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)**

THE NEW MEXICO ENVIRONMENT DEPARTMENT'S MOTION FOR LEAVE TO RESPOND TO AMIGOS BRAVOS/GILA RESOURCES INFORMATION PROJECT'S EXCEPTIONS TO THE HEARING OFFICER'S REPORT FILED APRIL 11, 2018

Pursuant to the New Mexico Water Quality Control Commission's ("Commission") procedural regulations at 20.1.6.207 NMAC, the New Mexico Environment Department ("Department" or "NMED") respectfully moves the Hearing Officer for leave to respond to certain exceptions filed by Amigos Bravos and the Gila Resources Information Project ("AB/GRIP") to the Hearing Officer's Report. Although it is styled as "Exceptions to the Hearing Officer's Report," AB/GRIP's June 15, 2018 pleading requests specific relief and supports that request with a 17-page memorandum. As such, it is effectively a motion, and other parties should be allowed an opportunity to respond.

INTRODUCTION

From the very first public listening session regarding amendments to the Commission's regulations at 20.6.2 NMAC, through the public hearing itself – a period of 18 months – NMED anticipated a challenge by industry to proposed rule amendments that would expressly provide the Department with authority to regulate vapor intrusion. Indeed, the only parties to comment on the public drafts of the rule were the New Mexico Mining Association ("NMMA") and Los Alamos National Security, LLC ("LANS"). Now, at the eleventh hour, AB/GRIP for the first time chooses to challenge a proposed regulatory provision that would clarify and solidify NMED's authority to regulate vapor intrusion. For the reasons discussed below, that challenge is without merit.

In their Exceptions to the Hearing Officer's Report, AB/GRIP claim that NMED and NMMA "submitted a new jointly proposed rule in their proposed findings of fact submitted to the WQCC on February 16, 2018." AB/GRIP Exceptions, I.1. AB/GRIP claim "[t]his process circumvented the public hearing process for regulatory change and therefore this finding must be removed." *Id.*

AB/GRIP attach a "Memorandum on Logical Outgrowth and the New Mexico Environment Department's and the New Mexico Mining Association's New Jointly Proposed Amendment to Section 20.6.2.4103.A,B NMAC" ("Memorandum"). In this Memorandum, AB/GRIP claim that the revisions at 20.6.2.4103.A(2) NMAC, as jointly proposed by NMED and NMMA, "violate[] the logical outgrowth doctrine." Memorandum at p.1. AB/GRIP ask that the Hearing Officer exclude all reference to that proposal, or, in the alternative, that the Commission "issue public notice and hold a public hearing before final Commission deliberations may commence." Memorandum at p.17.

AB/GRIP's representation of the compromise language proposed by NMED and NMMA on vapor intrusion is incorrect. Repeatedly calling that language a "new rule" does not make it one. The history of the proposed language as it has evolved through this proceeding shows that it has always focused on clarifying NMED's authority to regulate vapor intrusion, and the final version proposed represents a logical outgrowth of the version that the Department initially proposed. Nor does the final version limit NMED's regulatory authority in any way, as AB/GRIP claim.

HISTORY OF THE PROPOSED LANGUAGE ON VAPOR INTRUSION

At the first public "listening session" held in Santa Fe on May 20, 2016, NMED presented a PowerPoint presentation outlining the scope of this anticipated rulemaking, the groundwater protection regulations, and the proposed changes NMED was contemplating. The very first bullet point on the fourth slide, appearing under the heading "What kind of changes are we proposing?", read "adding vapor intrusion protections to the regulations." The fifth slide was devoted entirely to vapor intrusion. *See Update of 20.6.2. New Mexico Administrative Code: The Groundwater Regulations* (PowerPoint), attached as NMED Exhibit 44. This PowerPoint was used for all five remaining listening sessions throughout 2016.

The first public comment draft of the proposed amendments to 20.6.2 NMAC was published on June 16, 2016. It contained a new proposed section 20.6.2.4103.D NMAC providing:

> **D.** Soil-gas pollution or ground water pollution with a complete exposure pathway through vapor intrusion into occupied structures shall be abated to conform to applicable vapor intrusion screening levels calculated in accordance with the methods and guidelines presented in department technical guidance *Risk Assessment Guidance for Site Investigations and Remediation,* latest edition.

Both NMMA and LANS submitted comments on this proposed rule, questioning whether it was authorized by the Water Quality Act, NMSA 1978, §§ 74-6-1 to -17 (1967, as amended through 2013). *LANS' Comments on Proposed Changes to 20.6.2 NMAC* (August 17, 2016), attached as NMED Exhibit 45. *NMMA Comments on June 16, 2016 Working Draft Changes to 20.6.2 NMAC* (August 17, 2016), attached as NMED Exhibit 46.

The second public comment draft of the proposed amendments to 20.6.2 NMAC was published on September 16, 2016. It contained a new proposed section 20.6.2.4103.B NMAC providing:

> **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.

NMED made these revisions in order to accomplish what the original June proposal set out to do – i.e., regulate vapor intrusion – but incorporated language more closely aligned with that of the Water Quality Act. "Subsurface water" is included in the definition of "water" in the Water Quality Act. Section 74-6-2(H). "Water contaminant" is defined in Section 74-6-2(B) of the Water Quality Act as "any substance that could alter, if discharged or spilled, the physical, chemical, biological or radiological qualities of water." The language "with reasonable probability injure human health, animal or plant life or property, or to unreasonably interfere with the public welfare or the use of property" is from the Water Quality Act's definition of "water pollution" at Section 74-6-2(C). The language "percolation, capillary suction, sequestration, phytoextraction, plant uptake, volatilization, advection or diffusion into crops, structures, utility infrastructure, or construction excavations" was used to specify all the potential pathways that water contaminants could affect human health, animals, plants, and property in order to avoid potential authority-based challenges to the proposed regulation of vapor intrusion.

NMMA once again submitted comments challenging whether this proposal was authorized by the Water Quality Act, and requesting that NMED "not pursue this new subsection." *NMMA Comments on September 19, 2016 Draft Changes to 20.6.2 NMAC* (October 17, 2016), attached as NMED Exhibit 47.

Neither AB/GRIP nor the New Mexico Environmental Law Center (who was not at that time representing AB/GRIP but did actively participate in the public pre-rulemaking process) submitted any comments on either the June or September proposals regarding vapor intrusion, despite submitting extensive comments on other proposed amendments to 20.6.2 NMAC.

The language proposed in the September draft for 20.6.2.4103.B NMAC was the language eventually filed by NMED when it petitioned the Commission to amend 20.6.2 NMAC in May of

2017. This was also the language proposed when NMED submitted its Notice of Intent to Present Technical Testimony ("NOI") on September 11, 2017, and at the public hearing held from November 14 – 17, 2017 in Santa Fe.

Included in NMED's NOI, and admitted into evidence at the public hearing on November 17th, were the resume (NMED Exhibit 10) and direct testimony of Dr. Blayne Hartman, a recognized expert in the field of vapor intrusion. Dr. Hartman's written testimony focused exclusively on the dangers of the vapor intrusion pathway, using the term "vapor intrusion" no less than 17 times in three double-spaced pages. *See* NMED Exhibit 11 – *Written Direct Testimony – Blayne Hartmen, Ph.D.*

The written direct testimony of the Department's witness, Michelle Hunter, also focused on vapor intrusion, using the term no less than eight times. NMED Exhibit 2. Ms. Hunter's testimony also relied upon The U.S. Environmental Protection Agency's ("EPA") Final Guidance on Vapor Intrusion (2015), filed as NMED Exhibit 3.

NMMA's expert witness, in both written testimony and at the hearing, expressed concerns about the rule as proposed by NMED, urging the Commission not to adopt the rule as proposed. *See* NMMA Exhibit H – *Rebuttal Testimony of Daniel B. Stephens & Associates on Behalf of the New Mexico Mining Association*; Tr. Vol. 4, 973:22-985:12. Dr. Stephens testified that "[t]he proposed amendment would call into question the appropriateness of standard reclamation and remediation measures," while also acknowledging NMED's "need to regulate the vapor intrusion pathway" which is "not a significant issue at mine sites." NMMA Exhibit H, pp. 2-3.

