

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



\_\_\_\_\_  
)  
)  
**IN THE MATTER OF PROPOSED AMENDMENTS TO**  
)  
**GROUND WATER AND SURFACE WATER**  
)  
**PROTECTION REGULATIONS,**  
)  
**20.6.2 NMAC**  
)  
\_\_\_\_\_  
)

**No. WQCC 17-3 (R)**

**ROSWELL'S PROPOSED FINDINGS OF FACTS AND CONCLUSIONS OF LAW**

**COMES NOW** City of Roswell ("Roswell"), by and through undersigned counsel of record, and in accordance with the Hearing Officer's stipulated order extending time to file post hearing submittals, files its proposed Findings of Fact and Conclusions of Law as follows:

**FINDINGS OF FACT**

1. On May 1, 2017 the NMED filed its petition to amend certain portions of NMAC 20.6.2. of the Commission's regulations in Title 20, Chapter 6, Part 2, of the New Mexico Administrative Code (NMAC) titled "*Ground and Surface Water Protection*" ("Rules").
2. On June 2, 2017 Madam Hearing Officer, Erin Andrews, was appointed to preside over hearing in this matter held November 14-17, 2017.
3. NMED thereafter filed its amended petition on July 27, 2017.
4. Undersigned counsel filed its entry of appearance on behalf of Roswell on May 4, 2017 in WQCC 17-3 (R).
5. Roswell timely filed its Notice of Intent ("NOI") to present technical testimony in accordance with NMAC 20.1.6.200 (E) and the Hearing Officer's scheduling order and as amended and identified senior hydrologist Jay Snyder ("Snyder").

6. Jay Snyder was tendered and accepted as an expert at hearing. Tr. Vol. III 789:9; Roswell Ex. A.
7. Chief Scientist Dennis McQuillan (“McQuillan”) of NMED and Chief of Ground Water Quality Bureau within Water Protection Division of NMED Michelle Hunter (“Hunter”) provided technical testimony on behalf of NMED.
8. Roswell is a municipality located in Chaves County, NM that was gifted the former Walker Air Force Base that is a very large site with substantial TCE over standard. Tr. Vol. I 48:17-24. Previous to transfer in 1967, United States Army Corps of Engineers (“USACE”) tested for and cleaned ground water contamination. Tr. Vol. I 49:1-50:8. After 1967, the USACE does not test for or tell Roswell where TCE is located, but rather, Roswell is in the unenviable position of having to determine and characterize contamination. Tr. Vol. I 50:1-14.
9. On balance, Roswell asserts performance standards are much more manageable under current NMED abatement regulations than federal superfund. Current New Mexico abatement regulations, as applied, provide robust safe harbor. Tr. Vol. I 50:14-51:9.
10. Roswell may need to enter abatement or voluntary remediation under NMED regulations.

**20.6.2.3103(C) NMAC [Foot Note]:**

11. Roswell agrees with the NMED’s proposed prospective application of the new standards taking effect on July 1, 2020 pursuant to proposed footnote but argues the note should be formally codified as 20.6.2.3103 (D) NMAC.
12. In support of this contention, Roswell argued that the intent of the foot note is obvious—to give the regulated community time to comply within a reasonable grace period. Tr. Vol. I 51: 23-24.

13. Roswell does not want to waste time, money and resources in the future arguing in administrative, state, or federal arenas over the legal effect of the undisputed important grace period under the footnote in the event of a codification argument or lack thereof that may be used against Roswell as it enters abatement. Tr. Vol. I 51: 20.
14. McQuillan testified that he was the primary witness regarding proposed amendment to section 3103. Vol. II 391: 11-12; 392. Regardless of lack of codification, McQuillan testified that the regulated community could rely on the foot note language being legally effective. Tr. Vol. II 395: 10-16.
15. McQuillan stated he had no objection to codification unless there was some reason advanced to not codify by Archives and Records Center. Tr. Vol. II 396: 1-7.
16. McQuillan testified the NMED “want[s] the [footnote] to have teeth.” *Id.*
17. No objection or rebuttal or any other argument by any party was made that the foot note language should not and could not be codified as 20.6.2.3103 (D) NMAC.
18. Snyder testified and agreed that the foot note advanced an appropriate grace period for responsible parties to collect information whether to close sites under previous Stage II approved abatement plans or to comply with the new regulations entering abatement. Tr. Vol. II 449. For Roswell, specifically, it allows it to establish abatement plans on a very large facility. *Id.*
19. Snyder testified the grace period allowed Roswell to focus on characterizing source areas verses attenuated contamination with the goal of negotiating with the state for areas of ground water contamination under the current rule and to separate areas that do not need to enter into an abatement plan area. Tr. Vol. II 450.

20. Snyder testified the footnote should be “elevated” and codified as section 3103.D from a regulator perspective to provide specific citation to issue responsible party letters regarding re-opening of sites. Tr. Vol. II 451:5-11.

