owner and operator status explicitly linked to “responsible person” throughout 20.6.2 et seq., the proposed amendment language has precedent in New Mexico Storage Tank regulations at 20.5.1.7 (O) , under *The Solid Waste Act*, NMSA 1978 § 74-9-34 (B), and under Section 107(a) of CERCLA. The proposed amendment keeps

language from the current definition that implicates and encourages voluntary remediation and it does not include additional terms of art not otherwise already addressed in the regulations.

WHEREFORE, Laun-Dry requests that the Commission adopt and incorporate Laun-Dry's position on NMED's proposed amendments and further proposed amendments in this matter.

Respectfully submitted,
Domenici Law Firm, P.C.

A large, stylized handwritten signature in black ink, likely belonging to Pete V. Domenici, Jr., is written over the printed names of the attorneys.

Pete V. Domenici, Jr., Esq.,
Lorraine Hollingsworth, Esq.,
Reed C. Easterwood, Esq.,
320 Gold Ave. SW
Ste. # 1000
Albuquerque, NM 87102
(505) 883-6250

Attorneys for Laun-Dry

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served on the following via e-mail unless otherwise noted on July 27, 2017:

Ms. Pam Casataneda, Administrator*
Water Quality Control Commission
Room N-2168, Runnels building
1190 St. Francis Dr.
Santa Fe, New Mexico 87505
pam.castaneda@state.nm.us
1 Original, 2 hard copies, and 10 electronic
copies sent via personal courier

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

Pete Domenici
Lorraine Hollingsworth
Domenici Law Firm, P.C.
320 Gold Ave. SW, suite 1000
Albuquerque, NM 87102
pdomenici@domenicilaw.com
lhollingsworth@domenicilaw.com

Louis W. Rose
Kari Olson
P.O. Box 2307
Santa Fe, NM 87504
lrose@montand.com
Kolson@montand.com

Timothy A. Dolan
Office of Laboratory Counsel
Los Alamos National Laboratory
P.O. Box 1663, MS A187
Los Alamos, NM 87545
tdolan@lanl.gov

Rachel Conn
Projects Director
Amigos Bravos
P.O. Box 238
Taos, NM 87571
Rconn@amigosbravos.org

Dalva L. Moellenberg
1239 Paseo de Peralta
Santa Fe, NM 87501
DLM@gknet.com

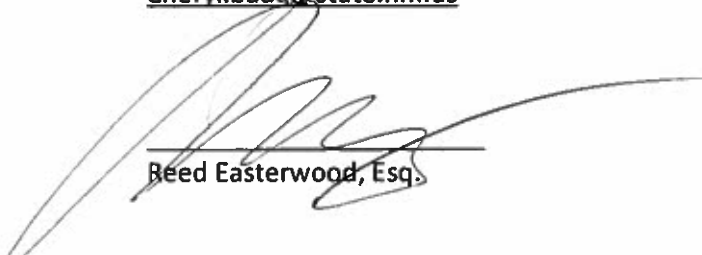
Micheal Bowen
Executive Director
1470 St. Francis Drive
Santa Fe, NM 87505
nmma@comcast.net

Jaimie Park
Douglas Meiklejohn
Eric Jantz
Jonathan Block
New Mexico Law Center
1405 Luisa Street, Suite 5
Santa Fe, NM 87505
jpark@nmelc.org
dmeiklejohn@nmelc.org

William C. Olson
14 Cosmic Way
Lamy, NM 87540
Billjeanie.olson@gmail.com

John Grubestic
Office of the Attorney General Post Office Drawer
1508
Santa Fe, NM 87504-1508
jgrubestic@nmag.gov

William Brancard
Cheryl Bada
Energy, Minerals and Natural Resources
Department
1220 South St. Francis Drive
Santa Fe, NM 87505
billbrancard@state.nm.us
Cheryl.bada@state.nm.us



Reed Easterwood, Esq.