ARGUMENT

NMED agrees with AB/GRIP regarding the standard for the logical outgrowth doctrine as articulated in *Zen Magnets, LLC v. Consumer Product Safety Commission*, 841 F.3d 1141 (10th

Cir. 2016), and the associated caselaw cited by AB/GRIP. Memorandum pp. 9-12. While NMED disagrees that 1.24.25.14.C NMAC applies to this proceeding, NMED agrees that the logical outgrowth doctrine applies to this proceeding as a matter of case law. There is no question that 20.6.2.4103.A(2) NMAC, as jointly proposed by NMED and NMMA, is a logical outgrowth of the vapor intrusion rule proposed by NMED, and the jointly proposed rule in no way limits NMED's authority under the Water Quality Act.

A. 1.24.25.14.C NMAC DOES NOT APPLY TO THIS PROCEEDING.

As an initial matter, NMED addresses AB/GRIP's claim that the Attorney General's recently-promulgated regulations at 1.24.25.14.C NMAC apply to this proceeding. New Mexico law presumes that statutes and rules apply prospectively absent a clear intention to the contrary. *Howell v. Heim*, 1994-NMSC-103, ¶ 17, 118 N.M. 500, 506 (internal citations omitted). A statute or regulation is considered retroactive if it impairs vested rights acquired under prior law or requires new obligations, imposes new duties, or affixes new disabilities to past transactions. *Id.*

The regulations at 1.24.25.14.C NMAC were promulgated pursuant to the State Rules Act, NMSA 1978, §§ 14-4-1 to -11 (1967, as amended through 2017). While that Act was amended in 2017, 1.24.25.14.C NMAC was not promulgated until April 1, 2018. NMED initiated the instant proceeding, WQCC 17-03 (R), on May 1, 2017, and the public hearing for this proceeding was held before 1.24.25.14.C NMAC was published in the New Mexico Register. *See* New Mexico Register, Vol. XXVIII, Issue 23 (December 12, 2017).[1] Section 1.24.25.14.C NMAC imposes a new obligation on rulemakings in New Mexico that had not been in effect prior to its promulgation. Because it was promulgated nearly a year after this proceeding was initiated, that rule cannot be applied to WQCC 17-03 (R).

[1] *Available at* http://164.64.110.239/nmregister/xxviii/xxviii23/AGnotice.htm.

The State Rules Act is silent as to any codification of the logical outgrowth doctrine, simply directing the Attorney General to "adopt default procedural rules for public rule hearings for use by agencies that have not adopted their own procedural rules consistent with the State Rules Act." Section 14-4-5.8 (2017). There are two points to be taken from this: First, the default procedural rules (later promulgated as 1.24.25 NMAC) do not apply to the Commission, since the Commission has had its own procedural rules in effect since 2017. *See* 20.1.6 NMAC. Second, 20.1.6 NMAC is consistent with the State Rules Act. The only argument AB/GRIP make regarding 20.1.6 NMAC is that these procedural rules do not incorporate a codification of the logical outgrowth doctrine, as does 1.24.25 NMAC. Memorandum, pp. 11-13. However, since the State Rules Act contains no codification of the logical outgrowth doctrine, nor any intention that this be a requirement, 20.1.6 NMAC is consistent with the State Rules Act, and therefore, as a matter of law, 1.24.25 NMAC does not apply to this proceeding. It is consistency with the statute which determines whether an agency's procedural rules are superseded by 1.24.25 NMAC, not consistency with the Attorney General's regulations. Section 14-4-5.8 (2017).

Regardless of AB/GRIP's technical argument, however, the Department does not question that the logical outgrowth doctrine applies to this rulemaking, and all rulemakings before the Commission, as a matter of case law. As explained below, the proposed language on vapor intrusion fully comports with that doctrine.

B. 20.6.2.4103.A(2) IS A LOGICAL OUTGROWTH OF THE VAPOR INTRUSION RULE PROPOSED BY NMED.

The history of the vapor intrusion rule leaves no doubt that the rule currently proposed is a logical outgrowth of the vapor intrusion rule originally proposed by NMED. As outlined above, the rule was initially drafted by NMED to clarify NMED's authority to regulate vapor intrusion under the Water Quality Act. NMED Exhibit 2. Tr. Vol. 4, 921:9-922:2. In response to industry comments questioning NMED's authority under the Water Quality Act, NMED amended the proposal in late 2016 to track more closely with the Water Quality Act. *See* NMED Exhibits 45 – 46 (comments from NMMA and LANS on NMED's June 16, 2016 public comment draft); Tr. Vol 4, 901:15-907:8, 913:19-914:3. It has always been clear, from the listening sessions, to the content of written testimony, to the selection of expert witnesses, that the point of NMED's proposals from the outset has been to secure explicit authority over vapor intrusion – a serious threat to human health and property, as recognized by EPA and other states – in the regulations. *See* NMED Exhibit 3 (Michelle Hunter using the term "vapor intrusion" no less than 8 times in written testimony), NMED Exhibit 10 (Resume of Blayne Hartman, Ph.D., establishing Dr. Hartman as an expert in the vapor intrusion pathway), NMED Exhibit 11 (Dr. Hartman's written testimony focused exclusively on the dangers of the vapor intrusion pathway, using the term "vapor intrusion" no less than 17 times in three double-spaced pages), NMED Exhibit 44 (NMED listening session PowerPoint listing "adding vapor intrusion protections to the regulations." as the first bullet point under a heading reading "What kind of changes are we proposing?").

"A final rule qualifies as a logical outgrowth if interested parties should have anticipated that the change was possible." *Zen Magnets,* 841 F.3d at 1154 (internal citations omitted). A final rule fails the logical outgrowth test where the final rule was "surprisingly distant from the proposed rule." *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1080 (D.C. Cir. 2009) (internal citations omitted). Courts "have refused to allow agencies to use the rulemaking process to pull a surprise switcheroo on regulated entities." *Envtl. Integrity Project v. E.P.A.*, 425 F.3d 992, 996 (D.C. Cir. 2005).

The history of the vapor intrusion language, as outlined above, makes it clear that (1) NMED was interested in clarifying its authority to regulate vapor intrusion; (2) Industry intended to challenge NMED's authority to do so under the Water Quality Act. *See* NMED Exhibits 45, 46; and (3) NMED crafted language, eventually proposed in WQCC 17-03 (R), that tracked more closely with the Water Quality Act so as to avoid such challenges. Tr. Vol. 4, 901:15-907:8, 913:19-914:3, 921:9-922:2.

At the public hearing on November 17, 2018, NMMA's specific concerns regarding the vapor intrusion language initially proposed by NMED became clear. Those concerns were not with NMED's authority to regulate vapor intrusion under the Water Quality Act, but were rather with unintended consequences for vegetative covers implemented as part of remediation/reclamation processes at mine sites. NMMA Exhibit H, pp. 2-3. Tr. Vol. 4, 982:15-984:11. When counsel for NMED cross examined NMMA's witness, the questioning was prefaced with a statement that NMED would be willing to work with NMMA to "craft language that might better clarify exemptions such as those which [Dr. Stephens] just discussed." Tr. Vol. 4, 985:22-986:3. The language proposed at 20.6.2.4103.A(2) NMAC does exactly that: it narrows the scope of the original rule so as not to inadvertently include vegetation at mining sites taking up contaminants in the soil at these sites. The eventual vapor intrusion language represents a compromise between two adverse parties, NMED and NMMA, retaining NMED's intended authority to regulate vapor intrusion, while not inadvertently adding additional regulation to mining sites where vegetative covers are used as a component of reclamation. Likewise, the proposed 20.6.2.4103.A(2) NMAC is not "surprisingly distant" from the language originally proposed at 20.6.2.4103.B NMAC; it simply narrows the scope so as to avoid unintended consequences. In fact, the new language is remarkably similar to the first iteration of the vapor intrusion language proposed by the Department. Claims by any party to this proceeding that the compromise language could not have been anticipated strain credulity.

