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**

NEW MEXICO MUNICIPAL LEAGUE ENVIRONMENTAL QUALITY ASSOCIATION'S REBUTTAL TECHNICAL TESTIMONY

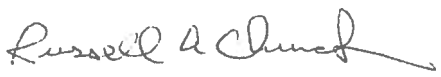
The New Mexico Municipal League Environmental Quality Association (NMML) hereby submits, pursuant to 20.1.6.202.B New Mexico Administrative Code (NMAC) and the Revised Procedural Order dated October 2, 2017 this rebuttal technical testimony in support of the NMML's comments (proposed revisions) to the New Mexico Environment Department's (NMED) petition to amend Ground and Surface Water Protection Regulations (20.6.2. NMAC).

The rebuttal technical testimony of the following witness is filed in complete and narrative form in the attached exhibits to this filing.

Exhibit Designation	**Description**
Exhibit NMML RT-1	Rebuttal Technical Testimony of Alex Puglisi
Exhibit NMML RT-2	Rebuttal Technical Testimony of John M. Stomp, P.E.

NMML reserves the right to call additional witnesses or introduce additional exhibits in response to technical testimony and witnesses presented at the hearing.

Respectfully submitted,
New Mexico Municipal League
Environmental Quality Association Subsection



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CERTIFICATE OF SERVICE

I hereby certify that on October 27, 2017, a true and correct copy of the foregoing pleading was hand delivered to the following:

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EXHIBIT NMML RT1

REBUTTAL TECHNICAL TESTIMONY OF ALEX PUGLISI

I. INTRODUCTION

My name is Alex Puglisi. I am the Source of Supply Manager and Compliance Officer for the City of Santa Fe and the President-Elect of the New Mexico Municipal League Environmental Quality Association (NMML). I present this written rebuttal testimony on behalf of the NMML which includes one correction to my technical testimony.

II. 20.6.2.7.T (currently 20.6.2.7.WW) Definition of "toxic pollutant"

The Los Alamos National Security, LLC (LANS) proposed adding the Chemical Abstract Service Registry Number (CAS Number) for each pollutant listed in 20.6.7.WW and 20.6.2.3.3103 and those proposed to be listed at 20.6.2.7.T.2 NMAC as an "unambiguous way to identify a chemical substance or molecular structure when there are many possible alternative systematic, generic, proprietary or trivial names for that substance." (LANS Direct Testimony of Robert S. Beers, page 4, lines 10-12) The NMML supports the addition of the CAS numbers in these sections.

New Mexico Environment Department (NMED) proposed to add numerous pollutants to the list of "toxic pollutants". (NMED Direct Testimony NMED Exhibit 5 – Written Direct Testimony of Dennis McQuillan (NMED DT Exhibit 5)). NMED's primary basis for adding the pollutants is whether the pollutant was found in groundwater in New Mexico or posing a credible threat of polluting groundwater in New Mexico at concentrations of concern to human health." (NMED DT Exhibit 5, p. 4, lines 4-6). However, NMED was not consistent with its approach for adding pollutants to the list. For some, the pollutants were detected in groundwater, whereas for others, the pollutants had not been detected yet. For the pollutants that NMED is proposing to add to the definition of "toxic pollutant" without a numeric standard in 20.6.2.3103, NMED did not provide evidence that the pollutants were at "concentrations of concern to human health." The method for translating data into permit requirements using the narrative standard provision is not specified. This is an example of how NMED often regulates by guidance and not rule which has been a longstanding issue raised by the NMML. The approach provides NMED flexibility, but results in uncertainty for the regulated community. The rule should not include pollutants that have not been detected in groundwater in New Mexico. Even NMED chose not to

include "other organic contaminants for which EPA has set drinking water standards" to the WQCC groundwater human-health standards at this time because those contaminants "have not been confirmed to be … at concentrations of human health concern in New Mexico." (NMED DT Exhibit 5, p. 32, lines 11-15) For the pollutants that have been detected, NMED has not demonstrated that those levels are at levels of concern, and therefore, the addition to the definition of "toxic pollutants" is premature.

III. 20.6.2.3103 Standards for Ground Water of 10,000 mg/L TDS Concentration or Less.

In the direct testimony (NMED DT Exhibit 5), NMED provided their explanation for inclusion of new pollutants and corresponding standards as well as revisions to existing standards. NMED provided testimony for retaining the numerical standards for chromium, fluoride and total xylenes at the current levels. (NMED DT Exhibit 5, page 33, line 6 through page 35 line 16).