21. The Hearing Officer finds Snyder’s testimony credible.

22. The Hearing Officer finds Roswell’s request that the footnote providing that application of the amended rules take effect as of July 1, 2010, codified as 20.6.2.3103 (D) NMAC well taken.

**20.6.2.4103 (E) and 20.6.2.4103(F) (d) NMAC (alternative abatement):**

23. Roswell does not agree that eight (8) consecutive quarterly samples from all compliance sampling stations should be a precondition to completing abatement and argues the regulation should be revised and amended (deletions in ellipses and additions in bold) to allow discretion to the Secretary as follows:

**20.6.2.4103 (E) (revisions in bold and ellipses)**

*“Subsurface-water and surface-water abatement shall not be considered complete until ... **sufficient** samples from ... compliance sampling stations **as determined by the Groundwater Quality Bureau** approved by the secretary meet the abatement standards of Subsections A, B, [and] C, and D of this section. []. Abatement of water contaminants measured in solid-matrix samples of the vadose zone shall be considered complete after one-time sampling from compliance stations approved by the secretary. Surface water pollution shall be abated to conform to the Water Quality Standards for Interstate and Intrastate Streams in New Mexico (20.6.4 NMAC)”* Roswell Amended NOI, p. 2.

**20.6.2.4103(F) (d) NMAC (alternative abatement) (revisions in bold and ellipses)**

*“compliance with the standard set forth in Subsections A and B of this section is technically infeasible, as demonstrated by a statistically valid extrapolation of the decrease in concentration of any water contaminant over the remainder of a twenty (20) year period, such that projected future reductions during that time would **not** be **substantially** less as **determined by the Secretary** than ... the concentration at the time technical infeasibility is proposed. A statistically valid decrease **can**... be demonstrated by fewer than eight (8) consecutive sampling events **or sufficient sampling as set forth in 20.6.2.4103 (E) subject to the approval of the Secretary in accordance with the provisions of 20.6.2.4103 (E).** Sampling events demonstrating a statistically valid decrease shall be collected with a minimum of ninety (90) days between sampling events, and shall not span a time period greater than four (4) years.”* *Id.*

24. Roswell argued situations where wells show ground water is clean with no trend above standard should not require additional eight quarters of sampling which is a remnant of discharge permit requirements. Tr. Vol. I 52:19-53:4.
25. Snyder testified Roswell's proposed language to 20.6.2.4103 (E) and 20.6.2.4103(F) (d) NMAC provided additional alternatives to the NMED in the situation, but not limited to, release after substantial natural attenuation and that additional discretion given to the Department and Secretary would be an overall benefit for the goals of abatement because it would put the hydrology, the release history, the site conceptual model and related factors into a unified context. Tr. Vol. IV 796: 8-15; 797:4-5.
26. Upon examination by the Commission, Snyder testified that optimization software allowed for setting appropriate sampling schedules on the basis of statistics to delineate plume dynamics which could mean more or less sampling in a given situation. Tr. Vol. IV 815-817. Snyder testified 8 consecutive quarters of sampling over a four year period at a minimum of 90 day intervals as proposed by NMED is an improvement to the current regulations. Tr. Vol. IV 795.
27. The Hearing Officer finds the NMED proposed language and Roswell's proposed language are not mutually exclusive and both should be placed in the regulations.
28. Snyder also provided public comment and stated section 4106.C purpose is to select a remedy in Stage I abatement to proceed expeditiously to Stage II to clean ground water contamination. Tr. Vol. III. 643:6. Snyder commented extracted water returned to the aquifer is more desirable because it minimized consumptive uses and pointed to permitted class V injection wells, as an example, which must comply with discharge permit requirements and are subject to separate hearing and public comment process Tr.

Vol. III 644-645. Snyder concluded that the expeditious intent to clean ground water contamination under section 4106.c could be stream lined in one public comment and hearing process regarding class V injection wells. Tr. Vol. III 646-647.

29. Pete V. Domenici, Jr. ("Domenici") provided public comment at hearing and stated he had 31 years experience with abatement on behalf of his clients and commented that the current regulations are not flexible, which negatively impacts real people in diverse situations. Tr. Vol. III 654-655. In other words, not all ground water presents the same hydrological factors or threat to the environment and public health. Tr. Vol. III 656.
30. Domenici commented after 1987, the insurance industry does not subsidize clean up upon reliance of the "absolute pollution exclusion" which supports flexibility and discretion needed on the part of the Secretary in appropriate situations. *Id.* Domenici noted technical infeasibility was in fact in the regulations but knew of only two determinations in the last 15 years and was personally involved in the only known alternative abatement standard issued by the Department where a middle-capitalized retiree spent as much as \$2 million before that decision regarding previous fruitless attempts to get nitrates below 20 parts per million Tr. Vol. III 657-658.
31. There was no challenge, objection or rebuttal to Snyder's direct technical testimony.
32. The Hearing Officer finds Snyder's direct technical testimony credible.
33. The Hearing Officer finds Roswell's proposed additional language to 20.6.2.4103 (E) and 20.6.2.4103(F) (d) NMAC reasonable and warranted. The language does not prevent eight consecutive quarters of sampling but merely provides the Secretary additional tools to as expeditiously as possible approve completion of abatement and close sites, taking

into account a variety of technical and other factors in the Department's goal to protect groundwater for the environment and the public.

