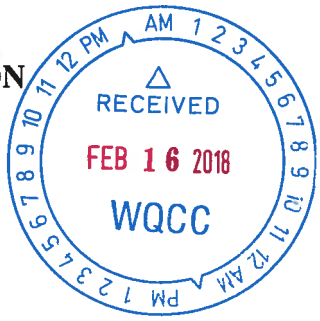
STATE OF NEW MEXICO
BEFORE THE WATER QUALITY CONTROL COMMISSION



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'S PROPOSED FINDING OF FACT AND CONCLUSIONS OF LAW, AND CLOSING ARGUMENT

INTRODUCTION

This matter came before the New Mexico Water Quality Control Commission ("WQCC" or "Commission") upon a petition filed by the Ground Water Quality Bureau ("GWQB") of the New Mexico Environment Department ("NMED" or "Department") proposing amendments to the State of New Mexico Ground and Surface Water Protection Rules, which are codified at Title 20, Chapter 6, Part 2 of the New Mexico Administrative Code (20.6.2 NMAC). NMED's petition to amend the Ground and Surface Water Protection Rules was filed with the Administrator on May 1, 2017. *See* Docket No. 1. NMED submitted the following additional documents:

1. Notice of Amended Petition, filed on July 27, 2017 (Docket No. 31).
2. Notice of Errata, filed on August 7, 2017 (Docket No. 37).
3. Joint Stipulation Regarding Proposed Changes to 20.6.2 NMAC, filed on September 6, 2017 (Docket No. 46).
4. Notice of Withdrawal of the NMED's Proposed Definition of Discharge Permit Amendment and Related Changes to 20.6.2 NMAC, filed on November 7, 2017 (Docket No. 88).

5. Amended Notice of Withdrawal of the NMED's Proposed Definition of Discharge Permit Amendment and Related Changes to 20.6.2 NMAC, filed on November 9, 2017 (Docket No. 89).

On May 9, 2017, the Commission voted to hold a hearing and designated Erin Anderson as the Hearing Officer. *See* Docket No. 4. The hearing on this matter began on November 14, 2017, in Santa Fe, New Mexico and concluded on November 17, 2017.

The New Mexico Municipal League Environmental Quality Association ("NMML-EQA") appeared and presented testimony through its witnesses Alex Puglisi (written testimony was provided, as witness was unavailable due to a death in the family)[1] and Mark Kelly. *See* Docket Nos. 21, 55, 83; Tr. Vol. 3 at 537-38; 754-785. The NMML-EQA is an association representing 104 municipalities across the State of New Mexico. These municipalities are charged with providing a safe water supply to their customers and are regulated by the New Mexico State Engineer, the New Mexico Environment Department, and the U.S. EPA which administers the Safe Drinking Water Act ("SDWA") and the NPDES Discharge System under the Clean Water Act.

The NMML-EQA presented testimony from Alex Puglisi in opposition to proposed changes to Regulations 20.6.2.7.T, 20.6.2.3103, and 20.6.2.4103. These Regulations pertain to toxic pollutants. Mr. Puglisi is the Public Utilities Department, Interim Source of Supply Manager and Environmental Compliance Officer for the City of Santa Fe. Mr. Puglisi's testimony established that the proposed changes to the three toxic pollutant Regulations had not been justified by NMED as required by NMSA 1978, § 72-6-4 (E)(1)(2)(3)(5) and (7). The proposed changes are unnecessary to protect the public health and accordingly conflict with NMSA 1978, § 74-6-

[1] Mr. Puglisi's written testimony is found at Docket No. 55 (Exhibit No. 4).

4(E)(1). Moreover, the proposed changes are not technically practical as required by NMSA 1978, § 72-6-4(E)(3), and should only be made if an analytic method is widely available as required by NMSA 1978, § 72-6-4 (E)(5). The proposed changes should not be adopted by the WQCC.

The NMML-EQA presented testimony from Mark Kelly in opposition to proposed changes to Regulations 20.6.2.3105 entitled "Exemptions from Discharge Permit Requirement," and 20.6.2.5006 entitled "Discharge Permit Requirements for Class V Injection Wells". Mr. Kelly is the Compliance Division Manager for the Albuquerque Bernalillo County Water Utility Authority ("Water Authority").

Mr. Kelly's testimony concerned proposed changes to Regulations 20.6.2.3105 and 20.6.2.5006 with respect to aquifer storage and recovery.[2] Since enactment of the New Mexico Groundwater Storage and Recovery Act in 1999, the Water Authority has undertaken two aquifer storage and recovery ("ASR") projects (referred to as "USR" – underground storage and recovery projects in the Regulations). The first was a passive infiltration ASR project at Bear Canyon, utilizing imported San Juan-Chama Project water. The second is a Large-Scale Demonstration Project injecting imported San Juan-Chama Project water into the aquifer through injection wells and subsequently diverting it through extraction wells.[3] Other cities are interested in ASR programs as well.

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[2] Ground water storage and recovery is provided by the Ground Water Storage and Recovery Act at NMSA 1978, § 72-5A-1 (1999) *et seq.* In enacting the Ground Water Storage and Recovery Act, the New Mexico Legislature found that the "conjunctive use and administration of both surface and ground waters are essential to the effective and efficient use of the state's limited water supplies…". *See* NMSA 1978, § 72-5A-2.A. Among the many benefits found by the Legislature were that ground water storage and recovery may "reduce the rate at ground water levels will decline and may prevent overstressing or dewatering aquifer systems…". *See* NMSA 1978, § 72-5A-2.B.(2).

