

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



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

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**No. WQCC 17-03(R)**

**WILLIAM C. OLSON PROPOSED STATEMENT OF REASONS**

The below William C. Olson Proposed Statement of Reasons (Olson SOR) is submitted for the purpose of assisting the New Mexico Water Quality Control Commission (Commission) in its deliberation in this proceeding. In adopting amendments to the Ground and Surface Water Protection Regulations of Title 20, Chapter 6, Part 2 of the New Mexico Administrative Code (“20.6.2 NMAC”), the Commission must prepare a Statement of Reasons to fulfill the requirement that the rulemaking record indicates the reasoning of the Commission and the basis on which it adopted the regulations.

The Olson SOR outlines the authority for the proceedings and provides factual findings, with citations to the evidentiary record, and conclusions of law to support my proposed amendments to the New Mexico Environment Department (Department) proposed revisions of 20.6.2 NMAC as contained in “*Amended NMED Exhibit 36*” that is attached to the Department’s November 9, 2017 “*Amended Notice of Withdrawal of the New Mexico Environment Department’s Proposed Definition of Discharge Permit Amendment and Related Changes to 20.6.2 NMAC*”. A February 16, 2018 “*William C. Olson Closing Argument*” is being submitted concurrent with the Olson SOR summarizing my issues in the hearing proceeding and explaining

why the Commission should adopt my proposed amendments to “*Amended NMED Exhibit 36*”.

Also concurrent with the Olson SOR and Closing Arguments, I have filed February 16, 2018 final proposed rule amendments titled “*William C. Olson Final Proposed Amendments to NMED Proposed Revisions to 20.6.2 NMAC*” (Olson Proposal). The Olson Proposal is a compilation of all of my proposed amendments to “*Amended NMED Exhibit 36*” based upon the evidence and testimony presented at the Commission’s November 14-17, 2017 rule amendment hearings.

### **FINDINGS OF FACT**

#### **I. PURPOSE OF COMMISSION RULES**

1. The Ground and Surface Water Protection Rules of 20.6.2 NMAC are fundamentally about protection of ground water resources in New Mexico for present and foreseeable future use. [Olson Direct Testimony, WCO Exhibit 1, pg. 5].

2. New Mexico is an arid state, with limited water resources and consequently ground and surface waters in New Mexico are public resources managed for public benefit. The state is growing and developing, placing an increasing demand on its limited ground water resources. [Olson Direct Testimony, WCO Exhibit 1, pg. 5].

3. New Mexican’s obtain approximately 90 percent of their drinking water from ground water sources and it’s extremely important to protect those resources. [Olson Direct Testimony, WCO Exhibit 1, pg. 5].

4. The New Mexico Legislature enacted the Water Quality Act in 1977. Pursuant to its statutory authority, the Commission has adopted water quality standards and rules to protect all surface and subsurface waters in New Mexico, including rules for abatement of water pollution above established standards. [Olson Direct Testimony, WCO Exhibit 1, pgs. 5-6].

5. The Water Quality Act was amended by the legislature in 2009 allowing the Commission to specify in rules measures to be taken to prevent water pollution and monitor water quality. [Olson Direct Testimony, WCO Exhibit 1, pg. 6].

## **II. PURPOSE OF THE PROPOSED RULE AMENDMENTS**

6. The Department's proposed amendments to certain portions of the Commission's 20.6.2 NMAC regulations for the purpose of bringing the rules up to date with current science, policy and practice. [Petition, pg. 1].

7. The purpose of the hearing was to address NMED's proposed revisions in "*Amended NMED Exhibit 36*" in a manner that prevent and abate water pollution and protect water quality in an effective, efficient and reliable manner consistent with statutory requirements of the Water Quality Act. [Olson Direct Testimony, WCO Exhibit 1, pg. 5].