Based on the explanation provided by the Department, the NMML still supports adoption of standards for all pollutants regulated by SDWA Primary Drinking Water regulations matching the MCLs with the exception of the chromium standard which should remain at 0.05 mg/L. Thus, the NMML agrees with the Department's reasoning for retaining the current standard of 0.05 mg/l for Chromium. EPA is in the process of considering a revision to their MCL for Total Chromium and possibly the adoption of a specific standard for hexavalent chromium. Recent monitoring conducted by municipal water supplies under the Unregulated Contaminant Monitoring Rule (UCMR) has indicated concern with the prevalence of these contaminants nationwide. Some states, such as California, have already looked into adoption of their own standard for hexavalent chromium for the protection of public health These standards are much more stringent than NMED's or EPA's current standards for "Total Chromium", which measures the total concentrations of both trivalent and hexavalent Chromium in water.

However, the NMML disagrees with NMED's reasoning for retaining the Fluoride standard at 1.6 mg/l:

"Since the existing WQCC standard of 1.6 mg/L is approximately equal to EPA's dental fluorosis standard of 2 mg/L, and also is protective against skeletal 1 fluorosis, NMED does not propose to amend the WQCC groundwater standard for fluoride at this time."

As stated above, NMED's own testimony seems to suggest that NMED's primary standard for groundwater protection should be based on an EPA "Secondary Contaminant Level" (SCL) but

then NMED does not propose that same SCL for adoption. Furthermore, a fluoride concentration of 1.6 mg/l is vastly different from EPA' SCL of 2.0 mg/l, especially since the recommended level of fluoridation for the purposes of dental protection in public water supplies is only 0.7 mg/l. There is not "approximate equivalence" between concentrations of 1.6 mg/l and 2.0 mg/l with respect to fluoride, as maintained by NMED in its testimony. The difference between NMED's current standard and EPA's secondary contaminant level is 0.4 mg/l. At a minimum, NMED should be proposing a revised standard of 2.0 mg/l to be consistent with their own argument that this standard is necessary to prevent dental fluorosis, as maintained by the EPA. However, the NMML also recognizes the fact that naturally occurring fluoride exist at higher levels in the water used by drinking water systems in this and other states. While secondary contaminant levels are useful in the protection of public health where possible, they should not form the basis of a groundwater standard nor do they form the basis for EPA to prevent the use of water sources containing contaminant concentrations above a SCL for drinking water purposes under the Safe Drinking Water Act. NMED's should utilize the current EPA MCL for fluoride.

NMML takes the position that NMED's arguments with respect to their reluctance to change the groundwater standard to the EPA MCL for "Total Xylenes" are not convincing. The Department states that NMED is comfortable in proposing to slightly adjust the WQCC groundwater standards to be numerically equivalent to the EPA MCLs for toluene and ethylbenzene. NMED would not be comfortable, however, with raising the total xylene standard from 0.62 to 10 mg/L, as that would be contrary to what Dr. Zalma testified to when the WQCC standards were set. NMED offers no toxicological reasons for either its comfort in raising some standards, or its discomfort with raising others to the levels set by EPA in their MCLs under the Safe Drinking Water Act. The fact that there is little toxicological basis for NMED's reluctance to review their position is borne out by the Department's statement that, "Based on Dr. Zalma's testimony regarding alkylbenzenes, and in light of the fact that NMED presently has not hired a medical/toxicological expert, NMED is not proposing to amend the WQCC groundwater standard for total xylenes at this time". In the absence of toxicological evidence, the NMML encourages NMED to be consistent in its adoption or non-adoption of MCLs as groundwater standards.

In the corrected direct testimony of the United States Air Force, Samuel L. Brock brings up issues with NMED's narrative standard for toxic pollutants at Section 20.6.2.3103(A)(2)

NMAC. NMED ties the standard for Toxic Pollutant to "A concentration shown by scientific information currently available to the public". The NMML concurs with the positions taken by the Air Force with respect to this issue, as we previously stated in our original comment submittal and witness testimony for this proceeding. NMML further agrees that this NMED's language is vague and will allow future standards to be based on scientific information that is not defensible. NMML also agrees that all transparency and peer review should be used in the formulation of groundwater standards.

This concludes my rebuttal testimony.

REBUTTAL TECHNICAL TESTIMONY OF JOHN M STOMP, III

I. INTRODUCTION

My name is John M. Stomp, III. I am the Chief Operating Officer for the Albuquerque Bernalillo County Water Utility Authority and member of the New Mexico Municipal League Environmental Quality Association (NMML). I present this written rebuttal testimony on behalf of the NMML.

