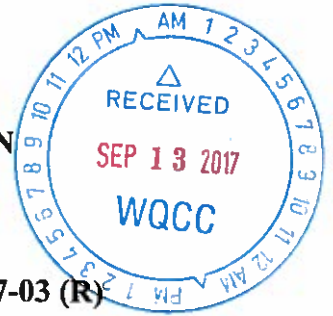


**STATE OF NEW MEXICO
BEFORE THE WATER QUALITY CONTROL COMMISSION**



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 RESPONSE TO
AMIGOS BRAVOS' AND GILA RESOURCES INFORMATION PROJECT'S
MOTION TO STAY ALL FILING DEADLINES AND HEARING**

Pursuant to the New Mexico Water Quality Control Commission's ("WQCC" or "Commission") regulations at 20.1.6.207.D NMAC, the New Mexico Environment Department (the "Department" or "NMED") submits this response in opposition to Amigos Bravos' and Gila Resources Information Project's (collectively "Amigos Bravos and GRIP") Motion to Stay All Filing Deadlines and Hearing (the "Motion"). The Motion is premised upon the erroneous assumption that there is a "discovery" process in rulemakings before the Commission, which there is not. The Motion also fails to state how Amigos Bravos and GRIP are prejudiced by not having access to 100% of the voluminous records they seek, and erroneously states that the Department intends to rely upon the records requested in their testimony. Finally, Amigos Bravos, GRIP, and their counsel have been aware of the Department's intention to revise all the areas for which they now request related records for over a year. Their lack of diligence in requesting these records until late July and August of 2017 should not be allowed to delay this rulemaking proceeding, which was set for hearing back in May, and now involves 13 other parties. Therefore, the Motion is without merit and should be denied for the reasons set forth below.

BACKGROUND

1. On May 20, 2016, the Department held a public meeting in Santa Fe, New Mexico, to present an overview of the amendments to 20.6.2 NMAC that the Department was considering for proposal to the Commission. Five additional public meetings throughout the state and online followed, along with two “public discussion drafts” of the proposed amendments being disseminated on June 16, 2016 and September 19, 2016. Those drafts included proposed changes relating to the definition of “discharge permit amendment”; allowance of variances for longer than five years; changes to the provisions for alternative abatement standards; and changes to the numerical standards in 20.6.2.3103 NMAC. Amigos Bravos and GRIP, as well as the New Mexico Environmental Law Center (“NMELC”), which at that time was not yet representing Amigos Bravos and GRIP, each submitted comments on both of the public discussion drafts.

2. The Department met with representatives from Amigos Bravos, GRIP, and NMELC on December 8, 2016, to discuss the proposed amendments.

3. On March 22, 2017, the Department filed its first Petition to Amend the Ground and Surface Water Protection Regulations (20.6.2 NMAC). After a procedural motion to dismiss, NMED withdrew this petition on April 19, 2017.

4. On May 1, 2017, the Department filed its second Petition to Amend the Ground and Surface Water Protection Regulations (20.6.2 NMAC) (the “Petition”). The proposed amendments were the same as those contained in the withdrawn petition.

5. On May 9, 2017, Amigos Bravos entered its appearance as a party in this matter. NMELC entered its appearance on May 12, 2017.

6. On May 26, 2017, the Hearing Officer sent the parties a Draft Procedural Order and Scheduling Order, requesting comment by May 30, 2017.

7. On May 31, 2017, after requesting and receiving additional time to comment, NMELC submitted comments on the Draft Procedural Order, requesting two revisions. NMELC's comments did not request any form of discovery or suggest a process or schedule for such discovery.

8. On June 14, 2017, NMELC filed its amended entry of appearance, representing Amigos Bravos and GRIP.

9. The Department met a second time with representatives from Amigos Bravos, GRIP, and NMELC, on July 6, 2017.

10. On July 25, 2017, NMELC submitted a request pursuant to the Inspection of Public Records Act ("IPRA"), NMSA 1978, §§ 14-2-1 to -12, seeking records related to various proceedings before the Environmental Improvement Board and the WQCC dating back as far as 1967. *See* Exhibit A to the Motion.

11. On August 7, 2017, NMELC submitted three more IPRA requests, seeking records related to various discharge permit amendments issued over the past ten years. *See* Exhibits B1 to 3 to the Motion.

12. On August 8, 2017, NMELC submitted a request pursuant to IPRA, seeking records related to various petitions for variances or alternative abatement standards. *See* Exhibit C to the Motion.

13. On August 29, 2017, Amigos Bravos and GRIP filed their Motion, seeking an immediate stay of all filing dates and the hearing date in this matter. Although the Motion was styled as "expedited", no justification for treating it as such was provided in the Motion itself, nor was there any request for an expedited briefing schedule.

14. On August 30, 2017, NMELC submitted a sixth request pursuant to IPRA, seeking records related to discharge permit amendments issued for a set of 12 specific discharge permits.

ARGUMENT

I. The Motion is Without Merit

The Motion is premised on an inaccurate and misleading assumption that parties are entitled to “discovery” in a rulemaking proceeding before the WQCC. Amigos Bravos and GRIP repeatedly refer to such a “discovery” process related to this rulemaking, yet cite no rule providing or governing “discovery” in a rulemaking proceeding. That is because no such rule or other authority exists. There is no provision for rulemaking “discovery” in the Water Quality Act, or in the procedural rules, 20.1.6 NMAC. Even House Bill 58 (passed earlier this year), which attempts to create baseline requirements for all rulemaking in New Mexico, does not contemplate or mention “discovery”, nor do the *1993 Guidelines for WQCC Regulation Hearings* (which were in effect until May 1, 2017). Rulemaking is a quasi-legislative process, in this case undertaken by a commission that is part of the executive branch. It is not a judicial proceeding, where the Rules of Civil Procedure on discovery would apply.