8. Pollution prevention at facilities that discharge pollutants is important because extensive contamination of ground water resources can and has occurred from various types of discharging facilities in the State of New Mexico, including mining, dairy, oil and gas, fueling, industrial, wastewater and federal facilities. [Olson Direct Testimony, WCO Exhibit 1, pg. 6]

9. Since the adoption of pollution prevention rules in 1977, the Department and New Mexico Oil Conservation Division of the Energy, Minerals and Natural Resources Department ("Oil Conservation Division") have discovered that some discharging facilities operational and disposal practices failed to prevent ground water pollution and resulted in impacts on ground water quality. [Olson Direct Testimony, WCO Exhibit 1, pg. 6]

10. Over time, as the agencies required new pollution prevention and ground water monitoring measures in permits, the number of cases of ground water contamination increased as more monitoring data was obtained. [Olson Direct Testimony, WCO Exhibit 1, pg. 6].

11. Due to the importance of preserving New Mexico's public water resources and the potential for contamination of these resources, water quality protection rules should be reviewed on a periodic basis to assess whether they are consistent with current knowledge and issues. [Olson Direct Testimony, WCO Exhibit 1, pg. 6]

12. Many Commission rules have not been revised in a long time and are due for review and update, especially the ground water standards. [Olson Direct Testimony, WCO Exhibit 1, pg. 6].

### **III. COMMISSION RULEMAKING AMENDMENT HEARINGS**

13. On May 1, 2017, the Department submitted its "*Petition to Amend the Ground and Surface Water Protection Regulations (20.6.2 NMAC) and Request for Hearing*" ("Petition"). [Olson Direct Testimony, WCO Exhibit 1, pg. 4; and Petition].

14. On May 31, 2017, the Commission Hearing Officer issued a Procedural Order ("Order") governing prehearing submissions, scheduling and conduct of the hearing. The Order was subsequently revised on June 2, 2017, and later amended on August 11, 2017. [Olson Direct Testimony, WCO Exhibit 1, pg. 4].

15. On July 27, 2017, pursuant to the Order, parties to the hearing submitted statements of position on the Petition and proposed their own amendments not contained in the Petition, but which are logical outgrowths of the Department's proposed revisions. [Olson Direct Testimony, WCO Exhibit 1, pg. 4].

16. On July 27, 2017, the Department also filed with the Hearing Officer a "*New Mexico Environment Department Notice of Amended Petition*" containing revisions to their original petition. [Olson Direct Testimony, WCO Exhibit 1, pg. 4].

17. On August 7, 2017, the Department filed a “*Notice of Errata*” with the Hearing Officer containing “*corrected Proposed Amendments to the New Mexico Ground and Surface Water Protection Regulations 20.6.2 NMAC*” (hereafter referred to as “Amended Petition”) which included an omitted subsection referenced in the July 27, 2017 “*New Mexico Environment Department Notice of Amended Petition*”. [Olson Direct Testimony, WCO Exhibit 1, pgs. 4-5].

18. On November 9, 2017, the Department submitted its “*Amended Notice of Withdrawal of the New Mexico Environment Department’s Proposed Definition of Discharge Permit Amendment and Related Changes to 20.6.2 NMAC*” that included additional proposed 20.6.2 NMAC rule amendments as contained in its attached “*Amended NMED Exhibit 36*”. [Olson Closing Argument, pg. 3].

19. Four (4) days of public hearings were held before the Commission between November 14, 2017 and November 17, 2018 in Santa Fe, New Mexico on the Department’s proposed amendments in “*Amended NMED Exhibit 36*” . [Tr. vols. 1-4].