**20.6.2.4108 (B) (4) (Roswell's revisions in bold)**

34. Roswell submits the following proposed revision to 20.6.2.4108 (B) (4) NMAC.

***“owners and residents of surface property located inside, and within 1/3 of a mile from, the perimeter of the geographic area where the standards and requirements set forth in Section 20.6.2.4103 NMAC are exceeded who shall be notified by a means approved by the secretary;...”*** Roswell Amended NOI at summary of direct, p. 5.

35. In support of the revision, Roswell argues it is consistent with the public notice and participation requirements regarding discharge permits under 20.6.2.3108 NMAC and that additional public notice is unnecessary, and burdensome. Roswell Amended NOI, at summary of direct testimony, p. 5.

36. At hearing, Snyder provided testimony that notice to the public is given by mail regarding Stage 2 abatement within a one-mile radius. Tr. Vol. III 798.

37. Snyder testified he was recently required to send 7,500 mailings on behalf of a client in the City of Albuquerque to comply with the current notice provision. Tr. Vol. III 799.

38. Snyder opined that public notice requirements could be accomplished more efficiently and cost effectively by publication in newspapers, neighborhood postings or radio advertising and suggested NMED Voluntary Remediation public notice provisions were less cumbersome and should be incorporated in the abatement regulations. Tr. Vol. III 799:6-19(“[T]h goal is to get the public notified, not necessarily do 7,500 mailings.”).

39. Hunter testified in rebuttal that Roswell allegedly provided no evidence in support of its proposed revision noting that sparsely populated locales would not be burdensome to notify within a 1 mile radius. Tr. Vol. IV 1023.

40. The Hearing Officer finds Snyder's testimony credible.

41. The Department did not provide any substantial support that persons outside a 1/3 mile radius would be impacted, hold an interest in abatement activities, or otherwise have a need to know of such activities whether or not the locale was sparsely populated.
42. The Hearing Officer finds that the suggested revision to notify the public within a 1/3 mile radius is sufficient, provides for meaningful public notice and participation and is consistent with participation requirements regarding discharge permits under the Department's own regulations at 20.6.2.3108 NMAC.

### LEGAL CONCLUSIONS

1. The Water Quality Control Commission has jurisdiction to amend portions of NMAC 20.6.2 under the Water Quality Act to prevent or abate water pollution. NMSA 1978 §§ 74-6-4.D; 74-6-4.E; *see also* § 74-6-2.C (Definition of "water pollution"); § 74-6-2.H ("water" means all water, including water situated wholly or partly within or bordering upon the state, whether surface or subsurface, public or private, except private waters that do not combine with other surface or subsurface water").
2. The footnote shall be deleted and 20.6.2.3103 (D) NMAC shall be added to the regulations formally codifying the foot note and shall read in full:

**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 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-trichloroethane 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 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-trichloroethane 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.**

3. 20.6.2.4103 (E) NMAC shall read in full:

**Subsurface-water and surface-water abatement shall not be considered complete until sufficient samples from compliance sampling stations as determined by the Groundwater Quality Bureau approved by the secretary meet the abatement standards of Subsections A, B, C, and D of this section. Abatement of water contaminants measured in solid-matrix samples of the vadose zone shall be considered complete after one-time sampling from compliance stations approved by the secretary. Surface water pollution shall be abated to conform to the Water Quality Standards for Interstate and Intrastate Streams in New Mexico (20.6.4 NMAC).**

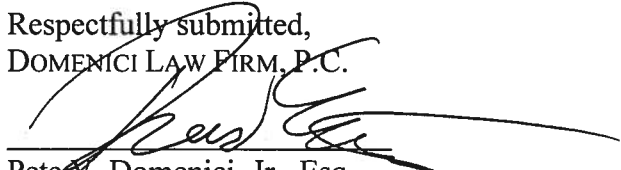
4. 20.6.2.4103(F) (d) NMAC shall read in full:

