

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



In the Matter of:)
)
PROPOSED)
AMENDMENTS TO GROUND)
AND SURFACE WATER)
PROTECTION REGULATIONS,)
20.6.2 NMAC)

No. WQCC 17-03(R)

**NEW MEXICO MINING ASSOCIATION’S JOINDER IN NMED’S RESPONSE TO
AB/GRIP’S EXEPTIONS TO THE HEARING OFFICER’S REPORT**

On June 22, 2018, the Environment Department (“NMED”) filed a “Motion for Leave to Respond to Amigos Bravos/Gila Resources Information Project’s (AB/GRIP) Exceptions to the Hearing Officer’s Report filed April 22, 2018.” NMED’s Motion addressed a Memorandum filed by AB/GRIP on June 15, 2018, which argues that language offered by NMED and the New Mexico Mining Association (“NMMA”) for 20.6.2.4103.A(2) NMAC “violated the logical outgrowth doctrine.” NMED’s Motion contained arguments in response to AB/GRIP’s Memorandum. The Hearing Officer, by the Revised Order on AB/GRIP’s Motion and Response Deadlines filed on June 29, 2018, ruled that the AB/GRIP Memorandum and argument would be treated as a Motion, that NMED was granted leave to respond, that AB/GRIP is permitted a reply, and that other parties also may respond on the points raised in the AB/GRIP Memorandum.

In lieu of filing its own response to the AB/GRIP Memorandum and argument, the NMMA hereby joins in the arguments made NMED in its response filed on June 22nd, 2018. NMMA agrees with NMED’s positions and arguments that:

1. The Attorney General's "default" rules for rulemaking, including 1.24.25.14.C NMAC, do not apply to this proceeding, both because the Commission has its own procedural rules for rulemakings consistent with the State Rules Act and because the Attorney General's default rules were adopted after this proceeding was initiated.

2. There appears to be general agreement that the "logical outgrowth doctrine" applies and to the principles behind the "logical outgrowth doctrine" as expressed in the case law.

3. The language offered by both NMED and NMMA for 20.6.2.4103.A(2) is a logical outgrowth of the rule language proposed by NMED prior to the hearing. The offered language meets NMED's primary objective, which it announced publicly as part of its outreach before the formal rulemaking process, in its pre-hearing written filings and written testimony, and during the public hearing, of clarifying its authority to regulate vapor intrusion under the abatement rule.

4. The offered language also addresses NMMA's concerns and unintended consequences should the Commission adopt the broader language proposed by NMMA to regulate "subsurface water contaminants." These concerns were presented in NMMA's pre-hearing pleadings and through its expert testimony, as cited in NMED's response. As discussed in the cases cited by NMED, the language offered by NMED and NMMA is not "surprisingly distant from the proposed rule," but indeed reflects the evidence and discussion presented at the hearing by both NMED and NMMA.

5. AB/GRIP and the other parties were on notice of NMMA's pre-filed written expert testimony opposing NMED's proposed language on "subsurface water contaminants" and counsel for AB/GRIP was present at the hearing to hear the discussion regarding possible compromise language, as cited in NMED's June 22 response. AB/GRIP did not avail itself of

the opportunity to present evidence, to cross-examine any of the witnesses who testified on this point, or to raise any objection to the possibility that NMED, NMMA or other parties might offer alternative language for the Commission's consideration. Consequently, it is neither a violation of the "logical outgrowth doctrine" nor unfair to AB/GRIP or the other parties for the Commission to consider the alternative language offered by NMED and NMMA.

In conclusion, the Hearing Officer already has ruled that the language offered by NMED and NMMA will not be excluded from the Hearing Officer's Report and has included that language in her Report. NMMA urges the Commission to deny the alternative relief requested by AB/GRIP to re-issue the public notice and hold another hearing before deliberating on the proposed amendments to 20.6.2 NMAC. Because the language offered by NMED and NMMA for 20.6.2.4103.A(2) is a logical outgrowth of NMED's proposed rule and is consistent with the evidence offered by both NMED and NMMA during the hearing, the Commission may deliberate on and consider its adoption without the need for further public notice or opportunity to present additional evidence.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Joinder to the Motion to for Leave to Respond to AB/GRIP's Exceptions to the Hearing Officer's Report filed by NMED was served on July 3, 2018, via electronic mail to the following:

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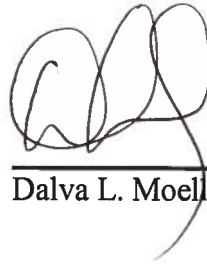
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