20. During the Commission’s rulemaking hearing, four witnesses presented technical testimony on behalf of the Department; one witness presented technical testimony on behalf of the City of Roswell (“Roswell”); one witness presented technical testimony on behalf of the Laun-Dry; one witness presented technical testimony on behalf of the Los Alamos National Security, LLC (“LANS”); one witness presented technical testimony on behalf of the Dairy Producers of New Mexico and Dairy Industry for a Clean Environment (Jointly “Dairies”); one witness presented technical testimony on behalf of Amigos Bravos and Gila Resources Information Project (Jointly “AB/GRIP”); one witness presented technical testimony on behalf of the New Mexico Energy Minerals and Natural Resources Department (“EMNRD”); two witnesses presented technical testimony on behalf of the United States Air Force and Department

of Defense (Jointly “USAF/DoD”); one witness presented technical testimony on behalf of the New Mexico Mining Association (“NMMA”); one witness presented technical testimony on behalf of the Environmental Quality Association Subsection of the New Mexico Municipal League (“NMML”); and William C. Olson was an expert witness presenting independent technical testimony on his own behalf as a member of the public. [Tr. vols. 1-4].

21. Each of the hearing parties presented written direct testimony and oral summaries of their testimony and was cross-examined by the other parties. Several witnesses also presented written rebuttal testimony and oral sur-rebuttal and were cross-examined by the other parties on their testimony. [Tr. vols. 1-4].

22. Rio Grande Resources Corporation, America Magnesium LLC, and New Mexico Copper Corporation were hearing parties but provided no witness testimony. [Tr. vols. 1-4].

23. Members of the public also presented public comment. [Tr. vols. 1-4].

24. The hearing record includes the September 11, 2017 pre-filed written direct testimonies of all parties with the exception of Rio Grande Resources Corporation, America Magnesium LLC, and New Mexico Copper Corporation. [Tr. vols. 1-4].

25. The hearing record also includes the October 27, 2017 pre-filed written rebuttal testimony of all parties with the exception of Roswell, Laun-Dry and Rio Grande Resources Corporation, America Magnesium LLC, and New Mexico Copper Corporation. [Tr. vols. 1-4].

26. Witness William C. Olson is a private consultant on water quality issues and was a witness presenting independent technical testimony on his own behalf as a member of the public. Mr. Olson has Bachelors of Science degree in geology and a Master of Science degree in hydrology from the New Mexico Institute of Mining and Technology. He previously served as Bureau Chief of the Department’s Ground Water Quality Bureau from October 2004 to October

2011. For 25 years, he implemented and enforced Commission rules adopted under the Water Quality Act regarding the issuance of discharge permits and oversaw soil and ground water reclamation activities with both the Department and the Oil Conservation Division. He served as a Commissioner on the Commission for 13 years, as designee for the New Mexico Oil Conservation Commission (Oil Conservation Commission). He also served as a Commissioner on the Oil Conservation Commission for over 5 years. During service on these commissions, he participated in adoption of a number of water quality protection rules pursuant to both the Water Quality Act and New Mexico Oil and Gas Act, including Commission rules for pollution abatement, public notice, adjudications, uranium ground water standards and stream standards, and Oil Conservation Division pit rules. Since 2012, he was a private consultant on water quality issues in New Mexico for various clients where he assisted the Department in initial development of the Copper Mine Rule; served as a consultant and expert witness for the New Mexico Attorney General's Office and private parties on water quality issues; was a party and expert witness in the Commission's Copper Mine Rule hearings; and was an expert witness in the 2015 Dairy Rule amendment hearings, including participating in and testifying on the subsequent 3-way Coalition, dairy industry and Department settlement of the Dairy Industry Group for a Clean Environment's rule amendment hearing petition and the subsequent joint proposed Dairy Rule amendments adopted by the Commission. [Olson Direct Testimony WCO Exhibit 1, pgs. 1-4; WCO Exhibit 2; and Olson Testimony Tr. vol. 1, pg. 65, line 14 to pg. 67, line 9].

#### **IV. JUSTIFICATION FOR OLSON PROPOSED RULE AMENDMENTS**

27. Due to the importance of preserving New Mexico's public water resources and the potential for contamination of these resources, water quality protection rules should be reviewed on a periodic basis to assess whether they are consistent with current knowledge and

issues. Many of the Commission rules have not been revised in years and are due for review and update, especially the ground water standards. [Olson Direct Testimony, WCO Exhibit 1, pg. 6].