II. 20.6.2.3105 EXEMPTIONS FROM DISCHARGE PERMIT REQUIREMENT and 20.6.2.5006 DISCHARGE PERMIT REQUIREMENTS FOR CLASS V INJECTION WELLS

The New Mexico Environment Department (NMED) testimony states that changes to Sections 20.6.2.3105 and 5006 New Mexico Administrative Code (NMAC) were necessary because: "The federal UIC regulations, for which New Mexico has primacy, does not exempt aquifers designated as Underground Sources of Drinking Water. ASR projects, by definition, inject into such aquifers, and thus, those projects cannot be exempt from the UIC regulations as a matter of federal law." (Direct Testimony for Michelle Hunter (10th page, lines 11 -17)). The NMED testimony is misleading.

The Underground Injection Control regulations are specified at 40 CFR 144. The rules pertaining to injection through Class V wells are at: 40 CFR 144.24, 25, 26, 81 and 84. These provisions provide for a "permit by rule" or "authorization by rule" approach to regulation of injection into Class V wells if certain conditions are met.[1] [2]

The federal regulations at 40 CFR 144.25(a) specify the following:

"The Director may require the owner or operator of any Class....V injection well which is authorized by rule under this subpart to apply for and obtain an individual or area UIC permit. Cases where individual or area UIC permits **may** be required include:

(1) The injection well is not in compliance with any requirement of the rule;

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[1] "A Class V injection well is authorized by rule, subject to the conditions in §144.84." 40 CFR 144.24(a).

[2] "With certain exceptions listed in paragraph (b) of this section, your Class V injection activity is "authorized by rule," meaning you have to comply with all the requirements of this subpart and the rest of the UIC Program but you don't have to get an individual permit." 40 CFR 144.84(a)

Note: Any underground injection which violates any authorization by rule is subject to appropriate enforcement action.

(2) The injection well is not or no longer is within the category of wells and types of well operations authorized in the rule;

(3) The protection of USDWs requires that the injection operation be regulated by requirements, such as for corrective action, monitoring and reporting, or operation, which are not contained in the rule…." (emphasis added)

40 CFR 144.25(a)(3) does allow the primacy authority to require a permit if "the protection of USDWs[3] requires that the injection operation be regulated by….corrective action, monitoring and reporting, or operation, which are not contained in the rule."

In addition, 40 CFR 144.1(g) describes the scope of the rule:

"Scope of the permit or rule requirement. The UIC permit program regulates underground injection by six classes of wells (see definition of "well injection," §144.3). The six classes of wells are set forth in §144.6. All owners or operators of these injection wells must be authorized either by permit or rule by the Director. In carrying out the mandate of the SDWA, this subpart provides that no injection shall be authorized by permit or rule if it results in the movement of fluid containing any contaminant into underground sources of drinking water (USDWs—see §144.3 for definition), if the presence of that contaminant may cause a violation of any primary drinking water regulation under 40 CFR part 141 or may adversely affect the health of persons (§144.12)…."

This scope requires a permit if the presence of a contaminant may cause a violation of a primary drinking water regulation or adversely affect the health of persons. The NMML seeks to retain the exemption from permit for Aquifer Storage and Recovery (ASR) projects which use drinking water as the source. The source water meets all the primary drinking water regulations as it is the finished product from the drinking water treatment plant.

The federal regulations do not handcuff NMED by requiring a permit for ASR projects. Instead, the regulations allow a permit by rule approach for ASR projects that use drinking water

[3] USDWs = Underground Sources of Drinking Water

as the source. Aquifers will be protected. The source water is regulated by the Safe Drinking Water Act program and meets the criteria in 40 CFR 144.1(g), therefore another layer of regulation is not required nor necessary. Duplicative permitting was also part of the technical testimony of Scott Clark of the United States Air Force, Department of Defense. This portion of the Air Force testimony is supported by the NMML.

The primary reason to protect Ground Water is so that it may be used as a potential drinking water source in the future. By requiring a discharge permit for adding drinking water to the aquifer, NMED takes the position that water that is safe to drink is not safe to put into the aquifer, and the reasoning is that one day we may need to take the water out of the aquifer in order to drink it. If NMED is concerned that the Safe Drinking Water Act is not protective of public health or the aquifer, then they should request to make amendments to the New Mexico Drinking Water Regulations and not attempt to use the Ground Water Regulations to add a new regulatory framework.

The NMML stresses the common sense and protective approach for exempting ASR projects when the source is drinking water from Ground Water Discharge permit requirements and encourages the Commission to adopt the NMML version of changes to 20.6.2.3105 and 5006 NMAC.

This concludes my rebuttal testimony.