[3] San Juan-Chama Project water is "imported" water from the Colorado River system, not "native" Rio Grande water. The San Juan-Chama Project diverts water from upper tributaries of the San Juan River, a tributary of the Colorado River, for importation and use in the Rio Grande Basin in New Mexico for municipal, industrial, domestic, and agricultural purposes. *See* San Juan Chama Project, Initial Stage, Act of June 13, 1962, P.L. 87-483. The Water Authority has a perpetual contract for the consumptive use of 48,200 acre-feet of San Juan-Chama Project water annually. San Juan-Chama Project water is stored in Heron Reservoir and contractors take delivery of the water at the Reservoir's outlet. After taking delivery, the Water Authority's water is conveyed downstream and stored in Abiquiu

The two Regulations at issue, particularly 20.6.2.3105, provide an exemption for a permitting process with NMED. These exemptions should be retained. If not retained, the amendments proposed by the NMML-EQA should be adopted. *See* Exhibit No. 1. The proposals put forth by NMED are unnecessary and burden the permitting process in ways that are expensive, and potentially threatening to New Mexico's use of imported San Juan-Chama water. They do not promote the public health, are not in the public interest, and accordingly conflict with NMSA 1978, § 72-6-4(E)(2). They should not be adopted. Alternatively, the modifications proposed by Mr. Kelly in Exhibit No. 1 should be adopted.

After public notice and public comment, the Commission heard evidence and asked the parties to submit written closing arguments and findings of fact and conclusions of law. In accordance with the Procedural Order and the Commission's and Hearing Officer's directions, the NMML-EQA submits the following proposed Findings of Fact, Conclusions of Law, and argument.

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

PROPOSED FINDINGS OF FACT

1. The New Mexico Municipal League is an association representing 104 municipalities across the State of New Mexico. Its constituent members are regulated entities as well as affected stakeholders seeking protection of their water supplies and environment. Docket No. 55, NMML-4, p.1, lns. 9-11.

Reservoir for release and use by the Water Authority.

2. NMED proposes changes to 20.6.2.7.T (currently 20.6.2.7) – the definition of "toxic pollutant," by regrouping the pollutants and adding about a dozen pollutants to the list of toxic pollutants. Docket No. 55, NMML-4, p.1, lns. 18-20.
3. All but two of the proposed additions at 20.6.2.7.T are either regulated or in the regulation development stage under the Safe Drinking Water Act ("SDWA") or the Clean Water Act. Docket No. 55, NMML-4, p.1, lns. 20-22.
4. The remaining two pollutants, prometon (an herbicide) and thiolane 1,1 dioxide (sulfolane), are not regulated. Docket No. 55, NMML-4, p.1, lns. 22-23. NMED failed to demonstrate that these pollutants are widespread in New Mexico, or present in sufficient concentrations of concern, in order to justify their regulation.
5. NMED failed to provide adequate justification for the addition of these pollutants to the list of toxic pollutants present at 20.6.2.7.T and NMED's argument for regulation was not supported by other petitioners.
6. NMED failed to provide adequate justification for the addition of promethos and thiolane to the list of toxic pollutants. The SDWA (Title 42, Section 300g-1(b)(1)(A) has criteria for determining whether these pollutants should be regulated in order to protect drinking water sources and public heath as follows. NMED failed to meet this criteria.
    - The contaminant may have an adverse effect on the health of persons;
    - The contaminant is known to occur or there is substantial likelihood the contaminant will occur in public water systems with a frequency and at levels of public health concern;

- In the sole judgment of the Administrator, regulation of the contaminant presents a meaningful opportunity for health risk reductions for persons served by public water systems.

Docket No. 55, NMML-4, p.1-2, lns. 38-42.

7. One other important factor is whether an analytic method is widely available. Pollutants should only be added to the list if an approved analytical method is widely available. Docket No. 55, NMML-4, p.2, lns. 44-52.
8. NMED proposes to move the narrative standard for toxic pollutants to 20.6.2.3103 NMAC. The proposal to move the language to a new subsection for "Standards for Toxic Pollutants", without reference to the current definition, has the potential to expand the regulatory authority beyond the list within the definition. In addition, the approach for translating or adopting results of scientific studies into standards should be codified so that there is a consistent method for translating that data into standards. If this proposal is retained, this provision should only be applied to the list of pollutants contained within the definition of "toxic pollutants".
9. NMED proposes to revise numeric standards to 20.6.2.3103 NMAC – Standards for Ground Water of 10,000 mg/L TDS or less to match federal SDWA program Maximum Contaminant Levels (MCLs). Docket No. 55, NMML-4, p.2, lns. 54-56.
10. NMED's proposal is not consistent with changing existing standards to match SDWA MCLs. Moreover, the U.S. Environmental Protection Agency is considering the adoption of drinking water standards, especially with regard to total chromium and/or hexavalent chromium, that are much stricter. Docket No. 55, NMML-4, pp.2-3, lns.72-82.

11. NMED's note at the end of 20.6.2.3103 is insufficient to define the applicability of the new standards to past, current or future discharges. Language regarding the clarification of the applicability of new standards to past and current discharges, with approved discharge and/or abatement plans and application of new administrative standards with approved abatement plans should be included within 20.6.2.3103 and 20.6.2.4103, not respectively. *See* Lines 75-106, Exhibit NMML-6. The applicability of any newly adopted standards should be included within the rule itself, and not a note. Alternatively, if the WQCC chooses to retain the original Regulations, it should make no changes.

12. NMED proposes changes to Regulations 20.6.2.3105 entitled "Exemptions from Discharge Permit Requirement," and 20.6.2.5006 entitled "Discharge Permit Requirements for Class V Injection Wells."

13. The Water Authority is a major player in protecting public health in New Mexico by providing drinking water to more than 675,000 customers. Docket No. 55, NMML-5, p.1.

14. The City of Albuquerque sponsored the Groundwater Storage and Recovery Act which was passed unanimously by the State Legislature and signed by the Governor in 1999. Docket No. 55, NMML-5, p.1.

