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 RESPONSE TO AMIGOS BRAVOS'S AND GILA RESOURCES INFORMATION PROJECT'S MOTION TO DISMISS IN PART THE NEW MEXICO ENVIRONMENT DEPARTMENT'S PETITION TO AMEND 20.6.2 NMAC

The New Mexico Mining Association ("NMMA") hereby responds in opposition to Amigos Bravos's and Gila Resources Information Project's ("Movants") Motion to Dismiss in Part the New Mexico Environment Department's ("Department") Petition to Amend 20.6.2 NMAC (the "Motion"). The Motion is without merit and should be denied.

A. Introduction

The Motion asks the Commission to dismiss two parts of the Department's Petition, first to remove the five-year time limit on the term of a variance, and second to add a definition of "discharge permit amendment" and to make a corresponding change to the definition of "discharge permit modification." Movants contend that these changes violate the Water Quality Act.

B. The Department's Proposal to Amend 20.6.2.1210 NMAC to Allow the Commission to Grant Variances for More than Five Years Does Not Violate the Water Quality Act.

Movants contend that the Water Quality Act limits the term of a variance to five years. The plain language of the Water Quality Act's authorization for variances, however, contains no such limit. The Commission's statutory authority to grant a variance is addressed in Section 74-

6-4.H of the Water Quality Act, the only provision of the Act that addresses variances, which states:

> **74-6-4. Duties and powers of commission**
>
> The commission:
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> . . . .
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> H. may grant an individual variance from any regulation of the commission whenever it is found that compliance with the regulation will impose an unreasonable burden upon any lawful business, occupation or activity. The commission may only grant a variance conditioned upon a person effecting a particular abatement of water pollution within a reasonable period of time. Any variance shall be granted for the period of time specified by the commission. The commission shall adopt regulations specifying the procedure under which variances may be sought, which regulations shall provide for the holding of a public hearing before any variance may be granted;

The primary indicator of the Legislature's intent is the text of the statute. *Tri-State Generation and Transmission Assoc., Inc. v. D'Antonio,* 2012-NMSC-039, ¶ 18. The plain language of Subsection H allows the Commission to determine the period of time for which the variance will be in effect. It does not contain a five-year limit. If the Legislature had intended to limit variances to five years, it would have said so. The Department's proposed language allowing the Commission to determine the length of a variance based upon the circumstances of a case and the evidence presented at a public hearing conforms to the plain language of the statute. The Commission's adoption of a rule consistent with the approach proposed by the Department is, therefore, consistent with the Water Quality Act.

Movants present two reasons why, despite the clear and plain language of the Water Quality Act, they believe that removal of a five-year limit on the term of a variance would violate the statute: (1) a variance could outlive the five-year term of a permit, and (2) a variance longer

than five years would eliminate the requirement for a public hearing. Neither of these reasons is valid. First, variances may not be associated with a permit, but can be associated with an abatement plan for a facility that does not hold a permit. For example, alternative abatement standards under the abatement rules, 20.6.2.4103.F NMAC must be considered and granted or denied under the variance provision, 20.6.2.1210 NMAC. Abatement plans can be required under the abatement rules when there is no discharge permit at all. *See* 20.6.2.4104 NMAC.

A variance may be considered to allow construction of a new or expanded facility that is subject to a discharge permit. Once a facility is constructed, it cannot be "unconstructed," which is why it makes sense to allow for a variance for the life of such a facility. A variance for the life of a facility provides regulatory certainty that authorization for construction of a facility will not be changed, as long as the permit holder complies with the conditions of the variance and permit. That said, once a facility is constructed in accordance with a variance and an associated discharge permit, its operation is subject to the conditions of a discharge permit (which, when a variance is issued, typically includes the conditions of the variance), as well as the applicable provisions of the Water Quality Act and the Commission's Regulations. Failure to comply has variance consequences, including action to terminate or revoke a discharge permit or to require an abatement plan. § 74-6-4.M NMSA 1978; 20.6.2.3109.E and .F NMAC. The Department's proposal tracks the process for termination or revocation of a permit.

The Commission also should consider that, under the recently adopted Copper Rule, 20.6.7 NMAC, as well as the Dairy Rule, 20.6.6 NMAC, variances have a different role than is contemplated by Movant's argument, which assumes that the purpose of a variance is to allow water pollution. The Copper Rule and Dairy Rule establish specific requirements, including engineering design requirements, for facilities that are subject to those rules. Consequently, under

the Copper Rule and Dairy Rule, variances may be used to modify the specific rule requirements. *See* 20.6.7.7(64) NMAC ("variance" means a commission order establishing requirements for a copper mine facility or portion of a copper mine facility that are different than the requirements in the copper mine rule); 20.6.6.18 NMAC (allowing for variances from the dairy rule, including a variance for the life of a facility, subject to five-year review and possible revocation). Variances from the specific requirements of the Copper Rule or the Dairy Rule may allow a different design, or perhaps different monitoring requirements, that would not necessarily have any adverse affect on ground water quality compared with the design specified in the Copper Rule or the Dairy Rule.

Movants' argument that the Department's proposal would eliminate an opportunity for public notice and a hearing also is without merit. Under the Department's proposal, a variance cannot be granted without meeting the statutory and rule requirements for a public hearing. One of the issues to be considered by the Commission in such a hearing will be the appropriate length of the variance as well as the conditions of the variance. Interested persons other than the applicant and the agency will have an opportunity to present their views and supporting information regarding both the appropriate length of the variance and its conditions at that hearing.