Finally, although 1.24.25.14.C NMAC does not apply in this proceeding, the proposed 20.6.2.4103.A(2) NMAC would also satisfy the third factor to consider – whether the effect of the adopted rule differs from the effect of the published rule. The effect of the compromise reached between NMED and NMMA is the same: to clarify NMED's authority to regulate vapor intrusion. While the scope of proposed 20.6.2.4103.A(2) NMAC is narrower than what was originally proposed, AB/GRIP is incorrect to claim that the rule "serves as the inverse of NMED's original position that it has regulatory authority over all forms of subsurface contaminants." Memorandum, p. 15. NMED's original position, which it still holds, is based upon the Water Quality Act and the existing regulations 20.6.2 NMAC. Tr. Vol. 4, 901:15-907:8, 913:19-914:3, 921:9-922:2. AB/GRIP appear to believe that narrowing the scope of a proposed regulatory provision would somehow limit the authority conveyed under the statute. That is incorrect. Rather, the inverse is true: "An [administrative] agency cannot amend . . . its authority through rules and regulations. Nor may an agency, through the device of regulations, modify [a] statutory provision." *Matter of Proposed Revocation of Food and Drink Purveyor's Permit for House of Pancakes*, 1984-NMCA-109, ¶ 13, 102 N.M. 63. Thus, the authority of the Commission "to prevent or abate water pollution in the state" under Section 74-6-4(E) of the Water Quality Act remains intact, and cannot be limited by any regulation.

In sum, the compromise language on vapor intrusion proposed by NMED and NMMA is a logical outgrowth of the original language, and all the various iterations thereafter, proposed by NMED. Importantly, AB/GRIP never took a position in this proceeding on the vapor intrusion language or indicated that they were concerned about changes in that language. There was clear discussion on the record at the hearing between NMMA and NMED regarding proposing compromise language after the hearing in order to narrow the scope of the provision to avoid unintended consequences. If AB/GRIP wanted to weigh in on that compromise language, they had every opportunity to do so. AB/GRIP's sudden concern with the vapor intrusion language, when they never indicated any interest in it at any other point in the over two years since the Department first announced its intent to propose amendments to the groundwater regulations to address vapor intrusion, appears to be an attempt to manufacture a procedural issue with the aim of further delaying the Commission's deliberations in this matter. The Hearing Officer and the Commission should reject that attempt.

CONCLUSION

For the foregoing reasons, NMED respectfully requests the Hearing Officer deny AB/GRIP's request to exclude all references to the proposed 20.6.2.4103.A(2) NMAC in the final Hearing Officer's Report. NMED further requests the Commission deny AB/GRIP's alternative relief requested, namely re-issuance of public notice and another public hearing prior to deliberation on proposed amendments to 20.6.2 NMAC.

Respectfully submitted,

NEW MEXICO ENVIRONMENT DEPARTMENT
OFFICE OF GENERAL COUNSEL

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed with the Commission Administrator and was served on the following via electronic mail on June 22, 2018:

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NMED
New
Mexico
Environment
Department

Update of 20.6.2 New Mexico Administrative Code: The Groundwater Regulations

New Mexico Environment Department, Spring 2016

NMED Exhibit 44

Agenda

- What are the groundwater regulations?
- What changes need to be made?
- What does it mean for New Mexico?
- What is the process?
- How can citizens participate?

What are the groundwater regulations?

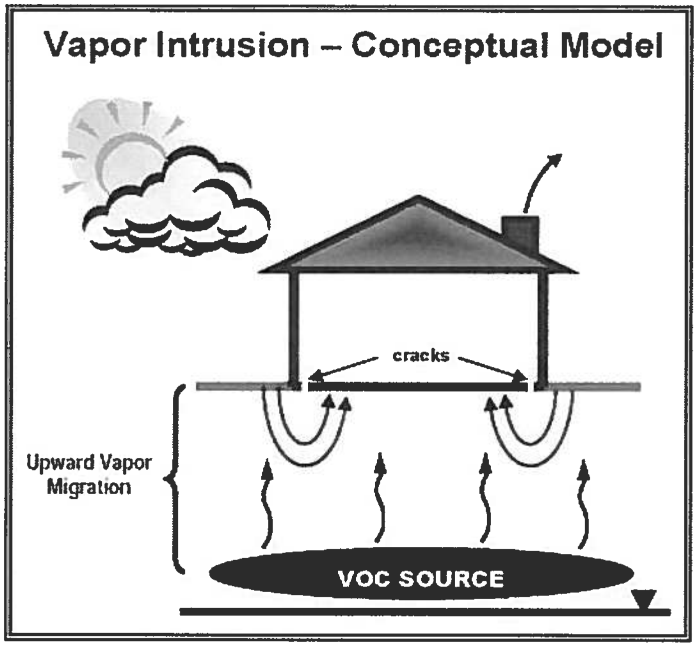
New Mexico was the first state in the Nation to develop protective regulations for groundwater in 1977

- The regulations included reporting and cleanup of spills and the issuance of permits for discharges that could impact groundwater quality
- 1977 numerical standards included metals, nutrients, and other inorganic standards
- Additions in 1982 and 1986 included organic standards such as PCE, TCE, and BTEX
- These organic standards for volatile organic compounds (VOCs) have not been updated since the 1980's
- The Abatement process was added in 1995
- Abatement language has not been updated in 20 years

Updating the Regulations

- **What type of changes are we proposing?**
  - Adding vapor intrusion protections to the regulations
  - Lowering (making more stringent) the groundwater standard for Trichloroethene (TCE) and adding its daughter products (1,2 DCE)
  - Clarifying Abatement Language
  - Raising Permitting Fees (GWQB is largely General Fund-dependent and has suffered cuts of 40% in the last few years)
  - Adding the regulatory oversight of Geothermal
  - Adding technology based (electronic notifications) provisions to the public notice requirements

What is Vapor Intrusion?



Department of Toxic Substances Control
California Environmental Protection Agency

- VI is the migration of contaminants from the subsurface into buildings
- Almost always a chlorinated solvent like PCE or TCE
- Usually emanating from a former dry cleaner, auto repair, or semi-conductor type of degreasing facility
- Petroleum products can create VI, but it's very rare

Why do the numerical standards need updating?

As scientific evidence grows,
the regulatory climate and standards often change.

Current NM Groundwater Standard

- PCE – 20 ug/L
- TCE – 100 ug/L

Current EPA Drinking Water Standard

- PCE – 5 ug/L
- TCE – 5 ug/L

New Mexico groundwater standards for PCE and TCE were promulgated in 1982

Other issues we have identified

- Incorporate email in the public notice process
- NMED now regulates and permits some geothermal activities
- Add PCE and TCE daughter (breakdown) products cis and trans 1,2-DCE
- Clarify abatement language
- Include financial assurance for abatement rules
- Clarify exemption language

www.env.nm.gov/gwqb/

Steve Huddleson - 505.827.2936

Ground Water Quality Bureau

1190 St. Francis Dr.

Santa Fe, NM

What is the process and how can citizens participate?