15. Groundwater storage and recovery is a key strategy for creating a sustainable water supply for the future for all of New Mexico. Docket No. 55, N MML-5, p.1.

16. In 1997, the Water Authority adopted a comprehensive water resources plan entitled the Water Resources Management Strategy ("Strategy") to transition from sole reliance on the aquifer to renewable supplies included imported San Juan-Chama Project water. Docket No. 55, NMML-5, p.1.

17. One of the key elements on the Strategy was the implement Aquifer Storage and Recovery Projects in compliance with the Act. Docket No. 55, NMML-5, p.1.

18. The Water Authority's Strategy to implement ASR is to inject treated San Juan-Chama water into the aquifer during the winter months when demands are lower, and then to divert the water to supplement supplies in summer months, or during droughts, or other times when supplies are limited. Docket No. 55, NMML-5, pp.1-2.

19. Aquifer Storage and Recovery is a key technology for addressing the strain climate change will put on water resources in the Southwest. Docket No. 55, NMML-5, p.2.

20. To date, the Water Authority has spent approximately $2.0 million on the Bear Canyon Recharge project (demonstration and full-scale, 2006 to present) and $1.4 million on the Large-Scale Recharge Demonstration (feasibility, design, permitting, and well construction; 2009 to present), or $3.4 million total. Docket No. 55, NMML-5, p.2.

21. The Water Authority has obtained USR demonstration and full-scale permits for Bear Canyon and a USR demonstration permit for the DWTP project from the OSE. Docket No. 55, NMML-5, p.2.

22. The Water Authority was informed twice by NMED that a discharge permit was not required for the Large-Scale Demonstration Project on September 24, 2009 and December 20, 2012. Tr. at 766.

23. NMED's proposed changes to Regulation 20.6.2.3105 NMAC are unnecessary when the source water is drinking water and the chemical compatibility of the aquifer is compatible with the chemistry of the aquifer. Tr. at 762.

24. NMED's proposed changes to Regulation 20.6.2.3105.A NMAC are unnecessary when the source water is drinking water because there is minimal or no risk of contamination. Tr. at 764.

25. The compatibility of injected drinking water can be addressed either through authorization-by-rule or another approach that does not require a groundwater discharge permit because the treatment requirements do not justify the burden of permitting. Tr. at 764.

26. The NMML-EQA proposes changes to Section 20.6.2.3105 NMAC because when the source water is drinking water, it is already highly regulated by the Safe Drinking Water Act. For the ASR projects, the owner/operator would only need to verify that the source water is compatible with the ground water. Without this exemption, the additional costs for permitting and monitoring are significant disincentives. Docket No. 55, NMML-5, p.3.

27. The NMML-EQA proposes changes to Section 20.6.2.5006 NMAC to narrow the scope of monitoring requirements to only contaminants contained in the source water. Because these projects are drinking water, the stringent requirements are already met. Docket No. 55, NMML-5, p.3.

28. NMED's proposed changes to Regulation 20.6.2.5006 NMAC are unnecessary because underground sources of drinking water only need to be protected from constituents that violate the primary drinking water regulations and that is unnecessary when the source water is drinking water. Tr. at 768-69.

29. NMED should make no changes to the above regulations. Alternatively, it should utilize the modifications proposed in Exhibit 1.

30. Rather than requiring discharge permits, NMED can utilize general permits or "permit by-Rule" under its primacy to administer the UIC program in a manner that is less burdensome to applications and which satisfy NMED's goals. Tr. at 747, 764.

PROPOSED CONCLUSIONS OF LAW

1. The proposal to move the language for "standards for Toxic Pollutants" to a new subsection in 20.6.2.3103 NMAC for "Standards for Toxic Pollutants", without reference to the current definition, has the potential to expand the authority of this Section beyond the list within the definition. In addition, the approach for translating or adopting results of scientific studies into standards should be codified so that there is a consistent method for translating that data into standards. If this proposal is retained, this provision should only be applied to the list of pollutants contained within the definition of "toxic pollutants".
2. NMED's proposed changes to Regulations 20.6.2.7.T, 20.6.2.3103, and 20.6.2.3104 have not been justified by NMED as required by NMSA 1978, § 74-6-4(E)(1)(2)(3)(5) and (7) and should not be adopted by the WQCC.
3. NMED's proposed changes to proposed Regulations 20.6.2.7.T, 20.6.2.3103, and 20.6.2.3104 are unnecessary to protect the public health and conflict with NMSA 1978, § 74-6-4(E)(1) and should not be adopted by the WQCC.
4. NMED's proposed changes to Regulations 20.6.2.7.T, 20.6.2.3103, and 20.6.2.3104 are overly burdensome to permittees and in certain cases cannot be complied with contrary to NMSA 1978, § 74-6-4(E)(2) and should not be adopted by the WQCC.

5. NMED's proposed changes to Regulations 20.6.2.7.T, 20.6.2.3103, and 20.6.2.3104 conflict with federal standards under the SDWA contrary to NMSA 1978, § 74-6-4(E)(7) and should not be adopted by the WQCC.
6. NMED's proposed changes to Regulations 20.6.2.7.T, 20.6.2.3103, and 20.6.2.3104 are not supported by substantial evidence and should not be adopted by the WQCC.
7. NMED has failed to sustain its burden of proof in proposing changes to Regulations 20.6.2.T, 20.6.2.3103, and 20.6.2.3104 and the should not be adopted by the WQCC. Alternatively, the WQCC should adopt the proposals in Exhibit No. 1, attached hereto.
8. NMED's proposed changes to Regulation 20.6.2.3105 do not address a "reduction in the concentration of water contaminants" for water treated to drinking water standards as required by NMSA 1978, 74-6-4(E) and should not be adopted by the WQCC.
9. NMED's proposed changes to Regulation 20.6.2.5006 do not address a "reduction in the concentration of water contaminants" for water treated to drinking water standards as required by NMSA 1978, 74-6-4(E) and should not be adopted by the WQCC.
10. A discharge permit for the Full Scale Demonstration Project utilizing San Juan-Chama Project water was waived by NMED. At a minimum, there should be no retroactive regulation applying to San Juan-Chama Project water as proposed by NMED. No evidence for requiring discharge plans was provided by NMED.
11. NMED's proposed changes to Regulations 20.6.2.3105 and 20.6.2.5016 do not address matters involving a "degree of injury to or interference with health, welfare, environment and property" as required by NMSA 1978, § 72-6-4 (E)(1).
12. NMED's proposed changes to proposed Regulations 20.6.2.3105 and 20.6.2.5016 jeopardize the public interest by restricting New Mexico's use of imported San Juan-

