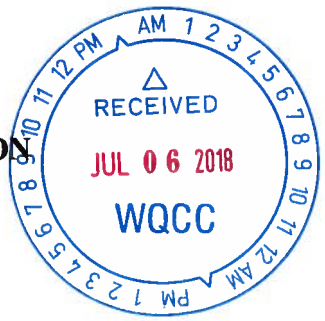

STATE OF NEW MEXICO
BEFORE THE WATER QUALITY CONTROL COMMISSION

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

No. WQCC 17-03 (R)

LOS ALAMOS NATIONAL SECURITY, LLC'S RESPONSE TO AMIGOS BRAVOS/GILA RESOURCES INFORMATION PROJECT'S EXCEPTIONS TO THE HEARING OFFICER'S REPORT FILED APRIL 11, 2018

Pursuant to the Hearing Officer's Revised Order on AB/GRIP' Motion and Response Deadlines, filed June 29, 2018, Los Alamos National Security, LLC ("LANS") submits its response to Amigos Bravos/Gila Resources Information Project's ("AB/GRIP") Memorandum on Logical Outgrowth and The New Mexico Environment Department's New Jointly Proposed Amendment to Section 20.6.2.4103.A-B NMAC ("AB/GRIP's Memorandum") attached as exhibit C to AB/GRIP's Exceptions to the Hearing Officer's Report, filed April 11, 2018.

While LANS takes no position on the substance of the agreed-upon language of proposed 20.6.2.4103.A-B NMAC, it recognizes debate over the appropriate application of the logical outgrowth doctrine in rulemaking proceedings has arisen in the past, is before the WQCC now, and is likely to arise in the future. Accordingly, LANS submits this response in which it provides its position the law in New Mexico with respect to that doctrine.

ARGUMENT

LANS submits this response to address the broad argument that (1) the "logical outgrowth doctrine" applies to "all rulemakings before the commission as a matter of case law," *see* NMED's Motion to Respond to AB/GRIP's Exceptions to the Hearing Officer's Report Filed April 11, 2018 ("NMED's Response") at 7, and (2) the New Mexico Office of the Attorney General's Default

Procedural Rule For Rulemaking is the "default rule to be applied to this proceeding," AB/GRIP Memorandum at 13. As discussed below, these assertions are not consistent with law and should not guide the Commission's analysis of the issue presented in AB/GRIP's memorandum.

A. Case Law Does Not Dictate That the Logical Outgrowth Doctrine Applies to <u>All</u> Rulemakings Before the Water Quality Control Commission

Neither federal nor state case law support AB/GRIP and NMED's position that the logical outgrowth doctrine applies generally to rulemakings before the Commission. New Mexico has never adopted the "logical outgrowth doctrine" as a test for determining whether a promulgated rule was properly noticed. In fact, the only reference in New Mexico case law to the "logical outgrowth" doctrine in a rulemaking is a district court decision involving an administrative appeal of an Oil Conservation Commission Rule. *See Marbob Energy Corp. v. The New Mexico Oil Conservation Comm'n*, No. D-101-CV-2006-00014, reversed by *Marbob Energy Corp v. New Mexico Oil Conservation Comm'n*, 2009-NMSC-013, 206 P.3d 135.[1] The district court, in addressing whether Marbob was denied due process because it was not provided with proper notice of the rules that were actually considered by the Commission, characterized the promulgated rule as a "logical outgrowth" of the proposed rule and ruled that the changes made in the rule were ministerial and insubstantial, and therefore should not warrant further notice. Beyond this passing reference, there is no support in New Mexico case law for AB/GRIP and NMED's assertion that the "logical outgrowth doctrine" applies generally to rulemakings before the Commission.[2]

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[1] The Supreme Court subsequently reversed the district court decision upholding the rule without addressing the court's characterization of the rule as a "logical outgrowth."

[2] LANS recognizes that the Commission ordered the scope of <u>this</u> rulemaking as being "limited to the amendments proposed by the Department in its Petition, and any logical outgrowths thereof." *See* Order for Hearing and Appointment of Hearing Officer (May, 9, 2017), Pleading Index 2. That Order does not, however, extend to mandate the scope of <u>all</u> rulemakings before the Commission.

Further, no New Mexico court has adopted, or has even considered adopting the body of federal case law relied upon by AB/GRIP and NMED. Absent any guidance from the New Mexico courts, the WQCC should not rely on foreign jurisdiction, non-binding authority.

Turning to federal authority, the Administrative Procedures Act ("APA") specifies two processes for rulemaking relevant here: (1) formal rulemaking, which consists of notice to affected parties, an on the record hearing with opportunity for direct and cross-examination of witnesses and a decision based only on the record; and (2) notice and comment rulemaking, referred to as "informal" rulemaking, which requires notice of a proposed rule in the Federal Register and the opportunity for comment by interested parties. *See* Phillip M. Kannan, The Logical Outgrowth Doctrine in Rulemaking, 48 Admin. L. Rev. 213-214 (1996); 5 U.S.C. §§ 553(b), (c), and (d)(3). As confirmed by the numerous federal and out of jurisdiction state cases cited in AB/GRIP's Memorandum, the "logical outgrowth doctrine" is a common law standard developed and applied by courts to resolve claims that a final rule was issued without the required notice in informal notice and comment rulemakings. *See AB/GRIP Memorandum* at 9-12. *See also* 48 Admin. L. Rev. at 214-216. There is no authority to support the assertion that application of the doctrine extends to formal rulemakings such as those before this Commission.