28. William C. Olson supported the Department's effort to update the Commission's 20.6.2 NMAC regulations and proposed amendments to seven (7) sections of the Department's initial Amended Petition. [Olson Direct Testimony, WCO Exhibit 1, pgs. 6-7].

29. The Department in its October 27, 2017 "*Notice of Intent to Provide Rebuttal Testimony*" and the accompanying Department proposed 20.6.2 NMAC rule amendments of "*NMED Exhibit 27*" and its November 9, 2017 "*Amended NMED Exhibit 36*" either accepted or otherwise addressed six (6) of William C. Olson's proposed amendments to 20.6.2.7.D(4)(b) NMAC, 20.6.2.1210.A(5) NMAC, 20.6.2.3103.A(2) NMAC, 20.6.2.3105.A NMAC, 20.6.2.3109.F(4) NMAC and 20.6.2.4103.F(1) NMAC. [McQuillan Rebuttal Testimony, NMED Exhibit 28, pgs. 6-7; Vollbrecht Rebuttal Testimony, NMED Exhibit 30, pg. 19-20; and Vollbrecht Testimony Tr. vol. 1, pg. 78, line 15 to pg. 79, line 8, Vollbrecht Testimony Tr. vol. 4, pg. 841, line 22 to pg. 842, line 22].

30. William C. Olson ultimately supported the Department's subsequent 20.6.2 NMAC hearing rule amendments contained in "*Amended NMED Exhibit 36*" with the exception of his proposed amendments addressed separately below and not taking a position on the Department's elimination of the 5 year term for approved variances in 20.6.2.1210 NMAC. [Olson Closing Argument, pgs. 7-8].

#### **Section 20.6.2.10 NMAC**

**20.6.2.10 LIMITATIONS:** These regulations do not apply to the following:

- A. Any activity or condition subject to the authority of the environmental improvement board pursuant to the Hazardous Waste Act, NMSA 1978, Sections 74-4-1 to -14, the Ground Water Protection Act, NMSA 1978, Sections 74-6B-1 to -14, or the Solid Waste Act NMSA 1978, Sections 74-9-1 to -25 except to abate water pollution or to control the disposal or use of septage and sludge, or
- B. any activity or condition subject to the authority of the oil conservation commission pursuant to provisions of the Oil and Gas Act, NMSA 1978, Section 70-2-12 and other laws conferring power on the oil



conservation commission and the oil conservation division of the energy, minerals and natural resources department to prevent or abate water pollution.

31. LANS and the USAF/DoD proposed to adopt a new section 20.6.2.10 NMAC to incorporate specific statutory exemptions in a separate section for the purpose of conforming with the language of the Water Quality Act and to better inform the regulated community and public on the scope of the regulations. However, the proposed language set forth by LANS and USAF/DoD did not conform with the language of the Water Quality Act and omitted portions of the statutory language. The Department and William C. Olson proposed that LANS' and USAF/DoD's language be amended as set out above to conform with the Water Quality Act including the above typographical correction noted by William C. Olson [Olson Rebuttal Testimony, WCO Rebuttal Exhibit 1, pgs. 2-3 and pg.5; Olson Testimony Tr. vol. 3, pg. 705, line 19 to pg. 706, line 13; and Amended NMED Exhibit 36, pg. 9].

32. The above-proposed Department and William C. Olson amendment was supported by LANS. [Beers Testimony Tr. vol. 3, pg. 686, lines 3-6].

33. For the above reasons, the Commission adopts the above 20.6.2.10 NMAC amendments as proposed by the Department and William C. Olson.