Chama water, and native water flows, in ASR programs, are in conflict with NMSA 1978, § 74-6-4 (E)(2) and should not be adopted by the WQCC.

13. NMED's proposed changes to Regulations 20.6.2.3105 and 20.6.2.5016 are in conflict with property rights and "accustomed uses" of San Juan-Chama Project water contrary to NMSA 1978, § 72-6-4 (E)(2) and should not be adopted by the WQCC.
14. NMED's proposed changes to Regulations 20.6.2.3105 and 20.6.2.5006 conflict with the public interest in State Engineer permitting, and should not be adopted by the WQCC.
15. NMED's proposed changes to Regulations 20.6.2.3105 and 20.6.2.5016 are not supported by substantial evidence and should not be adopted by the WQCC.
16. NMED has failed to make its burden of proof in proposing changes to Regulations 20.6.2.3105 and 20.6.2.5016 and they should not be adopted by the WQCC. Alternatively, the WQCC should adopt the proposals in Exhibit No. 1, attached hereto.

ARGUMENT

NMED HAS FAILED TO JUSTIFY CHANGES TO REGULATIONS 20.6.2.7.T, 20.6.2.3103, AND 20.6.2.3104

Testimony of Alex Puglisi

Alex Puglisi had been identified as a witness for the NMML-EQA with respect to Regulation 20.6.2.7.T – The Definition of Toxic Pollutants, with respect to Regulation 20.6.2.3103 Standards for Groundwater, and with respect to Regulation 20.6.2.3104. He submitted written testimony, but was unable to appear in person due to a death in the family and accordingly, his written testimony was moved and admitted. Tr. at 537-38; Docket No. 55, NMML-4.

Mr. Puglisi is the Interim Source of Supply Manager/Environmental Compliance Officer for the City of Santa Fe, and has served in that capacity since November of 2010. He was previously employed as the Manager of the Remediation Oversight Section of the New Mexico

Environment Department (November 2008-November 2010), and prior to that was Director of the Environment Department for Sandia Pueblo of five years. He has extensive experience in environmental compliance beginning in 1983. His testimony focused on three of NMED's proposed changes. They are:

- 20.6.2.7.T (currently 20.6.2.7.WW) Definition of "toxic pollutant";
- 20.6.2.3103 Standards for Ground Water of 10,000 mg/L TDS Concentration or Less;
- 20.6.2.3103 and 20.6.2.4103 Abatement Standards and Requirements should include sites with approved abatement plans.

Regulation 20.6.2.7.T

In its Statement of Reasons, NMED explains that the changes to 20.6.2.7.T are intended "to add several toxic pollutants in order to enable regulation of these dangerous constituents for the protection of human health...." NMED did not provide adequate justification for adding these pollutants. Docket No. 55, NMML-4, pp.1-2, lns. 29-37. All but two of the additions are already regulated or in the regulation development stage under the Safe Drinking Water Act ("SDWA") or the Clean Water Act[4]. Docket No. 55, NMML-4, p.1, lns. 20-56. Although the proposed state programs may be more stringent, the three criteria currently used to regulate contaminants in drinking water under the SDWA (Title 42, Section 300g-1(b)(1)(A)) are sufficiently protective for municipal water supplies. Accordingly, the proposed Regulations do not meet the requirements of NMSA 1978, § 72-4-6(E)(7) that "the commission shall give weight it deems appropriate to all relevant facts and circumstances, including...(7) federal water quality requirements...".

[4] The remaining two pollutants prometon (an herbicide) and thiolane 1, I dioxide (sulfolane) (a fuel additive) are not regulated by either program at this point.

Moreover, an important factor is whether an analytical method is widely available. If not, a permittee's ability to comply with the permit is affected. Docket No. 55, NMML-4, p.2, lns. 44-46. This is contrary to the mandate in NMSA 1978, §74-4-(E)(3) that the commission "shall give weight it deems appropriate" to "technical practicability...of reducing or eliminating water contaminants from the sources involved and previous experience with equipment and methods available to control the water contaminants involved..."'. NMSA 1978, §72-4-6 (E)(5) requires that the Commission "give weight it deems appropriate" to "feasibility of a user or a subsequent user treating the water before a subsequent use...". The WQCC's findings must be based on substantial evidence. An agency ruling that is not in accordance with the law should be reversed. *See NMMA v. N.M. Water Quality Control Commission*, 2007-NMCA-010, ¶¶ 30-34, 141 N.M. 41, 150 P.3d 991. NMED has not supported its proposed changes with substantial evidence.