As outlined in the background section, Amigos Bravos and GRIP (and their counsel) have been aware of the Department’s intention to propose revisions to 20.6.2 NMAC for over a year, and have been active participants in the process. They fully participated in the formulation of the Procedural Order at the invitation of the Hearing Officer for all parties to provide comment in May, 2017, and at no time during that process did they request that a discovery process be added to the Procedural Order or to the Scheduling Order. The first time they brought up the term “discovery” was in the Motion, filed August 29, 2017.

As such, the (now six) requests for records are not “discovery” requests; they are public records requests made pursuant to IPRA. The Commission, and therefore the Hearing Officer, has no authority over such requests. While the Department has worked diligently to fulfill these

requests, and to date has produced the vast majority of the records requested, if Amigos Bravos and GRIP believe the Department is not complying with IPRA, their remedy is either to file a complaint with the Attorney General or in New Mexico District Court as provided by law. They should not be permitted further delay this proceeding by falsely claiming that these public records requests are part of some mandated “discovery” process.

Although not stated in the Motion, in a subsequent email to all parties, counsel for Amigos Bravos and GRIP stated that “[t]his is a matter of due process.” Should Amigos Bravos and GRIP seek to assert such a claim in the future, New Mexico courts have long held that there are no due process rights in a rulemaking; there are only the rights created by statute. *Livingston v. Ewing*, 1982-NMSC-110 ¶14 (reaffirmed in *Earthworks v. OCC*, 2016-NMCA-055 ¶34).

In sum, there is simply no legal basis for Amigos Bravos and GRIP’s assertion that they are entitled to discovery in this rulemaking proceeding. As that assertion forms the underlying basis of their Motion, the Motion is without merit and should be denied.

II. The Motion Makes no Showing as to How Amigos Bravos and GRIP are Prejudiced

Another false and misleading statement in the Motion is that “[t]he documents requested by Amigos Bravos and GRIP are those documents NMED are [sic] relying upon for its petition to amend 20.6.2 NMAC.” Motion at ¶12. At no time has NMED represented that it intends to rely upon the plethora of records requested in the six IPRA requests submitted by NMELC in July and August in formulating its direct testimony, or in otherwise making its case to the Commission regarding the proposed rule revisions. Further, even if NMED did intend to rely upon these documents, it would provide such documents as exhibits to its Notice of Intent to Provide Direct Testimony (“NOI”), due on September 11, 2017, pursuant to the Scheduling Order. Amigos

Bravos and GRIP, along with all parties, would then be able to review these documents in preparing their rebuttal testimony, currently due on October 13, 2017.

Amigos Bravos and GRIP therefore have made no showing as to how they are prejudiced by their alleged concerns with NMED's response to their six IPRA requests.

III. Amigos Bravos' and GRIP's Lack of Diligence Should Not Affect the Schedule Agreed To and Relied Upon By the Other Parties

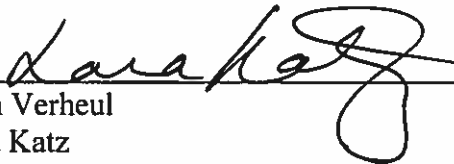
Even assuming that Amigos Bravos and GRIP somehow require all the thousands of pages of records they have requested pursuant to IPRA in order to prepare their technical testimony in this matter, that alleged burden is entirely of their own creation. They have known of the Department's intention to propose revisions to 20.6.2 NMAC for over a year. Certainly, no later than August of 2016, when Amigos Bravos, GRIP, and NMELC submitted their comments on the Department's first public discussion draft of the proposed revisions. From the outset, the Department has stated its intention to codify the practice of issuing discharge permit amendments, as well as its intention to amend the sections of 20.6.2 NMAC dealing with variances, alternative abatement standards, toxic pollutants, and numeric standards – all the topics which Amigos Bravos and GRIP now claim to need more information about. After being aware of these proposed rule changes for over a year and failing to request any form of discovery during the formulation of the Procedural Order, NMELC then waited until July 25, 2017, to submit their first IPRA request related to these topics, and a further two weeks for the next four requests. For Amigos Bravos and GRIP to now seek an indefinite delay in this proceeding based on their and their counsel's lack of diligence unfairly burdens the Department, which needs these revisions implemented in order to more effectively regulate and protect groundwater in the state, as well as the other 12 parties who have agreed to and relied upon the current Scheduling Order. Notably, no other party concurs in the Motion, and the majority oppose it.

CONCLUSION

For the foregoing reasons, Amigos Bravos' and GRIP's Motion to Stay All Filing Deadlines and Hearing should be denied.

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 WQCC Administrator and was served on the following via electronic mail on September 13, 2017:

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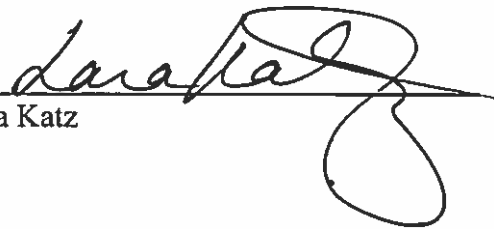
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