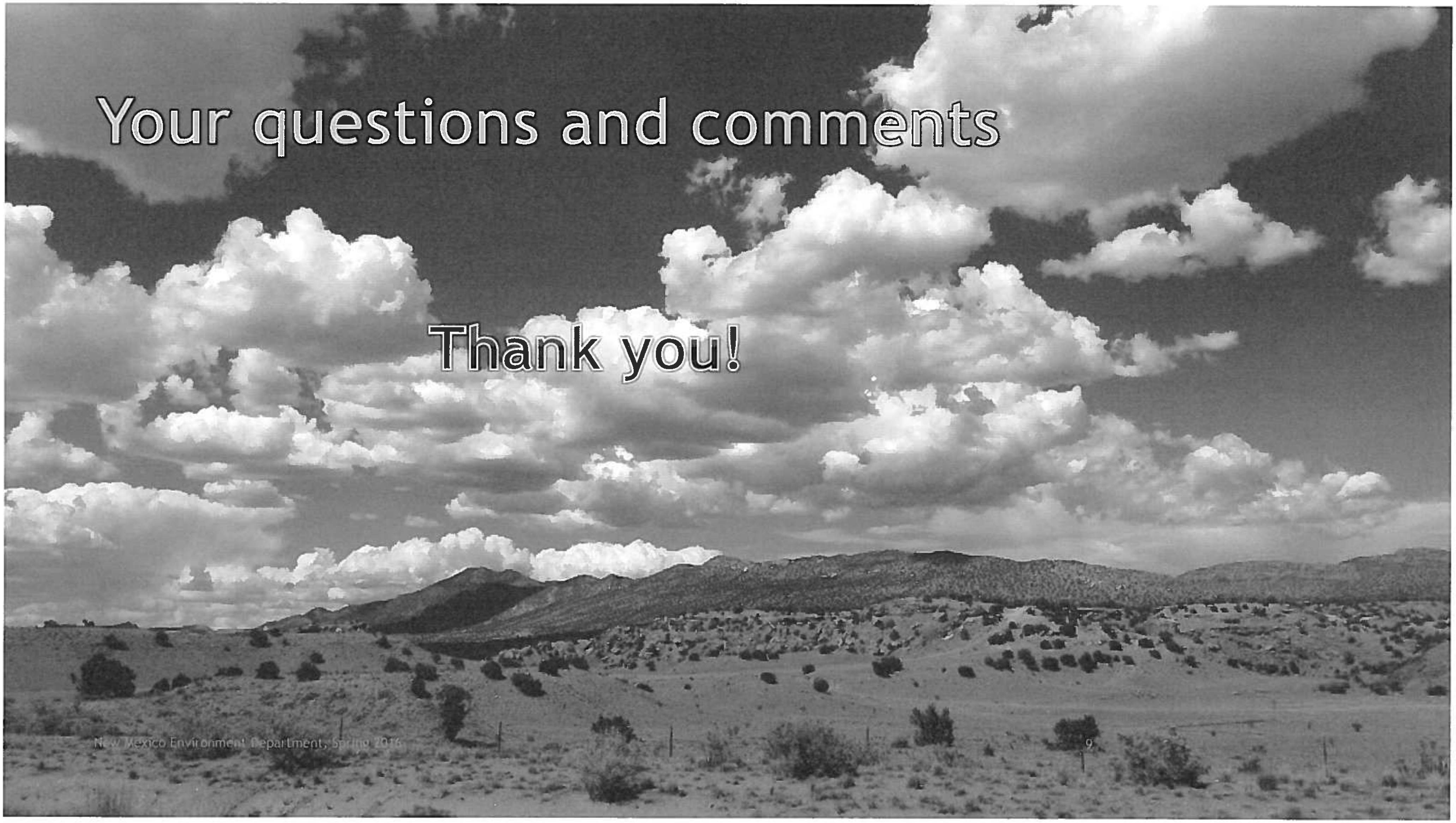
GWQB will file a petition with proposed changes with the Water Quality Control Commission (WQCC), which will set a hearing date in the fall. Hearing procedures, including provisions for public participation, are set forth in Section 20.1.9 of the New Mexico Administrative Code (NMAC) and in the WQCC Guidelines.

In the meantime, we welcome comments and dialogue, just as we will throughout the process.

E-MAIL NMED - for questions or information

Steven.huddleson@state.nm.us

NMED WEBSITES - for information
http://www.env.nm.gov/gwqb
http://164.64.110.239/nmac/parts/title20/20.001.0009.htm
https://www.env.nm.gov/wqcc/


Your questions and comments
Thank you!
New Mexico Environment Department, Spring 2016
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Los Alamos
NATIONAL LABORATORY
EST 1943

Environmental Protection & Compliance Division
Environmental Compliance Programs (EPC-CP)
PO Box 1663, K490
Los Alamos, New Mexico 87545
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Date: AUG 1 7 2016
Symbol: EPC-DO-16-236
LA-UR: 16-26287
Locates Action No.: N/A

Ms. Michelle Hunter, Bureau Chief
Ground Water Quality Bureau
New Mexico Environment Department
Harold Runnels Building, Room N2261
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Dear Ms. Hunter:

Subject: Los Alamos National Security, LLC's Comments on Proposed Changes to 20.6.2 NMAC

Los Alamos National Security, LLC ("LANS") provides the following comments and suggested changes to the Department's June 16, 2016 working draft of proposed changes to 20.6.2 NMAC, the ground and surface water protection regulations. LANS appreciates the opportunity to comment on the proposed changes. LANS notes that the discharge permit regulations, 20.6.2.3100 to 3114 NMAC have not been comprehensively reviewed or revised since their adoption in 1976.

1. *Definition of "discharge permit amendment," 20.6.2.7.D(4) NMAC.*[1] LANS supports the new definition of "discharge permit amendment" in 20.6.2.7.D(4) NMAC. LANS notes that the proposed definition of "discharge permit amendment" is the same as adopted by the Commission in the Copper Mine Rule, 20.6.7.7.B(19) NMAC. LANS understands that this has been a useful tool and has been implemented successfully for copper mines.

2. *Definition of "toxic pollutant," 20.6.2.7.T(2) NMAC.* The draft (1) revises the list of "toxic pollutants" by adding some and deleting other pollutants from the list; and (2) adds any pollutant "with a human health risk-based screening level." The term "human health risk-based screening level" is not defined.

NMED Exhibit 45

[1] The regulatory references are to the revised numbering proposed in the draft.

a. LANS opposes the addition of pollutants "with a human health risk-based screening level." Since the program added toxic pollutants, the WQCC has listed specific pollutants that are "toxic pollutants" for which the rules specify criteria for establishment of discharge limits or abatement standards. If the new language is added, new and unspecified constituents would automatically be added to the list of "toxic pollutants" without public notice or comment, in violation of NMSA 1978, § 74-6-6 (1993), which requires public notice and a hearing to adopt a new regulation or water quality standard. This is not only a legally flawed approach, but is objectionable because regulated entities need clear notice of the contaminants regulated as "toxic pollutants" to make operational decisions and prepare permit applications or abatement plans.

Additionally, the proposed language is objectionable because it fails to define or identify what is meant by a "human health risk-based screening level." It is not clear who would set those levels for purposes of the rule? While LANS is familiar with screening levels, such levels typically are set very conservatively, at levels that signify no risk, and they cover a broad variety of contaminants, including many that are not currently listed in the existing rule and some for which the Commission has set specific ground water standards in 20.6.2.3103 NMAC. Consequently, the addition of the proposed language could create conflicts and confusion regarding the applicable criteria.

b. Further, LANS suggests that the criteria for determining acceptable concentrations of toxic pollutants be moved to 20.6.2.3103 NMAC (ground water standards), treating the criteria as narrative standards. This would leave which pollutants are toxic pollutants in the definitions and put all of the applicable ground water standards in 20.6.2.3103 NMAC, and would eliminate the need to reference toxic pollutants separately in the approval criteria for permits in 20.6.2.3109 NMAC and for abatement plans in 20.6.2.4109 NMAC.

3. *Notice of intent to discharge, 20.6.2.1201 NMAC.* LANS notes that the proposed changes are limited to oil and gas production activities and discharges from geothermal resources in excess of 250 degrees Fahrenheit. LANS has no comments on those changes. The regulation currently excludes only discharges "being made or will be made into a community sewer system or subject to the Liquid Waste Disposal Regulations adopted by the [EIB]." LANS suggest that discharges subject to other permitting programs, such as the hazardous waste and solid waste programs also be excluded from the NOI requirements. The Water Quality Act, NMSA 1978, § 74-6-12.B (1999), specifically exempts "any activity or condition subject to the authority of the environmental improvement board pursuant to the Hazardous Waste Act, the Ground Water Protection Act or the Solid Waste Act."