Regulation 20.6.2.3103

NMED proposes to amend 20.6.2.3103 NMAC to revise some numeric standards to match federal SDWA mandated Maximum Contaminant Levels ("MCLs"). However, NMED has not been consistent with changing existing standards to match MCLs. Docket No. 55, NMML-4, p.2, lns. 55-56. In paragraph 7 of it's Statement of Reasons, NMED states that "...the Department proposes changes to the numeric standards to bring those standards in line with the Maximum Contaminant Levels for each pollutant as specified by the U.S. Environmental Protection Agency ("EPA") under the federal Clean Water Act. The Department is not proposing changes to certain existing standards that are more stringent than current EPA standards in order to protect public health and welfare...." NMED did not list which "certain existing standards" were not changed. The ground water standards are set to protect drinking water use, and should match the SDWA MCLs. The numeric standards for barium, toluene, 1, I-dichloroethylene (1, I DCE), and vinyl

chloride were increased to match the MCLs in NMED's proposal; however the numeric standards for chromium, fluoride and total xylenes remained the same. To match the MCLs, the numeric standards for fluoride and total xylenes should be increased (4.0 mg/L and 10,000 mg/L, respectively). Docket No. 55, NMML-4, p. 3, lns. 65-71. The current standard for total chromium was justified in its original adoption by NMED for reasons beyond comparability with the federal MCLs.

The U.S. Environmental Protection Agency is considering the adoption of MCLs much stricter than NMED's current standard for chromium of 0.05 mg/L for total chromium. Currently, there is no federal or state MCL specific to the hexavalent form of chromium. Hexavalent Chromium is regulated in drinking water through the establishment of a Total Chromium MCL (Hexavalent Chromium is one of the forms of chromium making up Total Chromium). In New Mexico, the Total Chromium standard referenced by NMED for revision is 50 ppb, while the federal MCL is 100 ppb. At the time Total Chromium MCLs were established, ingested Hexavalent Chromium associated with consumption of drinking water was not considered to pose a cancer risk, as is at this time, especially in light of the recent concern at both federal and state levels, and the need for regulation of hexavalent chromium.

This proposal is not consistent with NMSA 1978, 74-4-6 (E)(7) which requires the Commission to "give weight it deems appropriate" to "federal water quality requirements."

NMED further explains in Paragraph No. 7 of its Statement of Reasons that "...[t]he Department also proposes to move the narrative standard for toxic pollutants to 20.6.2.3103 NMAC." The proposal to move the language to a new subsection for "Standards for Toxic Pollutants", without reference to the current definition, has the potential to expand the authority beyond the list within the definition. In addition, the approach for translating or adopting results

of scientific studies into standards should be codified so that there is a consistent method for translating that data into standards. If this proposal is retained, this provision should only be applied to the list of pollutants contained within the definition of "toxic pollutants".

Regulation 20.6.2.4103

NMML-EQA proposes that the language presented in the note included by NMED at the end of the Section 20.6.2.3103 to describe the implementation timeline for the more stringent standards and clarification for their applicability to past or current water discharges (as of July 1, 2017) be added to that section as a specific subpart to the rule. *See* Exhibit No. 1, Lines 72, 82-85. The note, as amended by NMED, also concerns currently approved abatement plans based on the current standards for which the Secretary has approved an abatement completion report pursuant to 20.6.2.4112 NMAC. Mr. Puglisi testified that the language regarding the clarification of both the applicability of the new standards to past, current, or future water discharges, as well as, to sites under abatement for which the Secretary has approved an abatement completion report should be included within the rule at 20.6.2.3103 and at 20.6.2.4103 to provide specificity as to the applicability of any new standards in the rule and not within a note. Docket No. 55, NMML-4, p.4, lns. 102-105.

Therefore, the NMML-EQA is further proposing, with respect to the issue of the applicability of newly approved standards, that the last sentence of the "Note" following Section 20.6.2.3103.A.3.C be deleted, the "Note" included by NMED as a new subsection to 20.6.2.3103, and that new text be added to the newly formatted Section 20.6.2.4103.C. NMAC for clarification on the hierarchy of when the grandfathered standard would apply with respect to the most recently adopted standards being proposed by NMED, if approved by the WQCC by adding these criteria:

1. the standards of Section 20.6.3103 NMAC

2. the standards specified in an abatement completion report pursuant to Section 20.6.2.4112 NMAC approved by the NMED Secretary prior to the effective date of the revisions to Section 20.62.3103 NMAC, or
3. if the NMED Secretary notified the responsible person that the site is a source of contaminants in ground water at a place of withdrawal for present or reasonably foreseeable future use at concentrations in excess of the standards of 20.6.2.3103, then the applicable standards of Standards 20.6.3103 NMAC shall apply.

Docket No. 55, NMML-4, p.4, lns. 105-08; Exhibit No. 1, lns. 96-103.

In sum, the changes proposed by NMED to Regulations 20.6.2.7.T, 20.6.2.3103, and 20.6.2.4103 are not supported by the required substantial evidence. *See NMMA v. N.M. Water Quality Control Commission*, 2007-NMCA-010, ¶¶ 30-34, 141 N.M. 41, 150 P.3d 991. NMED has not met its burden of proof to support the changes as required by *Tenneco Oil v. New Mexico Water Quality Control Comm'n.*, 1987-NMCA-153, ¶ 8, 107 N.M. 469, 760 P.2d 161.

NMED'S PROPOSED CHANGES TO REGULATIONS 20.6.2.3105.A AND 20.6.2.5016 ARE NOT JUSTIFIED

Testimony of Mark Kelly

The New Mexico Municipal League's second witness was Mark Kelly, the Compliance Division Manager for the Albuquerque Bernalillo County Water Utility Authority. His resume is found at Docket No. 91. His responsibilities include ensuring compliance with state and federal regulations for the Water Authority, the largest water and wastewater utility in the state; ensuring that the Water Authority is in compliance with the Clean Water Act, the Safe Drinking Water Act, and various discharge permits, as well as preparing regulatory reports and submittals to NMED and EPA, including groundwater discharge permit reporting. He serves as liaison between regulators such as NMED, EPA and the Water Authority for compliance issues. Docket No. 91;

TR at 755-756. He commonly works with the Safe Drinking Water Act. He testified that the Water Authority has "a staff of water quality specialists that are taking samples just about every weekday in compliance with the Safe Drinking Water Act." Tr. at 756.