#### **Section 20.6.2.1210.E NMAC**

##### **20.6.2.1210 VARIANCE PETITIONS:**

E. For variances granted for a period in excess of five years, the petitioner shall provide to the department for review a variance compliance report at five year intervals to demonstrate that the conditions of the variance are being met, including notification of any changed circumstances or newly-discovered facts **that are material to the variance**. At such time as the department determines the report is administratively complete, the department shall post the report on its website, and mail or e-mail notice of its availability to those persons on a general and facility-specific list maintained by the department who have requested notice of discharge permit applications, and any person who participated in the variance process. If such conditions are not being met, or there is evidence indicating changed circumstances or newly-discovered facts or conditions that were unknown at the time the variance was initially granted **and which are material to the variance or the conditions under which the variance was approved, the department or any person, including the department who is adversely affected** may request a hearing before the commission to revoke, modify or otherwise reconsider the variance within 90 days of the issuance of notice of availability of the report.

34. The NMMA and Dairies proposed alternative language to the variance section of 20.6.2.1210.E on the content of five-year review reports, clarification of the nature of changed circumstances and who may request a hearing to re-open an approved variance. The NMMA's and Dairies proposed language on facts being "*material*" to the variance is reasonable. William C. Olson provided evidence that the NMMA's and Dairies proposed language limiting appeals to a person who has "*standing to appeal a permit decision*" is not consistent with the Water Quality Act. The Water Quality Act specifies that appeals of agency and Commission actions can be made by "*a person who is adversely affected*" (see NMSA 1978 74-6-5.O and NMSA 1978 74-6-7.A) and are not limited to a legal standing for appeal. Mr. Olson also testified that it is also not appropriate to link the five-year compliance report submission to a permit renewal. A variance is a deviation from Commission rules that is separate from issuance of a permit even though it may later be incorporated into a permit. A decision on re-consideration of an approved variance must be made within 90 days of availability of the report. Permit renewals have many associated deadlines for submission and review and a deadline for re-consideration of a variance should not be buried within the framework of deadlines for permit renewals where many other issues are under consideration. In addition, Mr. Olson testified that the NMMA's and Dairies insertion of language regarding "*substantially different*" circumstances into this section is vague and creates ambiguity about what needs to be included in the report. William C. Olson proposed compromise language that addressed the above issues consistent with the WQA and other Commission Rules. [Olson Rebuttal Testimony, WCO Rebuttal Exhibit 1, pgs. 6-8 and pg. 10; and Olson Testimony Tr. vol. 2, pg. 340, line 16 to pg. 342, line 20].

35. For the above reasons, the Commission adopts the above William C. Olson amendments to "*Amended NMED Exhibit 36*".

### **Section 20.6.2.3103.A(2) NMAC**

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

##### **A. Human Health Standards.**

(2) **Standards for Toxic Pollutants.** A toxic pollutant shall not be present at a concentration shown by 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. **Sources of scientific information for human health risk assessments should be based on credible science and supporting studies conducted in accordance with sound scientific practices as well as data collected by accepted methods. Examples of acceptable sources for scientific information for human health risk assessments include, but are not limited to, the Integrated Risk Information System, EPA's Provisional Peer Reviewed Toxic Values, Agency for Toxic Substances and Disease Registry Minimal Risk Levels and Human Effects Assessment Summary Tables.**

36. The USAF/DoD" proposed revisions to language in "*Amended NMED Exhibit 36*" to clarify the scientific basis for setting standards for toxic pollutants by rewriting the language of 20.6.2.3103.A(2) for establishing how a toxic pollutant standard is determined and adding criteria for sources of acceptable scientific information used in such determinations. William C. Olson testified that in "*Amended NMED Exhibit 36*", the Department moved the existing language for determining toxic pollutants from the definitions section of the rule to the standards but preserved the long-standing language on how the Commission determines toxic pollutants. The USAF/DoD revised language omits portions of existing Commission language about how an appropriate concentration of a toxic pollutant is determined. Mr. Olson also testified that the USAF/DoD proposed language for criteria on acceptable science when determining concentrations of toxic pollutants is reasonable, but is not consistent with the Commission statutory requirement that standards be "*based upon credible scientific data and other evidence appropriate under the Water Quality Act*" (see NMSA 1978 74-6-4.D). In addition, Mr. Olson testified that the Commission should not limit appropriate science, as proposed by USAF/DoD, to United States federal agency toxicology information due to the