**compliance with the standard set forth in Subsections A and B of this section is technically infeasible, as demonstrated by a statistically valid extrapolation of the decrease in concentration of any water contaminant over the remainder of a twenty (20) year period, such that projected future reductions during that time would not be substantially less as determined by the Secretary than the concentration at the time technical infeasibility is proposed. A statistically valid decrease can be demonstrated by fewer than eight (8) consecutive sampling events or sufficient sampling as set forth in 20.6.2.4103 (E) subject to the approval of the Secretary in accordance with the provisions of 20.6.2.4103 (E). Sampling events demonstrating a statistically valid decrease shall be collected with a minimum of ninety (90) days between sampling events, and shall not span a time period greater than four (4) years.**

5. 20.6.2.4108 (B) (4) NMAC shall read in full:

**owners and residents of surface property located inside, and within 1/3 of a mile from, the perimeter of the geographic area where the standards and requirements set forth in Section 20.6.2.4103 NMAC are exceeded who shall be notified by a means approved by the secretary; and**

Respectfully submitted,  
DOMENICI LAW FIRM, P.C.



Pete W. Domenici, Jr., Esq.  
Lorraine Hollingsworth, Esq.  
Reed Easterwood, Esq.  
320 Gold Ave. SW Suite 1000  
Albuquerque, New Mexico 87102  
(505) 883-6250

*Attorneys for City of Roswell*

## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served on the following via email unless otherwise noted on February 16, 2018:

Ms. Pam Castaneda, Administrator\*  
Water Quality Control Commission  
Room N-2168, Runnels building  
1190 St. Francis Dr.  
Santa Fe, New Mexico 87505  
[pam.castaneda@state.nm.us](mailto:pam.castaneda@state.nm.us)  
via e mail with 1 Original, 12 hard copies,  
sent via fed ex

New Mexico Environmental Department  
Office of General Counsel  
John Verheul  
Lara Katz  
P.O. Box 5469  
Santa Fe, New Mexico 87502  
[john.verheul@state.nm.us](mailto:john.verheul@state.nm.us)  
[lara.katz@state.nm.us](mailto:lara.katz@state.nm.us)

Pete Domenici  
Lorraine Hollingsworth  
Domenici Law Firm, P.C.  
320 Gold Ave. SW, suite 1000  
Albuquerque, NM 87102  
[pdomenici@domicilaw.com](mailto:pdomenici@domicilaw.com)  
[lhollingsworth@domicilaw.com](mailto:lhollingsworth@domicilaw.com)

Louis W. Rose  
Kari Olson  
P.O. Box 2307  
Santa Fe, NM 87504  
[lrose@montand.com](mailto:lrose@montand.com)  
[kolson@montand.com](mailto:kolson@montand.com)

Timothy A. Dolan  
Office of Laboratory Counsel  
Los Alamos National Laboratory  
P.O. Box 1663, MS A187  
Los Alamos, NM 87545  
[tdolan@lanl.gov](mailto:tdolan@lanl.gov)

Rachel Conn  
Projects Director  
Amigos Bravos  
P.O. Box 238  
Taos, NM 87571  
[Rconn@amigosbravos.org](mailto:Rconn@amigosbravos.org)

Dalva L. Moellenberg  
1239 Paseo de Peralta  
Santa Fe, NM 87501  
[DLM@gknet.com](mailto:DLM@gknet.com)

Micheal Bowen  
Executive Director  
1470 St. Francis Drive  
Santa Fe, NM 87505  
[nmma@comcast.net](mailto:nmma@comcast.net)

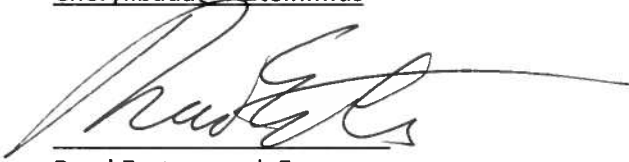
Jaimie Park  
Douglas Meiklejohn  
Eric Jantz  
Jonathan Block  
New Mexico Law Center  
1405 Luisa Street, Suite 5  
Santa Fe, NM 87505  
[jpark@nmelc.org](mailto:jpark@nmelc.org)  
[dmeiklejohn@nmelc.org](mailto:dmeiklejohn@nmelc.org)

William C. Olson  
14 Cosmic Way  
Lamy, NM 87540  
Billjeanie.olson@gmail.com

John Grubesic  
Office of the Attorney General Post Office Drawer  
1508  
Santa Fe, NM 87504-1508  
[jgrubesic@nmag.gov](mailto:jgrubesic@nmag.gov)

William Brancard

Cheryl Bada  
Energy, Minerals and Natural Resources  
Department  
1220 South St. Francis Drive  
Santa Fe, NM 87505  
[billblanchard@state.nm.us](mailto:billblanchard@state.nm.us)  
[Cheryl.bada@state.nm.us](mailto:Cheryl.bada@state.nm.us)

A handwritten signature in black ink, appearing to read "Reed Easterwood", with a long horizontal flourish extending to the right.

Reed Easterwood, Esq.