Mr. Kelly was qualified as an expert witness to give expert testimony. Tr. at 757. His prefiled testimony appears as Docket No. 55, NMML-5. It was prepared in conjunction with John Stomp, the Chief Operating Officer of the Water Authority[5]. *Id.* at 758. The opinions contained in Exhibit No. 55 are Mr. Kelly's opinions. *Id.* His rebuttal testimony appears at Docket No. 83.

Mr. Kelly testified that he was familiar with Aquifer Storage and Recovery, or "ASR." *Id.* *See* NMSA 1978, § 72-12A-1 *et seq.* (1999). Mr. Kelly stated: "the whole idea [of Aquifer Storage and Recovery] is to inject treated San Juan-Chama water into the aquifer during winter months when demands are lower. The storage [sic] San Juan-Chama water could then be used to supplement supplies in the summer months during droughts or other times when supplies are low." *Id.* at 759. Mr. Kelly described the two projects that had been implemented at Bear Canyon and the Large-Scale Recharge Demonstration Project for a total of some 3.4 million dollars. Tr. at 759-60.

Regulation 20.6.2.3105.A-"Exemptions from Discharge Permit Requirement"

Regulation 20.6.2.3105.A provides an exemption from discharge permits for discharges that conform to all the listed numerical standards of Section 3103 and have a total nitrogen concentration of 10 mg/L or less and do not contain any toxic pollutant. Tr. at 761. NMED proposes to change the regulation by adding "[i]f treatment or blending is required to achieve these standards, this exemption does not apply." Tr. at 762. Mr. Kelly testified that "[t]he effect is that some presently exempted discharges may be required to get groundwater discharge permits." *Id.*

[5] Mr. Kelly was substituted as a witness for Mr. Stomp on November 9, 2017, Docket No. 91. Accordingly, the prefiled testimony appears under Mr. Stomp's name.

Mr. Kelly testified that the Municipal League proposes to address that change if it were adopted by adding language "that would allow recharge projects used to replenish the water and aquifer where source water meets all drinking water standards and the source water chemistry is shown to be compatible with the chemistry of the groundwater." *Id.* The Municipal League's changes are shown on page 3 of Exhibit No. 1. Mr. Kelly testified that "this exemption is similar to other discharges permitted similar to the NPDES exemption that are covered when the permittee is not required to obtain a groundwater discharge permit. Tr. at 763. He testified that under these circumstances the changes that are proposed by NMED "are not needed." Tr. at 763.

Mr. Kelly addressed NMED's direct testimony which pertained to wastewater discharges and UIC regulations. He responded to these in his rebuttal testimony at Docket No. 83. He testified that "the federal regulations provide for a permit-by-rule or authorization-by-rule approach to these instead of a permit discharge – discharge permit requirement." Tr. at 764. He addressed NMED's rebuttal testimony which concerned the issues of discharges requiring treatment and monitoring. He testified that "there is a minimal or no risk of contamination when using drinking water as a source." Tr. at 764. Accordingly, the treatment requirements "do not justify the burden of permitting." *Id.* He testified that the compatibility of the injected source water was an issue that "can be addressed either through authorization-by-rule approach, or another approach...that does not actually require a groundwater discharge permit." Tr. at 765. Mr. Kelly noted that the Authority's Large Scale drinking water demonstration project had been granted separate letters from NMED stating that a discharge permit was not required in 2009 and 2012. Tr. at 766. The basis was that it was unlikely that the discharge would affect groundwater quality. *Id.* It should be noted that the source water for the large scale demonstration project of

San Juan Chama Project water is presently served to 675,000 people as drinking water every day. Tr. at 766. It is sampled and monitored by the Water Authority. *Id.*

NMED's proposed changes to Regulation 20.6.2.3105.A conflict with NMSA 1978, § 72-6-4 (E)(1)(2)(6). These provisions of the law state that "the commission shall give weight it deems appropriate to all relevant facts and circumstances" including "the public interest." *See Id.* at (E)(2). Section (E)(1) requires the Commission to act when a regulation will address a "degree of injury." It asks the Commission to consider "character and degree of injury to or interference with health, welfare, environment and property...." As set forth in Mr. Kelly's testimony, when the source water is drinking water that already has been treated to remove contaminants, no further treatment is necessary. There is no injury to remedy. Similarly, Section (E)(6) requires the Commission to consider "accustomed uses". In this case, the "accustomed use" of the San Juan-Chama water is as a drinking water supply to 675,000 people for whom it has been treated to remove contaminants. Further treatment is not necessary. Further permitting clearly burdens the public interest without benefit, contrary to Section (E)(2).

Regulation 20.6.2.5006 – Discharge Permit Requirements for Class V Injection Wells

Regulation 20.6.2.5006 requires classified injection wells to meet the requirements of sections 3000 – 3999 and 5000 – 5006, which also includes the exemptions from discharge permit requirements. NMED proposes to exclude all underground storage and recovery projects from any kind of exemption regardless of the source water. That change would mean that "every aquifer storage and recovery project will require a groundwater discharge permit." Tr. at 768. Mr. Kelly testified that that change was not necessary. The reason is that the NMML believes that the exemption should apply, and that if it does not, "we have additional language that talks about monitoring only for those contaminants shown to be present in the source water which have the

potential to be mobilized during injection, as well as some relief from sampling requirements after subsequent sampling." *Id.* In rebuttal, NMED reiterated their UIC requirements, making no mention of their primacy documentation, stating that it was needed to protect underground sources of drinking water, but failed to admit that there were alternatives.