4. *Notification of Discharge—Removal,* 20.6.2.1203 NMAC. The regulation requires notification to NMED of "any discharge" of oil or other water contaminant "in such quantity as may with reasonable probability injure or be detrimental to human health, animal or plant life, or property, or unreasonably interfere with the public welfare or the use of property." The rule exempts continuous or periodic discharges made in conformance to WQCC rules and rules of other state and federal agencies. The rule also specifies procedures and requirements for investigation and remediation of those discharges.

a. 1203.A specifies the current reporting threshold as: "in such quantity as may with reasonable probability injure," is vague and subject to disparate application. NMED should look at replacing the narrative criteria with reportable quantities.

b. 1203.B, includes exemptions from the reporting and corrective action. The current regulation only exempts discharges "in conformance with" the WQCC regulations or other federal or state agency rules. LANS suggests that the exemptions be expanded to include spills/releases subject to reporting/remediation requirements under other state or federal laws, including the Hazardous Waste Act (hazardous waste and petroleum storage tanks) and the Solid Waste Act. This will avoid duplication and potential conflict of a facility's reporting and remediation requirements. In most cases, the spills/releases are addressed by other programs administered by the Department. To further avoid duplication, the Department should also consider exempting discharges from facilities required to have discharge permits, if there are spill requirements in the permit.

5. *Standards for Ground Water of 10,000 mg/l TDS Concentration or Less,* 20.6.2.3103. This section specifies the acceptable levels of water contaminants in ground water. The language in the introduction concerning "existing concentration" is confusing and has been the subject of debate and negotiation. It would be prudent to revise the language to clarify that the numeric concentrations in the regulation do not apply to waters where the concentrations exceed the numeric criteria at the time a permit application is reviewed. In those cases, the discharge cannot make the situation worse.

6. *Exemptions from discharge permit requirement, 20.6.2.3105 NMAC.* LANS notes that since the adoption of the discharge permit program, the exemption under 20.6.2.3105 NMAC have not changed to conform to coverage changes in the Water Quality Act. Specifically, Section 74-6-12 was amended in 1993 to exempt "any activity or condition subject to the authority of the environmental improvement board pursuant to the Hazardous Waste Act, the Ground Water Protection Act or the Solid Waste Act except to abate water pollution or to control the disposal or use of septage and sludge." LANS suggests that the exemptions in 20.6.3105 be revised to conform to the statutory exclusions.

a. 3105.A proposes to add language clarifying that the exemption for effluent or leachate that conforms to the numerical standards of 20.6.2.3103 NMAC only applies to those discharges that meet the criteria without "treatment or blending." LANS understands that the proposed change merely confirms NMED historic practice. LANS supports the change.

b. 3105.N proposes to add an exemptions from permitting requirements for effluent or leachate discharges regulated under the federal Resource Conservation and Recovery Act[2] "provided that the substantive requirements of [Part 2] are met and the [NMED] secretary determines that no hazard to public health would result." While LANS supports excluding discharges subject to RCRA from the permitting requirements, the proposed exemption is inconsistent with the Water Quality Act. Section 74-6-12.B specifically exempts "***any activity or condition*** subject to the authority of the environmental improvement board pursuant to the Hazardous Waste Act, the Ground Water Protection Act or the Solid Waste Act." (Emphasis added). To be consistent with the Water Quality Act, the proposed exemption should delete the "provided that" language. Additionally, LANS suggests that the reference to RCRA be revised to specifically reference the New Mexico Hazardous Waste Act. Thus, LANS proposes the proposed exemption be revised to read as follows:

[2] LANS understands that the proposed exclusion for discharges regulated under RCRA also applies to discharges regulated under the New Mexico Hazardous Waste Act.

N. Effluent or leachate discharges subject to the authority of EPA under the federal Resource, Conservation and Recovery Act or the Environmental Improvement Board under the New Mexico Hazardous Waste Act.

c. Similarly, 3105.J exempts leachate from "materials disposed of in accordance with the Solid Waste Management Regulations ([20.9.1 NMAC]) adopted by the New Mexico Environmental Improvement Board." The exemption is inconsistent with the exemption in the § 74-6-12.B, which excludes "any activity or condition subject to the authority of the environmental improvement board pursuant to . . . the Solid Waste Act . . . ." The paragraph should be revised, consistent with 3105.N, as follows:

J. Effluent or leachate discharges subject to the authority of the Environmental Improvement Board under the New Mexico Solid Waste Act.

d. To avoid duplicative requirements, LANS requests that the Department exempt discharges subject regulation under the federal Clean Water Act (stormwater permitting) or the Comprehensive Environmental Response, Compensation and Liability Act, or discharges that are part of corrective actions subject to regulation under other state and federal programs.

7. *Application for Discharge Permits and Renewals, 20.6.2.3106 NMAC, including proposed discharge permit amendment procedures, 20.6.2.3106.G NMAC.*

a. 3106.F makes extension of a permit during permit renewal dependent on whether the discharger "is not in violation of the discharge permit on the date of its expiration." LANS recommends that NMED consider eliminating that condition. Based on the paragraph, any violation, no matter how small or inconsequential, could be sufficient to void extension of the permit.

b. New 3106.G proposes procedures for discharge permit amendments, which are defined as minor changes to permits. LANS supports the changes. Discharge permits have become more detailed and complex, and sometimes contain very specific requirements for operations, monitoring, recordkeeping, reporting, and closure. Changes in facility operations, including those resulting from operational experience, sometimes necessitate changes to applicable permit requirements. Adjustments often require the ability to quickly make minor adjustments in permit language that are internal to the operation, have no effects outside of the operation. If these adjustments are subject to the extensive public notice and participation requirements of 20.6.2.3108 NMAC, the adjustments can be delayed for weeks and months, and operations can suffer. LANS notes that other NMED programs, such as the air quality program, have successfully implemented processes for permit changes that involve less than the full public notice and comment procedures. Additionally, LANS recommends that the approval criteria for discharge permit amendments, proposed 3106.G(3) & (4), be moved to 20.6.2.3109 NMAC, which specifies the criteria for approval of discharge permit applications, modifications, and renewals, and the procedures for discharge permit termination.

8. *Monitoring, Reporting, and Other Requirements, 20.6.2.3107 NMAC.* NMED has not requested any changes to this section. LANS requests that NMED consider the following changes:

a. 3107.A.11 specifies the requirement to submit a closure plan with the discharge permit application, designed to prevent the exceedance of ground water standards. The closure must include "financial assurance," but does not specify the nature, form, or amount of the assurance required. Language should be added to this section or another section included that spells out the requirements for financial assurance. *See* e.g., 40 CFR 264.140 to 151 (financial assurance for hazardous waste treatment, storage and disposal facilities). Additionally, the section should be revised to exclude federal facilities and facilities subject to closure and financial assurance requirements under other laws (e.g., mining operations subject to the New Mexico Mining Act). Additionally, language similar to proposed 4103.G, to allow the Secretary to approve using institutional controls for certain remediation activities conducted under the closure requirements.

b. 3107.C requires a discharger to notify the Secretary of "any facility expansion, production increase or process modification that would result in any significant modification in the discharge of water contaminants." The term "significant modification" is vague and subject to different interpretation. LANS suggests that the term be defined or the applicable criteria clearly identified.