current politicization and suppression of science at the federal level. Subsequently, Mr. Olson proposed the above alternate compromise language consistent with the statutory language on Commission powers for setting standards in NMSA 1978 74-6-4.D and existing Commission rule language. [Olson Rebuttal Testimony, WCO Rebuttal Exhibit 1, pgs. 4-5; and Olson Testimony Tr. vol. 2, pg. 502, line 19 to pg. 505, line 9].

37. The USAF/DoD testified that it was amenable to support William C. Olson's language if a new DoD proposed definition of credible science was adopted. The USAF/DoD's proposal is similar to Mr. Olson's proposed language, but contains limiting criteria inconsistent with the broader requirements of the WQA. [Olson Testimony Tr. vol. 2, pg. 505, lines 10-23.].

38. For the foregoing reasons, the Commission adopts the above William C. Olson amendments to "*Amended NMED Exhibit 36*".

#### **Section 20.6.2.4108 NMAC**

##### **20.6.2.4108 PUBLIC NOTICE AND PARTICIPATION:**

**B.** ~~[Within thirty (30) days of filing of ]Any person proposing a Stage 2 abatement plan [proposal, or proposed] or a significant modification [of] to a Stage 2 [of the] abatement plan, or an alternative abatement standard[any responsible person]~~ shall provide ~~[to the secretary proof of public]~~ notice of the ~~[abatement plan]proposal~~ to the following persons:

**(1)** the public, who shall be notified through publication of a notice in newspapers of general circulation in this state and in the county where the abatement will occur or where the water body that would be affected by a proposed alternative abatement standard is located, and, in areas with large percentages of non-English speaking people, through the mailing of the public notice in English to a bilingual radio station serving the area where the abatement will occur with a request that it be aired as a public service announcement in the predominant non-English language of the area;

**(2)** those persons, as identified by the secretary, who have requested notification, who shall be notified by mail or email;

**(3)** the New Mexico Trustee for Natural Resources, and any other local, state or federal governmental agency affected, as identified by the secretary, which shall be notified by certified mail;

**(4)** owners and residents of surface property located inside, and within one (1) 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

**(5)** the Governor or President of each Indian Tribe, Pueblo or Nation within the state of New Mexico, as identified by the secretary, who shall be notified by mail or email.

**C.** The public notice proposal for a Stage 2 abatement plan proposal or significant modification of a Stage 2 abatement plan shall ~~[include, as approved in advance by]~~ be submitted to the secretary for approval with a proposed Stage 2 abatement plan proposal, or significant modification of a Stage 2 abatement plan, and shall include:

- (1)** name and address of the responsible person;
- (2)** location of the proposed abatement;



action;

(3) brief description of the nature of the water pollution and of the proposed abatement

determination;

(4) brief description of the procedures followed by the secretary in making a final

(5) statement on the comment period;

(6) statement that a copy of the abatement plan can be viewed by the public at the department's main office or at the department field office for the area in which the discharge occurred;

(7) statement that written comments on the abatement plan, and requests for a public meeting or hearing that include the reasons why a meeting or hearing should be held, will be accepted for consideration if sent to the secretary within sixty (60) days after the ~~[determination of administrative completeness; and]~~ date of public notice; and

(8) address and phone number at which interested persons may obtain further information.