Mr. Kelly testified that that was not necessary. He testified that "the underground sources of drinking water need to be protected from any constituent that violates the primary drinking water regulations, and when we start out with drinking water that is already meeting the primary drinking water regulations that it is unnecessary to be permitted." Tr. at 768-69. In lieu of a discharge permit, NMED could do a permit-by-rule approach or authorization by-rule approach. Tr. at 769. This is presently employed in the UIC rules.

The proposed changes to Regulation 20.6.2.5006 conflict with NMSA 1978, § 72-6-4 (E)(3) because they do not have the effect of eliminating water contaminants. As with Regulation 20.6.2.3105.A, the source water is San Juan Chama Water, which has been treated to drinking water standards and serve d to 675,000 customers. Further treatment therefore is also in conflict with NMSA 1978, § 72-6-4(E)(6) which relates to "accustomed uses." Because the treatment outweighs the public benefit, the proposed changes are contrary to the public interest and are contrary to NMSA 1978, § 74-6-4 (E)(2). NMED has not supported its proposed changes to Regulations 20.6.2.5006 and 20.6.2.3105.A with the required substantial evidence. *See NMMA v. N.M. Water Quality Control Commission*, 2007-NMCA-010, ¶¶ 30-34, 141 N.M. 41, 150 P.3d 991. NMED has not met its burden of proof to support the changes as required by *Tenneco Oil v. New Mexico Water Quality Control Comm'n.*, 1987-NMCA-153, ¶ 8, 107 N.M. 469, 760 P.2d 161.

In the event that the Commission decides to proceed with changes to these two Regulations, the NMML proposes that it adopt the Regulations with the changes proposed by the NMML in the attached Exhibit No. 1.

CONCLUSION

For the reasons set forth in the proposed Findings of Fact and Conclusions of Law, the WQCC should reject the changes proposed by NMED to the toxic pollutant regulations and the regulations related to aquifer storage and recovery, as set forth in NMML's Proposed Findings of Fact and Conclusions of Law, or accept the alternative language provided by the NMML at Exhibit No. 1, attached hereto.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the *New Mexico Municipal League's Proposed Finding of Fact and Conclusions of Law, and Closing Argument* was served to the following parties on February 16, 2018, via USPS first-class mail:

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EXHIBIT NMML-6

NMML'S RECOMMENDED CHANGES TO 20.6.2 NMAC

The New Mexico Municipal League Environmental Quality Association (NMML) recommends the following changes to the New Mexico Department Environment Department petition to amend 20.6.2 NMAC as highlight in light blue.

Regarding 20.6.2.7.T(2) NMAC – Definition of "toxic pollutant", the NMML proposes that the language in the introductory paragraph be retained and the pollutants "prometon" (proposed at 20.6.2.7.T(2)(t)(xi)) and "thiolane 1,1 dioxide (sulfolane)" (proposed at 20.6.2.7.T(2)(y)) be deleted from the list and renumber as appropriate.

[~~VV.~~]T. Definitions that begin with the letter "T."

...

[~~WW.~~] (2) **"toxic pollutant"** means a water contaminant or combination of water contaminants in concentration(s) which, upon exposure, ingestion, or assimilation either directly from the environment or indirectly by ingestion through food chains, will unreasonably threaten to injure human health, or the health of animals or plants which are commonly hatched, bred, cultivated or protected for use by man for food or economic benefit; as used in this definition injuries to health include death, histopathologic change, clinical symptoms of disease, behavioral abnormalities, genetic mutation, physiological malfunctions or physical deformations in such organisms or their offspring; in order to be considered a toxic pollutant a contaminant must be one or a combination of the potential toxic pollutants listed below and be at a concentration shown by scientific information currently available to the public to have potential for causing one or more of the effects listed above;] any water contaminant or combination of the water contaminants in the list below[creating a lifetime risk of more than one cancer per 100,000 exposed persons is a toxic pollutant: ...

(t) pesticides

~~(xi) prometon~~

(xii)(xi) toxaphene

...

~~(y) thiolane 1,2 dioxide (sulfolane)~~

Regarding the new paragraph in Subsection 20.6.2.3103.A(2) NMAC, the NMML proposes to delete the language:

20.6.2.3103.A. Human Health Standards[~~Ground water shall meet the standards of Subsection A and B of this section unless otherwise provided. If more than one water contaminant affecting human health is present, the toxic pollutant criteria as set forth in the definition of toxic pollutant in Section 20.6.2.1101 NMAC for the combination of contaminants, or the Human Health Standard of Subsection A of Section 20.6.2.3103 NMAC for each contaminant shall apply, whichever is more stringent. Non-aqueous phase liquid shall not be present floating atop of or immersed within ground water, as can be reasonably measured.~~]

(1) Numerical Standards....

~~(2) Standards for Toxic Pollutants. A concentration shown by existing scientific information currently available to the public to have potential for causing one or more of the following effects upon exposure, ingestion, or assimilation either directly from the environment or indirectly by ingestion through food chains: (1) unreasonably threatens to injure human health, or the health of animals or plants which are commonly hatched, bred, cultivated or protected for use by man for food or economic benefit; as used in this definition injuries to health include death, histopathologic change, clinical symptoms of disease, behavioral abnormalities, genetic mutation, physiological malfunctions or physical deformations in such organisms or their offspring; or (2) creates a lifetime risk of more than one cancer per 100,000 exposed persons.~~

(2)~~(3)~~ Standards for Non-Aqueous Phase Liquids. Non-aqueous phase liquids shall not be present floating atop of or immersed within ground water, as can be reasonably measured.

EXHIBIT 1

Regarding 20.6.2.3103 NMAC – Standards for Ground Water of 10,000 mg/L TDS or less, the NMML proposes that the numeric standards for fluoride and total xylenes be increased to match the MCLs (4.0 mg/L and 10, 000 mg/L, respectively) unless additional information is provided to justify the lower numbers.