9. *Public Notice and Participation, 20.6.2.3108 NMAC.* In addition to the changes proposed by NMED, which LANS supports, LANS requests that NMED consider the following changes:

a. This section specifies the public notice and public participation requirements for processing discharge permit applications. Additionally, the section includes the requirements for NMED processing of an application, including the requirement for preparing a draft permit. Because the section's content extends beyond public notice and participation, the title of the section should be revised to include a reference to permit processing.

b. 3108.H specifies the requirements for notice of the proposed permitting decision. It is the only regulatory provision addressing the preparation of a proposed decision. It states that NMED "shall make available a proposed approval or disapproval of the application for a discharge permit, modification or renewal, including conditions for approval by the department or the reasons for disapproval." The current language does not require NMED to identify the reasons for approval of the proposed permit or the basis for any proposed conditions for approval. It should be amended to require that NMED also prepare a statement of the reasons for the proposed decision. This would conform the section to the provisions of the Water Quality Act, § 74-6-5.D (2009), which specifies that "[a]dditional conditions on a final permit may be imposed if the applicant is provided with an opportunity to review and provide comments in writing on the draft permit conditions and to receive a written explanation of the reasons for the conditions from the constituent agency."

10. *Secretary approval, disapproval, modification or termination of discharge permits, and requirements for abatement plans, 20.6.2.3109 NMAC.* The draft proposes to clarify the requirements for notification of department action to approve a proposed discharge permit, permit modification, or permit renewal, under 20.6.2.3109.B NMAC, or terminate a discharge permit, under 20.6.2.3109.E(4) NMAC. LANS supports the proposed changes, but believes that the procedures for permit review and processing are insufficient and should be revised.

a. 3109.B should be revised to require the reasons for the imposition of each permit condition and the Department's responses to comments on the draft permit. That is necessary not only to give notice to the applicant, but to provide a basis for review by the Commission in any appeal. Further, this paragraph specifies that the Secretary must approve, approve with conditions or disapprove a proposed discharge permit "within 30 days after the administrative record is complete and all required information is available." LANS proposes the paragraph be revised to define the period as beginning after a public hearing, if any, is complete or the comment period on a draft permit has expired. Additionally, LANS does not believe that 30 days is sufficient to allow NMED to review and evaluate a permit application, including public comments. LANS suggests that NMED consider adding some time, preferably 60 days, to the review deadline.

b. 3109.H specifies the criteria for disapproval of a proposed discharge permit. The paragraph is not consistent with the WQA, § 74-6-5.E. It should be revised in a manner consistent with the Act.

11. *Fees, 20.6.2.3114 NMAC and Table 1.* The draft includes substantial changes to the fee schedule in Table 1 and a provision for automatic increases based on changes to the consumer price index. These include substantial increases to fees for a number of categories, but no changes to fees for other categories. LANS is unaware of the basis for the proposed fee changes. Under the Water Quality Act, § 74-6-5.K, the Commission may set a schedule for permit fees, "not exceeding the estimated cost of investigation and issuance, modification and renewal of permits." While LANS is open to fee changes, it cannot support the proposed fee changes without additional information from the Department explaining the basis for the proposed fee changes, including how they relate to the Department's overall costs to efficiently process permit applications and to take timely action on those applications, how the overall fee changes and the changes for each category relate to the statutory limits on fees, and an explanation for the differences in proposed fees for each category. LANS notes that the fee changes in general leave the fees for smaller entities the same while imposing the greatest fee increases on larger facilities. LANS understands that affordability may be a consideration for smaller dischargers, but the Act sets the criteria for fees as the estimated cost of investigation and issuance of permits, and investigating and issuing permits for smaller facilities sometimes can consume resources comparable to larger facilities. LANS does not believe it is appropriate for larger facilities to subsidize the permitting costs for smaller facilities.

12. *Abatement standards and requirements, 20.6.4.4103 NMAC.* The draft proposes to add requirements for abatement of soil gas pollution or ground water pollution with a complete exposure pathway through vapor intrusion into occupied structures and changes to the alternative abatement standards process.

a. New 4103.D would require soil-gas pollution and ground water pollution with a complete exposure pathway through vapor intrusion to be abated "to applicable vapor intrusion screening levels calculated in accordance with the methods and guidelines presented in [NMED's] technical guidance *Risk Assessment Guidance for Site Investigations and Remediation*, latest edition." LANS supports the adoption of remediation requirements for soil-gas pollution and ground water pollution with a complete exposure pathway through vapor intrusion. LANS questions, however, whether regulations under the Water Quality Act are the appropriate place for such requirements. The WQCC's authority under the Water Quality Act is limited to the adoption of rules to prevent or abate water pollution.

NMSA 1978, § 74-6-4.E (2009). "Water pollution" is defined as the introduction of water contaminants into water "in such quantity and of such duration as may with reasonable probability injure human health, animal or plant life or property, or to unreasonably interfere with the public welfare or the use of property." NMSA 1978, § 74-6-2.C (2003). The draft does not define "soil-gas pollution," but since the new language also references "ground water pollution," it appears that soil-gas pollution is not "water pollution." If it is not "water pollution," the WQCC has no authority to adopt this proposal. LANS notes that the EIB may have authority to regulate such conditions under the Environmental Improvement Act, Solid Waste Act, or the Hazardous Waste Act.

Additionally, LANS opposes the adoption of abatement criteria for such pollution by reference to the NMED's remediation guidance. By reference to the "latest addition" of the guidance, it appears that NMED intends the guidance to be binding and subject to enforcement. LANS notes that the guidance has not undergone the rigorous public review and comment process specified for regulations. LANS contends that for the guidance to be enforceable, the guidance needs to be subject to review and approval by the WQCC under the regulation or standards procedures specified in the Water Quality Act.

b. 4103.F reorganizes the existing language to clarify the alternative abatement standards petition process, particularly for petitions that the Secretary can act upon. The changes improve the public participation process by adding new public notice and public participation requirements for petitions that the Secretary can act upon. The criteria for a technical infeasibility demonstration do not appear to have changed substantially from the existing criteria. LANS supports the proposed changes. LANS particularly supports the allowance for action by the Secretary on a petition for alternative abatement standards for water contaminants for which human health based standards have not been set even if the contaminant level exceeds 200% of the standard.

c. 4103.G allows the Secretary to require institutional controls for certain remediation activities. LANS supports the changes, but suggests that NMED consider requiring such controls when waste is to be left in place after the remediation is complete.

Again, LANS appreciates the opportunity to comment on the proposed changes to the ground water discharge permitting and abatement regulations. If you have any questions concerning these comments, please contact Robert S. Beers by telephone at (505) 667-7969 or by email at bbeers@lanl.gov.

Sincerely,

Anthony R. Grieggs
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New Mexico Mining Association

August 17, 2016

VIA EMAIL TO: NMENV.GWQBrulerev@state.nm.us

Ms. Michelle Hunter, Bureau Chief
Ground Water Quality Bureau
New Mexico Environment Department
1190 Saint Francis Drive
P.O. Box 5469
Santa Fe, New Mexico 87502

Re: New Mexico Mining Associations Comments on June 16, 2016 Working Draft Changes to 20.6.2 NMAC

Dear Ms. Hunter:

On behalf of the New Mexico Mining Association ("NMMA"), these comments are submitted regarding the changes that the Department is considering with regard to 20.6.2 NMAC. NMMA's members include companies in the base, precious and industrial minerals, fertilizer, and aggregates industries who explore for, mine and process various commodities such as copper, coal, potash, uranium, humate, and sand and gravel. These industries are major contributors to employment, tax payments, and other economic benefits to New Mexico, particularly in rural areas. A number of NMMA members hold ground water discharge permits or are subject to the abatement regulations under 20.6.2 NMAC.

NMMA understands that the subject rules have not been substantially amended since the mid-1990s and some updates are in Order. Since the rules were last amended, the Water Quality Act that governs the regulations was amended in 2009, and as a result, industry-specific rules were adopted for the copper and dairy industries. NMMA can support many of the proposed rule changes in the June 16, 2016 draft. However, NMMA has serious concerns with a few of the proposed changes, and has some suggestions for additional changes to the rules.

