

**STATE OF NEW MEXICO
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)

**LOS ALAMOS NATIONAL SECURITY, LLC'S
RESPONSE IN OPPOSITION TO AMIGOS BRAVOS' AND GILA RIVER
INFORMATION PROJECT'S MOTION TO DISMISS IN PART
PETITION TO AMEND 20.6.2 NMAC**

Los Alamos National Security, LLC ("LANS") hereby submits its response in opposition to Amigos Bravos' and Gila River Information Project's ("AB/GRIP") Motion to Dismiss in Part the New Mexico Environment Department's Petition to Amend 20.6.2 NMAC, filed September 29, 2017. In support of its position in opposition, LANS states:

1. AB/GRIP's motion asserts that NMED's proposed changes to the variance provisions of the regulations, 20.6.2.1210 NMAC, the proposed definition of "discharge permit amendment," 20.6.2.7 NMAC, and the proposed procedures for discharge permit amendments, 20.6.2.3106 & 3109 NMAC, are beyond the WQCC's authority under the Water Quality Act, NMSA 1978, § 74-6-1 to 17 and therefore, should be dismissed.

2. LANS disagrees and opposes the motion and, for the reasons specified below, requests that the WQCC deny the motion.

3. AB/GRIP's pre-hearing challenge to NMED's proposed changes is untimely and not ripe for consideration. LANS asserts that if AB/GRIP believes that the proposed changes are beyond the WQCC's authority, they should have submitted a challenge when the WQCC reviewed NMED's petition for hearing and decided to grant the hearing request. The WQCC's rulemaking rules required the WQCC to "determine, at a public meeting . . . whether or not to

hold a public hearing on the proposal.” 20.1.6.200.C NMAC. The rules provide that “[a]ny person may respond to the petition either in writing prior to the public meeting or in person at the public meeting.” *Id.* AB/GRIP did not submit a response to the petition. Their failure to challenge the WQCC’s authority to consider the proposed changes when the petition was submitted precludes their ability to file any further pre-hearing challenge to that authority.

4. Absent a timely pre-hearing challenge to the proposed rules, the matter should be addressed after a full WQCC hearing, where all interested parties can submit evidence and argument to the WQCC. The WQCC is not required to merely adopt or reject NMED’s proposed changes. The WQCC, after hearing and considering the evidence and arguments of all of the parties and the general public, may alter the changes. The WQCC’s authority to adopt changes should be evaluated only after the WQCC makes a decision on the final rule language. As the Supreme Court noted in the context of a pre-hearing judicial challenge to a regulatory proposal, “the proposed regulation was the subject of public hearings, and the final version, if one emerges from the process, is unknown. It is only upon the adoption of a regulation that parties can be certain that they are aggrieved and that there is an actual controversy.” *New Energy Economy, Inc. v. Shoobridge*, 2010-NMSC-049, ¶ 18, 243 P.3d 746, 149 N.M. 42. The WQCC should deny the motion and consider AB/GRIP’s arguments in its deliberation on the proposed changes.

5. Finally, AB/GRIP’s reliance on NMSA 1978, § 74-6-5(M) (2009) as expressing a Legislative limitation on the authority to modify or amend a permit is misplaced. That section authorizes NMED (or other appropriate constituent agency) to unilaterally modify or terminate a permit if certain conditions are met. It does not limit a permittee’s authority to request changes to a permit. The WQCC has broad authority to specify when and how a permit may be revised or modified after issuance. Specifically, Section 74-6-5(F) requires the WQCC to adopt

regulations concerning notice of each “application for . . . modification of a permit.” Additionally, Section 74-6-5(K) authorizes the WQCC to adopt a schedule of fees for permit, “not exceeding the estimated cost of investigation and . . . modification . . . of permits.”

For the foregoing reasons, AB/GRIP’s Motion to Dismiss in Part the New Mexico Environment Department’s Petition to Amend 20.6.2 NMAC should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 16, 2017, a true and correct copy of the foregoing *Los Alamos National Security, LLL's Response in Opposition to Amigos Bravos' and Gila River Information Project's Motion to Dismiss in Part Petition to Amend 20.6.2 NNMAC* was served via electronic mail or hand-delivered to the following:

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