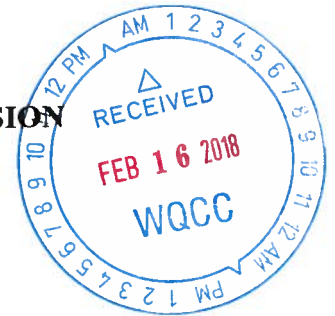


**STATE OF NEW MEXICO
BEFORE THE WATER QUALITY CONTROL COMMISSION**



)
)
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'S PROPOSED FINDINGS OF FACTS AND CONCLUSIONS OF LAW

COMES NOW Laun-Dry Supply Co. ("Laun-Dry"), by and through undersigned counsel of record, and in accordance with the Hearing Officer's stipulated order extending time to file post hearing submittals, files its proposed Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT

1. On May 1, 2017 the NMED filed its petition to amend certain portions of NMAC 20.6.2. 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").
2. On June 2, 2017 Madam Hearing Officer, Erin Andrews, was appointed to preside over hearing in this matter held November 14-17, 2017.
3. NMED thereafter filed its amended petition on July 27, 2017.
4. On July 27, 2017 Laun-Dry through its counsel entered appearance in WQCC 17-3 (R).
5. Laun-Dry timely filed its Notice of Intent to present technical testimony in accordance with NMAC 20.1.6.200 (E) and the Hearing Officer's scheduling order and as amended and identified senior hydrologist Jay Snyder ("Snyder").

6. Jay Snyder was tendered and accepted as an expert at hearing. Tr. Vol. III 789:9; Laun-Dry Ex. A.
7. Chief Scientist Dennis McQuillan (“McQuillan”) of NMED and Chief of Ground Water Quality Bureau within Water Protection Division of NMED Michelle Hunter (“Hunter”) provided technical testimony on behalf of NMED.
8. Laun-Dry is a low to middle capitalized private industrial responsible party on a significant site that is already in abatement. Tr. Vol. I 59:25-61:6; Snyder NOI, p.3. Under NMED’s proposed amendment to 20.6.2.4103(F)(d) NMAC, Laun-Dry needs eight consecutive quarters of sampling showing decrease in groundwater contamination to close or partially close the site, but does not have this data yet. *Id.*
9. The plume at the Laun-Dry site is cigar shaped and Laun-Dry seeks partial closure of a portion of the site. *Id.*

In re 20.6.2.4103 (C) (2) NMAC

10. Laun-Dry proposed the following additional provision to NMED’s proposed 20.6.2.4103 (C) (2) NMAC:

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. Snyder NOI, p.4.

11. At hearing, Laun-Dry argued the term “existing condition” has been interpreted as synonymous with “background” from a regulator standpoint to date. *See also* Snyder NOI, p. 4 (“background is in law and practice tied to TCE standards under the regulations”). “Existing condition” is a phrase that principally applies to discharge plans pursuant to section 3103. Tr. Vol. III 792.

12. Laun-Dry illustrated a hypothetical where background is assumed 300 parts/ billion TCE, but a downstream responsible party leaching into groundwater at 200 parts/billion TCE can continue indefinitely polluting. Because such unauthorized discharge is deemed an “existing condition”, that party only has to clean to background, and that party can thus close its site. Tr. Vol. I 61:12-64:25. The matter of the contiguous Dona Ana dairies in abatement presented this potential scenario but for their successful consortium formed that that presented a single abatement plan by agreement of all parties including regulators. Tr. Vol. III 793.
13. Laun-Dry submitted that the application of section 4103 as currently applied is problematic where multiple sources of contamination are involved because another responsible party downstream does not necessarily clean man-made, non-natural conditions. *Id.*
14. As a result, Laun-Dry argued it was more comfortable using background as the standard to remediate over existing condition because a path to exit abatement as expeditiously as possible is a goal of the regulations (*see* § 4106 C NMAC) verses a scenario where 90 % abatement is achieved but sampling goes on indefinitely— a significant possibility where an upstream responsible party is cleaning to background synonymous with existing condition, and given migration, fate and transport of other multiple sources of contamination at other relevant sites deemed closed by NMED. *Id.*
15. At hearing, neither Hunter nor McQuillan opposed this testimony or proposed revision to 20.6.2.4103 (C) (2) NMAC.
16. At hearing Commissioner DeRose asked Snyder how one could meet the abatement treatment standards of A(2) 3103 cited under section 4103 NMAC. Tr. Vol IV: 826.