NMED Exhibit 46

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CHANGES SUPPORTED BY NMMA

Discharge Permit Amendments

NMMA strongly supports the changes providing for discharge permit amendments, including the new definition of "discharge permit amendment" in 20.6.2.7(D)(4) and the procedures specified in 20.6.2.3106(G). Over time, discharge permits have become more detailed and complex, and sometimes contain conditions that establish very specific requirements for monitoring, operations, and closure. Mining operations are constantly moving and expanding and can require adjustments due to changes in market conditions, changes in the nature of the mined materials, and regular expansions. Such adjustments typically do not substantially change the nature of the permitted discharges or the nature and scale of the permitted operations. Adjustments in mine operations often require the ability to quickly make minor amendments to permit language that are internal to the operation, have no effects outside of the operation, and raise no interests of public concern. If these adjustments are subject to the extensive public notice and participation requirements of 20.6.2.3108 NMAC, the adjustments can be delayed for weeks and months, and operations can suffer when necessary adjustments are delayed. NMMA believes that the Commission can reasonably conclude that permit amendments, which are limited to minor permit changes that are not expected to have an effect outside of the permitted operations and with no reasonable expectation of public interest, can be treated differently than permit "modifications" that are subject to public notice and participation requirements under the Water Quality Act.

The definition of "discharge permit amendment" is the same as proposed by the Department and adopted by the Commission in the Copper Mine Rule, 20.6.7.7(B)(19). NMMA understands that this has been a useful tool and has been implemented successfully for copper mines. For these reasons, NMMA supports the proposed changes regarding discharge permit amendments.

Variance Petitions

NMMA supports the proposed changes to 20.6.2.1210 NMAC regarding variance petitions, although some clarifications to the proposed language may be needed. In effect, these changes would remove the current prohibition against the Commission granting a variance for a period of time in excess of five years in favor of a flexible variance period to be supported by evidence presented by the applicant and a periodic review by NMED whether the conditions of the variance have been met.

Variances may be used in a variety of circumstances to allow for permits to vary from requirements in the Commission's regulations, and the Department should consider whether clarifications may be needed to the proposed language to account for the different circumstances when the variance procedures may be utilized. In particular, the rule regarding alternative abatement standards refers to 20.6.2.1210 NMAC, though it is not clear whether only subsection A is relevant in that regard, or whether the remainder of that section, including proposed new subsection D, also applies to alternative abatement standards. That should be clarified.

Alternative Abatement Standards

NMMA supports the proposed changes to the rule governing alternative abatement standards, 20.6.2.4103(F) NMAC. Most of the proposed changes reorganize the existing language to clarify the petition process, particularly for petitions that the Secretary can act upon. The changes improve the public participation process by adding new public notice and public participation requirements to ensure an opportunity for public participation regarding petitions that the Secretary can act upon, and which consequently will not require a hearing before the Commission.

The criteria for a technical infeasibility demonstration do not appear to have changed substantially from the existing criteria. NMMA particularly supports the allowance for action by the Secretary on a petition for alternative abatement standards for water contaminants for which human health based standards have not been set, even if the contaminant level exceeds 200% of the standard. As an editorial comment, perhaps it would be clearer to say, in subparagraph F(1)(b) "Petitions proposing alternative abatement standards in excess of 200 percent of the abatement standard for a water contaminant that is not a toxic pollutant and for which no human health-based standard has been set under 20.6.2.3103(A) NMAC shall be filed with the secretary." Similarly subparagraph F(1)(c) could read "Petitions proposing alternative abatement standards for a water contaminant with a concentration greater than 200 percent of the abatement standard set forth in Subsections A or B of this section that is a toxic pollutant or for which health based standard has been set in 20.6.2.3103(A) NMAC shall be filed with the commission."

NMMA also has some concern with the use of the term "remedial action" in proposed paragraph (F)(1) and the intent of the limiting language "following implementation of a remedial action pursuant to an approved abatement plan." "Remedial action" is not defined for this purpose and the term is not used in the abatement rule, so its meaning is unclear. The term is used as a term of art in CERCLA, and that could cause some confusion. As to the limitation, in the mining context, actions to abate ground water sometimes are required and taken under discharge permits, which can require contingency and corrective actions as well as source control actions as part of closure. There may be many instances in which NMED would agree that all necessary actions have been taken under the provisions of a discharge permit, and it is appropriate to proceed to a technical infeasibility determination without the need to go through the formal abatement plan process, as that would simply duplicate the work already done under a discharge permit. NMMA requests that the Department consider broadening this provision to include those circumstances.

NMMA strongly supports the addition of a new subsection G to section 20.6.2.4103 NMAC. Institutional controls have long been utilized as an important part of overall abatement, particularly when alternative abatement standards are set. This provision is an important acknowledgment of this important tool. As the process moves forward, NMMA may have additional comments on the details of this language and also the financial assurance and funding provisions of section 20.6.2.4104(C) and (D), particularly the potential need for additional details in the rule language.

CHANGES THAT NMMA DOES NOT SUPPORT

Definition of "Toxic Pollutant"

NMMA oppose the addition of the language "or be a pollutant with a human health risk-based screening level" at two locations in the definition of "toxic pollutant" in proposed 20.6.2.7(T)(2). Currently, this definition lists specific pollutants which are deemed to be "toxic pollutants" for which the rules specify criteria for establishment of discharge or abatement standards in permits or abatement plans. If the new language is added, new and unspecified constituents would automatically be added to the list of "toxic pollutants" and would constitute a new rule without public notice or comment, in violation of Section 74-6-6 NMSA 1978, which requires public notice and a hearing to adopt a new regulation or water quality standard. This is not only a legally flawed approach, but is objectionable because the regulated community needs clear notice of the constituents that are regulated as "toxic pollutants" to properly prepare applications and plans and to maintain compliance.

Although the above comment is legally fatal to the addition of the proposed language, the proposed language also is fatally flawed because it fails to define or identify what is meant by a "human health risk-based screening level." Who would set such levels for purposes of the rule? NMED? U.S.E.P.A? The World Health Organization? What are the criteria to set such screening levels? While NMMA is familiar with some of this type of screening level, it is important that such levels typically are set very conservatively, often at levels that signify no risk, and they cover a broad variety of contaminants, including many that are not currently listed in the existing rule and some for which the Commission has set specific standards in 20.6.2.3103 NMAC. Consequently, the addition of the language suggested by NMED would potentially create conflicts and confusion regarding how the rules operate.

Note to Section 20.6.2.3103 NMAC

The Department recommends deleting the note to 20.6.2.3103 NMAC regarding the effectiveness of the amended uranium standard. NMMA opposes the deletion of the first sentence of the note. The second sentence regarding new water discharges can be deleted.

Change to Exemption from Discharge Permit Requirement, 20.6.2.3105(A)

NMMA does not support the limitation to the existing exemption in 20.6.2.3105(A) for discharges of water that meet all of the standards of 20.6.2.3103 NMAC. The limitation would exclude situations where blending or treatment is used to meet standards. This change would increase regulatory burdens for responsible parties who appropriately, and often at great expense, address water quality issues before any discharge that could adversely affect ground water, which is beneficial to the environment. The existing exemption provides an important incentive to design a process that produces wastewater that meets 3103 standards. Importantly, the terms "blending" and "treatment" are not defined in the proposed rule language. As a result, the proposed change is ambiguous. In particular, within a mining, industrial or other process involving the use of solutions, various steps can take place within a contained process that affect the quality of solutions and, ultimately, any wastewater. The language of the proposed change is unclear as to how and at what stage of a process the terms "blending" and "treatment" would apply.

Fees

The proposed rule changes include substantial changes to the fee schedule in 20.6.2.3114 NMAC and a provision for automatic increases based on changes to the consumer price index. These include substantial increases to fees for a number of categories, but no changes to fees for other categories. NMED has not provided any analysis of which NMMA is aware as a basis for the proposed fee changes. Under the Water Quality Act, the Commission may set a schedule for permit fees, " . . . not exceeding the estimated cost of investigation and issuance, modification and renewal of permits." § 74-6-5(K) NMSA 1978.