Rulemakings before the Commission are analogous to federal APA formal rulemakings in that they are on the record, with the opportunity to present direct and rebuttal evidence, and to conduct direct and cross-examination of witnesses. Additionally, the Commission bases its decision exclusively on the record at the conclusion of this process. Neither NMED nor AB/GRIP cite to any authority for the proposition that the "logical outgrowth doctrine" should be applied to WQCC formal rulemakings.

And for good reason. The trial-like process before the WQCC is a robust trial-type proceeding at the conclusion of which the transcript, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision. Hearings on significant rule proposals last for days and sometimes weeks with input, support and opposition from parties across various industries and geographic regions of the state. Necessarily, this process may, and indeed should, result in promulgation of a rule somewhat different than what was originally proposed. Were that the not the case, the extraordinarily resource extensive hearing process would essentially be a meaningless exercise. LANS recognizes that the promulgated rule must have some reasonable relationship to the subject matter described in the public notice of hearing. However, what that reasonable relationship is should be determined under New Mexico law considering the specific rulemaking process at issue.

In sum, LANS submits that AB/GRIP's and NMED's proposed wholesale adoption of federal common law concerning an unrelated federal informal rulemaking process is not appropriate to WQCC's rulemaking and finds no support in the cited authority.

B. The Alleged "Codification" of the Logical Outgrowth Doctrine Set Forth in the Attorney General's Procedural Rules is Not Applicable to Rulemakings Before the Commission

AB/GRIP argues that the New Mexico Office of the Attorney General's Default Procedural Rule for Rulemaking provide "minimum requirements for agency regulatory change rules," and that agencies must therefore "provide similar or more protective rules than are provided at Section 1.24.25.14.C," which AB/GRIP characterizes as the codification of the logical outgrowth test found in case law. *See* AB/GRIP Memorandum at 11-12. For at least two reasons, this assertion is incorrect.

First, as fully explained in NMED's Response, the AG's procedural rule for rulemaking cannot be applied to WQCC-17-03 because the rule was promulgated nearly a year after this proceeding was initiated without any authorization for the rule to be applied retroactively.[3] *See* NMED Response at 6, quoting *Howell v. Heim*, 1994-NMSC-103, ¶ 17, 118 N.M. 500.

Setting aside this timing issue, the AG's Procedural Rule for Rulemaking is not applicable to rulemakings before the Commission because the Commission has its own procedural rules for rulemakings and such procedural rules are consistent with the State Rules Act. *See* NMED Response at 7. The State Rules Act, NMSA 1978, §14-4-5.3.B (2017), states that "[e]ach agency shall determine, ***in accordance with governing statutory and case law***, the manner in which parties to the proceeding and members of the public will be able to participate in public hearings." (Emphasis added.) LANS notes that the type of public hearing required by the State Rules Act, § 14-4-5.3.B, differs from hearings required under the Water Quality Act, NMSA 1978, §74-6-6 (1993). Under the Water Quality Act, the Commission is required to "allow all interested persons reasonable opportunity . . . to examine witnesses testifying at the hearing;" the State Rules Act does not provide for such examination and only requires that the public "be given a reasonable opportunity to submit data, views or argument orally or in writing." Contrary to AB/GRIP's position, Section 14-4-5.8 of the State Rules Act directs agencies to provide "at least as much opportunity for participation by parties and members of the public as is provided in the procedural rules adopted by the attorney general" without any requirement that such procedural rules for rulemaking contain all provisions set forth in 1.24.25.14.C NMAC.

LANS further notes that when the State Rules Act was amended in 2017 to include procedures for rulemaking, the legislature considered, but chose <u>not</u> to adopt, proposed language

[3] In fact, the State Rules Act amendments authorizing the Attorney General's rules did not become effective until after this proceeding was initiated.

addressing logical outgrowth indicating that the legislature did not intend to impose such a requirement on agencies. *See* Item 2 of Senate Floor Amendment Number 1 to House State Government, Indian and Veterans Affairs committee substitute for House Bill 58, as amended (March 13, 2017) (striking "No agency shall take action on a final rule that differs from the action proposed in the notice of proposed rulemaking on which the rule is based unless the action is a logical outgrowth of the notice given or comment received and a detailed justification is included in the rulemaking record."). *Compare with* 2010 Revised Model State Administrative Procedure Act § 308, Variance Between Proposed and Final Rule ("An agency may not adopt a rule that differs from the rule proposed in the notice of proposed rulemaking unless the final rule is a logical outgrowth of the rule proposed in the notice.").

Because there is no codification of the logical outgrowth doctrine in the State Rules Act or mandate that such a doctrine be included in agency procedural rules for rulemaking, the AG has no authority to impose requirements set forth in 1.24.25.14.C NMAC on other agencies. Particularly here, where the Commission has its own procedural rules specifying the participation process for parties and members of the public consistent with the mandate in the State Rules Act. For these reasons, AB/GRIP's assertion that the Commission is bound by the factors set forth in 1.24.25.14.C NMAC in determining whether a promulgated rule is the "logical outgrowth" of the proposed rule is incorrect.

CONCLUSION

Neither the common law nor the State Rules Act mandate the use of the logical outgrowth doctrine to resolve claims that a final rule was issued without the required notice in a rulemaking before this Commission. To the extent that the Commission intends to apply that doctrine in this proceeding to resolve AB/GRIP's dispute, the Commission is not bound by 1.24.25.14.C or the

state or federal cases cited by AB/GRIP in its memorandum in articulating the scope of that doctrine.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 6, 2018, a true and correct copy of the foregoing *Los Alamos National Security, LLC's Response to Amigos Bravos/Gila Resources Information Project's Exceptions to the Hearing Officers Report Filed April 11, 2018*, was served via electronic mail or hand-delivered to the following:

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