17. Snyder responded that recourse to NMED tables provided numerical standards to address specific concerns related to regulating carcinogens. Tr. Vol IV: 827.
18. The Hearing Officer finds the testimony of Snyder credible and un-rebutted.
19. The Hearing Officer finds Laun-Dry's proposed additional provision under 20.6.2.4103 (C) (2) NMAC is well-taken because it provides clarity as to defining background in relation to exceeding standards annunciated under subsection A,B, and C of 20.6.3103 NMAC.

In re 20.6.2.4104 (C) NMAC

20. Laundry proposed the following revision to NMED's proposed 20.6.2.4104 (C) NMAC indicated by italics.

"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."

21. At hearing, Snyder testified that requirement of financial assurance would inhibit timely implementation if applied to low to middle capitalized parties. Tr. Vol. IV 818; Snyder NOI, p. 3. Snyder has participated in several hundred ground water assessments and cleanups, is familiar with the abatement regulations and currently has clients going through abatement. *Id.* Tr. Vol. II 448. Snyder noted cleanup costs can vary substantially by method of cleanup, and cleanup technologies can change in actions and costs over time. This makes estimating cleanup costs over time variable. Snyder presented the scenario where some "mom and pop" wells were perhaps 3 times standards 15 years ago but come up now because of potential purchase or where urban commercial re-

development triggers burdensome requirement of financial assurance. Tr. Vol. III 792, 796.

22. At hearing, Pete. V. Domenici, Jr., Esq. (“Domenici”) provided public comment that he has 31 years of experience with abatement cases and personal knowledge of low capitalized clients that unfortunately bought properties associated with previous contamination of ground water. Tr. Vol. III 654-655. These clients gave up retirement and savings because the abatement regulations were inflexible and closure was not in sight. *Id.*
23. In opposition to Laun-Dry’s proposed revision, Hunter testified that the NMED would use discretion and be reasonable in its application of financial assurance requirement to regulated communities such as mobile homes and villages. Tr. Vol. IV 996:11-999:16.
24. The Hearing Officer finds that Laun-Dry’s proposed revision is a return to the current provision in place without amendment.
25. On balance, the Hearing Officer finds that Laun-Dry’s proposed action to keep 4104 (C) as currently promulgated effective upon pre-condition of operation under a discharge plan well-taken. The provision left as is provides clarity to the Department and protects low to middle capitalized private concerns within the regulated community that the Department admits should or would not be subject to requirements of financial assurance to enter abatement and close such sites expeditiously.

LEGAL CONCLUSIONS

1. The Water Quality Control Commission has jurisdiction to amend portions of NMAC 20.6.2 under the Water Quality Act to prevent or abate water pollution. NMSA 1978 §§ 74-6-4.D; 74-6-4.E; *see also* § 74-6-2.C (Definition of “water pollution”); § 74-6-2.H (“

‘water’ means all water, including water situated wholly or partly within or bordering upon the state, whether surface or subsurface, public or private, except private waters that do not combine with other surface or subsurface water”).

2. 20.6.2.4103 (C) (2) NMAC shall read in full :

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.

3. 20.6.2.4104 (C) (2) NMAC shall read in full:

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.

Respectfully submitted,
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I certify that a copy of the foregoing was served on the following via email unless otherwise noted on February 16, 2018:

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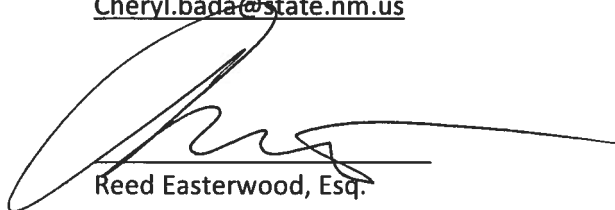
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