C. The Department's Proposed Amendments Formalizing the Limitations on Discharge Permit Amendments Does Not Violate the Water Quality Act.

Movants assert that the Department's proposed amendments to add a definition of "discharge permit amendment" and to modify the definition of "discharge permit modification" violate the Water Quality Act. Movants erroneously assert that Section 74-6-4(M) NMSA 1978 identifies the criteria for modification of a permit. Subsection M, however, addresses only the circumstances when a constituent agency may initiate a modification of a discharge permit due to

a violation or similar circumstances. That section does not address the circumstance when a permit holder seeks to change the conditions or a requirements of a permit.

If Movants were correct that Subsection M of Section 74-6-4 describes the exclusive criteria for "modification" of a permit, then it follows that the Water Quality Act would not allow for a permit holder to initiate any changes to a discharge permit. That is a nonsense interpretation that would stifle business and economic development by preventing businesses from expanding and change their operations to grow and to address changing economic conditions. Such an interpretation also is inconsistent with Subsection F of Section 74-6-4, which contemplates an "application" for modification of a permit, and Subsection K, which contemplates fees for permit modifications, neither of which would apply to an agency action by a constituent agency to modify a permit as specified in Subsection M.

Had the Legislature wished to clearly specify what it meant by a permit "modification," it could have defined that term. However, the Water Quality Act does not define a "permit modification." Consequently, the Water Quality Act leaves it to the Commission to define that term, consistent with its general authority to adopt regulations for discharge permits as provided by Sections 74-6-4 and 74-6-5 of the Water Quality Act.

Indeed, the Commission's existing regulations define "discharge permit amendment" in 20.6.2.7.P NMAC, which has been in place for many years. The existing definition most clearly does not include all possible types of changes to a permit. Had that been the Commission's intent it would not, for example, have limited "discharge permit amendments" to permit changes that result in "significant" increases in discharge volumes or qualities. Instead, it would have simply defined a "discharge permit modification" as any change to a discharge permit.

Movants appear to argue on pages 9 and 10 of the Motion that the Commission's existing definition conflicts with the Water Quality Act, particularly Subsection M as discussed above. The Commission's definition, however, addresses both the circumstances of a "modification" initiated by a constituent agency ("or as required by the secretary") and the circumstances of a modification initiated by a permit holder ("change in the location of the discharge, a significant increase in the quantity of the discharge, a significant change in the quality of the discharge"). Note that as discussed above, this definition, which has been in place for many years, does not at all address other types of changes to a permit that do not change the location, quantity, or quality of a discharge. As has been explained by the Department, it has treated such changes as permit "amendments," a term used simply to distinguish those permit changes from the Commission's limited definition of "discharge permit modifications" under 20.6.2.7.P NMAC.

The Commission's current definition of "discharge permit modification" appears to leave it to the constituent agency's discretion to decide when a proposed change to a permit would result in a "significant" change to the quantity or quality of a discharge. The current definition, therefore, leaves it to the agency to decide whether that permit change would qualify as a "discharge permit modification" that requires public notice and an opportunity to participate, payment of fees, and compliance with other procedural requirements that apply to a "modification." If the agency concludes that the proposed change to the permit is not a "discharge permit modification," then the agency can process the permit change without complying with those requirements. The Department has explained that such changes have, up to now, been processed as permit "amendments."

The Department's proposed rule amendments would constrain a constituent-agency's discretion to determine how to process a permit change by limiting "discharge permit

amendments" to minor permit changes that fall within certain criteria. Consequently, far from opening the door to allow permit changes without complying with the public notice and participation requirements, the Department's proposal constrains a constituent-agency's discretion as well as establishes new public notice requirements for "discharge permit amendments." Indeed, as it will explain at the hearing, the NMMA is not in agreement with all of the limitations for "discharge permit amendments" proposed by the Department. Instead, the NMMA has proposed that the Commission use a definition of "discharge permit amendment" consistent with the definition it adopted under the Copper Rule in 20.6.7.7.B(19) NMAC, which establishes a precedent for the Commission to define that term. That said, because Movants' arguments are without merit due to their erroneous and flawed interpretation of the Water Quality Act, the Commission should proceed to hearing to consider the merits of the Department's Petition as well as the other parties' positions.

WHEREFORE, NMMA respectfully requests that the Water Quality Control Commission deny the Motion and proceed to a hearing on the Department's Petition with respect to the issues raised in the Motion.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the **New Mexico Mining Association's Response to Amigos Bravos's and Gila Resources Information Project's Motion to Dismiss in Part the New Mexico Environment Department's Petition to Amend 20.6.2** was served on October 16, 2017, via electronic mail to the following:

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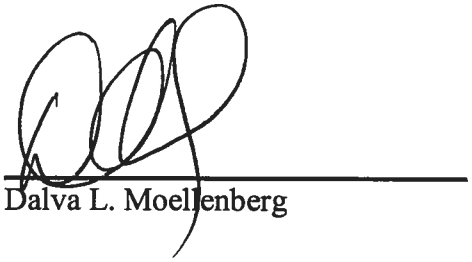

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