NMMA cannot support the proposed fee changes without additional information from the Department explaining the basis for the proposed fee changes, including how they relate to the Department's overall costs to efficiently process permit applications and to take timely action on those applications, how the overall fee changes and the changes for each category relate to the statutory limits on fees, and an explanation for the differences in proposed fees for each category. NMMA notes that the fee changes in general leave the fees for smaller entities the same while imposing the greatest fee increases on larger facilities. NMMA understands that affordability may be a consideration for smaller dischargers, but the Act sets the criteria for fees as the estimated cost of investigation and issuance of permits, and investigating and issuing permits for smaller facilities sometimes can consume resources comparable to larger facilities. NMMA does not believe it is appropriate for larger facilities to, in effect, subsidize the permitting costs for smaller facilities. At a minimum, the Department should show that the proposed fee schedule provides for fees that will not exceed the estimated cost of permitting for any facility category, which should be based on recent data concerning the Department's permitting costs.

Soil-Gas Pollution

Sections 20.6.2.4104(A)(3) and 20.6.2.4103(D) of the proposed changes would expand the rules to address "soil-gas pollution." The Commission's authority under the Water Quality Act is limited to the adoption of rules to prevent or abate water pollution. § 74-6-4(E) NMSA 1978. "Water pollution" is defined as the introduction of water contaminants into water. § 74-6-2(C) NMSA 1978. The rule changes do not define "soil-gas pollution," but this appears to be different than "water pollution." NMMA opposes the expansion of the rules beyond the scope authorized by the Water Quality Act. If there is a need for additional regulations to address "soil-gas pollution," and the Department wishes to address those under 20.6.2. NMAC, the Department first needs to seek approval from the Legislature.

ADDITIONAL CHANGES FOR CONSIDERATION

Statement of Reasons for Imposing Permit Conditions

The Water Quality Act allows the Department to establish permit conditions, but requires that "[T]he constituent agency has the burden of showing that each condition is reasonable and necessary to ensure compliance with the Water Quality Act and applicable regulations, considering site-specific conditions." § 74-6-5(D) NMSA 1978. This requirement is not adequately addressed in the existing rules. In particular, the first notice an applicant may receive of proposed permit conditions is specified in 20.6.2.3108(H), which states, in part: ". . . the department shall make available a proposed approval or disapproval of the application for a discharge permit, modification or renewal, including conditions for approval proposed by the department or the reasons for disapproval." In order for a permit applicant to have fair notice of the legal and technical basis for a permit conditions proposed by the Department, the reasons for establishing each permit condition, as well as the site-specific conditions warranting the permit conditions, must be identified when the Department publishes the draft permit. That is necessary for a permit applicant to evaluate each permit condition for purpose of presenting comments and deciding whether to request a hearing within the short time allowed.

Similarly, in 20.6.2.3109, Subsection A should require the Department to identify in the administrative record how it has met its burden of showing that a proposed permit condition meets the requirements of the Act. Similarly, in subsection B of that section, the added language requiring that the notice give reasons for the action, which NMMA supports, should go further to specifically require the reasons for the imposition of each permit condition. That is necessary not only to give notice to the applicant, but to provide a basis for review by the Commission in any appeal.

CONCLUSION

NMMA appreciates the opportunity to provide these comments and to participate in the rule development process and its consideration by the Commission. NMMA anticipates having further comments as the process moves forward and will provide those at the appropriate times.

Sincerely,

Dalva L. Moellenberg
Chairman, NMMA Environment Committee

October 17, 2016

VIA EMAIL TO: NMENV.GWQBrulerev@state.nm.us

Ms. Michelle Hunter, Bureau Chief
Ground Water Quality Bureau
New Mexico Environment Department
1190 Saint Francis Drive
P.O. Box 5469
Santa Fe, New Mexico 87502

Re: New Mexico Mining Association's Comments on September 19, 2016 Draft of Proposed Changes to 20.6.2 NMAC

Dear Ms. Hunter:

On behalf of the New Mexico Mining Association ("NMMA"), these comments are submitted regarding the changes that the Department is considering with regard to 20.6.2 NMAC. NMMA's members include companies in the base, precious and industrial minerals, fertilizer, and aggregates industries who explore for, mine and process various commodities such as copper, coal, potash, uranium, humate, and sand and gravel. These industries are major contributors to employment, tax payments, and other economic benefits to New Mexico, particularly in rural areas. A number of NMMA members hold ground water discharge permits, are seeking such permits, or are subject to the abatement regulations under 20.6.2 NMAC.

NMMA submitted comments on the previous draft rule changes by letter dated August 17, 2016 and incorporate those comments by reference, except as modified in this letter. As a general comment, copper mines are regulated by 20.6.7 NMAC in addition to 20.6.2 NMAC. Renumbering of 20.6.2 NMAC will affect cross-references to 20.6.2 NMAC contained in 20.6.7 NMAC. Consequently, the Bureau should consider how to change the cross-references in 20.6.7 NMAC as needed to reflect amendments to 20.6.2 NMAC that may be adopted by the Commission.

Discharge Permit Amendments

The September 19 draft contains a modified definition of "discharge permit amendment" and revised procedural requirements for an amendment in what is identified as 20.6.2.3106(H) in the latest draft. NMMA continues to support the concept for a "discharge permit amendment" as provided in the new draft rule language. NMMA notes that the definition of "discharge permit amendment" in the September 19, 2016 draft differs slightly from the prior proposal, but does not have comments on the revised language

Variance Petitions

NMMA continues to support the changes to the variance provision, 20.6.2.1210 NMAC, to eliminate the five-year limit on variances. NMMA has some comments on the revised language. First, the five-year interval period for summary update reports should be specified in the order granting a variance, and that should be stated that in the rule language. Also, the same new subsection states that the Secretary may file a petition with the Commission. Since the Secretary or his designee usually sits on the Commission, Department petitions to the Commission usually are submitted by the Bureau to avoid a conflict. Consequently, it may be better for the rule to provide that the Bureau submit the petition for a hearing. It also would be appropriate to reference the procedural rules that would govern such a hearing.

Changes and Additions to definition of "Toxic Pollutant" and 20.6.2.3103 NMAC

NMMA appreciates the changes made to the definition of "toxic pollutant" so that it covers only the specific listed pollutants. However, in the new draft, the Bureau has proposed a number of additions to the definition of "toxic pollutant" and changes and additions to 20.6.2.3103 NMAC, but has not yet provided its scientific, legal and policy justifications for the changes. NMMA likely will have future comments on and/or opposition to some of these proposed changes after the scientific basis and reasons are made available by the Bureau. For example, some of the changes proposed by the Bureau may not be appropriate for measurement or enforcement in ground water.

Fees

NMMA stands on its prior comments on the substantial increases that NMED has proposed to the fees.

Abatement Rule

With regard to the September 19 draft rule language, NMMA is very concerned with the new Subsection B proposed for 20.6.2.4103 NMAC, which adds new authority for NMED to require abatement of "subsurface water contaminants." The phrase "subsurface water contaminants" is ambiguous, vague, and could be extremely broad, considering the definitions in 20.6.2.7 NMAC, though this phrase could be interpreted as an entirely new and undefined phrase. Moreover, while the other provisions of the abatement rules designed to address "water pollution" are carefully tied to water quality standards in 20.6.2.3103 NMAC and 20.6.4 NMAC, the language of the proposed new subsection B does not appear to be tied to any published standard or criteria. Consequently, it is difficult to imagine exactly what substances could be subject to abatement if the new subsection B is adopted and what criteria could be considered and applied as a numeric, or perhaps non-numeric, abatement mandate. The reach of the language proposed for this new subsection is difficult to assess, and it is doubtful whether such an abatement provision is even authorized by the Water Quality Act. Consequently, NMMA requests that the Bureau not pursue this new subsection.

Conclusion

NMMA once again appreciates the opportunity to participate in this process and to provide these comments. NMMA reserves the right to submit additional or different comments if NMED makes further drafts available for public comment and discussion, and reserve the right to submit additional or different comments to the Water Quality Control Commission.

Sincerely,

New Mexico Mining Association

By ______________________________
Dalva L. Moellenberg
Chairman, Environmental Committee