20.6.2.3103 STANDARDS FOR GROUND WATER OF 10,000 mg/l TDS CONCENTRATION OR LESS: ....

A. Human Health Standards ~~[Ground water shall meet the standards of Subsection A and B of this section unless otherwise provided. If more than one water contaminant affecting human health is present, the toxic pollutant criteria as set forth in the definition of toxic pollutant in Section 20.6.2.1101 NMAC for the combination of contaminants, or the Human Health Standard of Subsection A of Section 20.6.2.3103 NMAC for each contaminant shall apply, whichever is more stringent. Non-aqueous phase liquid shall not be present floating atop of or immersed within ground water, as can be reasonably measured.]~~

(1) Numeric Standards

...

~~(6)~~ (h) Fluoride (F).....~~[1.6]~~ 4.0 mg/l

...

~~(23)~~ (aa) total xylenes.....~~[0.62]~~ 10,000 mg/l

...

Regarding the proposed note below 20.6.2.3103 NMAC: The NMML proposes that the last sentence of the note be deleted and the following text be added to the newly formatted Section 20.6.2.4103.C. NMAC.

20.6.2.3103 STANDARDS FOR GROUND WATER OF 10,000 mg/l TDS CONCENTRATION OR LESS: ...

[2-18-77, 1-29-82, 11-17-83, 3-3-86, 12-1-95; 20.6.2.3103 NMAC - Rn, 20 NMAC 6.2.III.3103, 1-15-01; A, 9-26-04; A XX/XX/17]

[Note: For purposes of application of the amended numeric uranium standard to past and current water discharges (as of 9-26-04), the new standard will not become effective until June 1, 2007. ~~For any new water discharges, the uranium standard is effective 9-26-04.~~] For purposes of application of the amended numeric standards for arsenic, cadmium, lead, combined radium-226 & radium-228; benzene, PCBs, carbon tetrachloride, EDC, PCE, TCE, methylene chloride, EDB, 1,1,2-trichlorethane and benzo-a-pyrene, to past and current water discharges (as of July 1, 2017), the new standards will not become effective until July 1, 2020. ~~With regard to sites for which the secretary has approved an abatement completion report as of the effective date of this rule pursuant to 20.6.2.4112 NMAC, the amended numeric standards for arsenic, cadmium, lead, combined radium-226 & radium-228; benzene, PCBs, carbon tetrachloride, EDC, PCE, TCE, methylene chloride, EDB, 1,1,2-trichlorethan and benzo-a-pyrene shall not apply unless the secretary notifies the responsible person that the site is a source of these contaminants in ground water at a place of withdrawal for present or reasonably foreseeable future use at concentrations in excess of the standards of this section.~~]

20.6.2.4103 ABATEMENT STANDARDS AND REQUIREMENTS:

~~B.~~|C. Ground-water pollution at any place of withdrawal for present or reasonably foreseeable future use, where the TDS concentration is 10,000 mg/L or less, shall be abated to meet:

(1) ~~the standards of Subsections A, B and C of~~ Section 20.6.2.3103 NMAC,

(2) the standards specified in an abatement completion report pursuant to Section 20.6.2.4112 NMAC approved by the NMED Secretary prior to [the effective date of the revisions to Section 20.6.2.3103 NMAC], or

(3) If the NMED Secretary notified the responsible person that the site is a source of contaminants in ground water at a place of withdrawal for present or reasonably foreseeable future use at concentrations in excess of the standards of 20.6.2.3103 NMAC, then the applicable standards of Section 20.6.2.3103 NMAC shall apply.

~~[conform to the following standards:~~

~~(1) toxic pollutant(s) as defined in Section 20.6.2.1101 NMAC shall not be present; and~~

~~(2) the standards of Section 20.6.2.3103 NMAC shall be met.]~~

Regarding 20.6.2.5006 NMAC - Discharge Permits for Class V Injection Wells, the NMML proposes that the exemption should be as follows:

20.6.2.3105 EXEMPTIONS FROM DISCHARGE PERMIT REQUIREMENT: Sections 20.6.2.3104 and 20.6.2.3106 NMAC do not apply to the following:

A. Effluent or leachate which conforms to all the listed [~~numerical~~] standards of Section 20.6.2.3103 NMAC and has a total nitrogen concentration of 10 mg/l or less[~~, and does not contain any toxic pollutant~~]. If treatment or blending is required to achieve these standards this exemption does not apply except for recharge projects used to replenish the water in an aquifer where the source water is regulated by the Safe Drinking Water Act and meets all drinking water standards and the source water chemistry is shown to be compatible with the chemistry of the ground water. To determine conformance, samples may be taken by the agency before the effluent, [~~or~~] leachate or other source water is discharged so that it may move directly or indirectly into ground water; provided that if the discharge is by seepage through non-natural or altered natural materials, the agency may take samples of the solution before or after seepage. If for any reason the agency does not have access to obtain the appropriate samples, this exemption shall not apply;

20.6.2.5006 DISCHARGE PERMIT REQUIREMENTS FOR CLASS V INJECTION WELLS: Class V injection wells must meet the requirements of Sections 20.6.2.3000 through 20.6.2.3999 and Sections 20.6.2.5000 through 20.6.2.5006 NMAC. Class V injection wells or surface impoundments constructed as recharge basins used to replenish the water in an aquifer, including use to reclaim or improve the quality of existing water, must additionally provide documentation of compliance with 19.25.5 NMAC (Underground Storage and Recovery) ~~and shall not be subject to the exemptions of 20.6.2.3105 NMAC~~. If the exemption in Section 20.6.2.3105.A. does not apply for a recharge basin project, a discharge permit shall be required as follows:

A. Monitoring will be required for only those contaminants shown to be present in the source water or which have the potential to be mobilized during injection or infiltration; and

B. The permittee shall have the opportunity to petition to eliminate or reduce sampling requirements after two years or four rounds of sampling whichever comes first.