**D.** The public notice proposal for a proposed alternative abatement standard shall be submitted to the secretary for approval thirty (30) days prior to the filing of a petition for alternative abatement standards, and shall include:

(1) name and address of the responsible person;

(2) location of the proposed alternative abatement standards;

(3) brief description of the nature of the water pollution and of the proposed alternative abatement standards;

(4) brief description of the procedures followed by the commission in making a final determination on a petition for alternate abatement standards;

(5) statement that a copy of the petition for alternate abatement standards petition can be viewed by the public at the department's main office or at the department field office for the area in which the affected water body is occurring;

(6) statement on how the public can request to be placed on a facility-specific mailing list for notification of any hearing conducted on the petition for alternate abatement standards pursuant to 20.1.3 NMAC; and

(7) address and phone number at which interested persons may obtain further information.

**DE.** Within thirty (30) days of the secretary's approval of a Stage 2 abatement plan public notice proposal for a proposed Stage 2 abatement plan, significant modification of a Stage 2 abatement plan or alternative abatement standard, any responsible person shall provide to the secretary proof of public notice to the persons listed in Subsection B of 20.6.2.4108 NMAC.

**EF.** For a proposed Stage 2 abatement plan or significant modification of a Stage 2 abatement plan, Aa public meeting or hearing may be held if the secretary determines there is significant public interest. Notice of the time and place of the meeting or hearing shall be given at least thirty (30) days prior to the meeting or hearing pursuant to Subsections A and B above. The secretary may appoint a meeting facilitator or hearing officer. The secretary may require the responsible person to prepare for approval by the secretary a fact sheet, to be distributed at the public meeting or hearing and afterwards upon request, written in English and Spanish, describing site history, the nature and extent of water pollution, and the proposed abatement. The record of the meeting or hearing, requested under this Section, consists of a tape recorded or transcribed session, provided that the cost of a court recorder shall be paid by the person requesting the transcript. If requested by the secretary, the responsible person will provide a translator approved by the secretary at a public meeting or hearing conducted in a locale where testimony from non-English speaking people can reasonably be expected. At the meeting or hearing, all interested persons shall be given a reasonable chance to submit data, views or arguments orally or in writing, and to ask questions of the secretary or the secretary's designee and of the responsible person, or their authorized representatives.

**G.** An alternative abatement standard shall only be granted after a public hearing before the commission, as required by NMSA 1978, Section 74-6-4(H) of the Water Quality Act. The commission shall review petitions for alternative abatement standards in accordance with the procedures for review of variance petitions provided in the commission's adjudicatory procedures, 20.1.3 NMAC.

39. William C. Olson testified that existing rule language in 20.6.2.4108 NMAC does not address initial public notice of submission of alternate abatement standards petitions and that

alternate abatement standards may be petitioned at any time, and could be submitted outside submission of a Stage 2 abatement plan. The requirements in the Department's proposed section 20.6.2.4103.F(5) NMAC of "*Amended NMED Exhibit 36*" specifies that review of alternate abatement standards petitions follow Commission adjudicatory procedures in 20.1.3 NMAC (Variance Hearings). However, the Commission variance hearing procedures only require a one-time newspaper publication and notification of the facility-specific list 30 days prior to a Commission hearing. There is no initial public notice of submission of alternate abatement standards petitions to the Department. The public, adjacent landowners, tribes, pueblos and Natural Resource Trustee and other local, state or federal agencies would not receive initial notice of submission of alternate abatement standards petitions, as occurs for a Stage 2 abatement plan. These public and governmental parties would subsequently not have the opportunity to provide input on whether it may affect them during the Department's review of the petition prior to a Commission hearing on the matter. Receiving information from the public and other governmental agencies upfront in the review process is critical and useful to the Department in evaluating alternate abatement standard petitions, especially knowledge of area water wells and present and future water and land uses that may be affected, as well as other site specific information. In addition, the information contained in an alternate abatement standard petition is highly technical and extensive. The public should be provided with adequate time to review and assess the petition's effects prior to the Commission's 30-day hearing notice issued pursuant to the Commission's adjudicatory procedures. [Olson Direct Written Testimony WCO Exhibit 1, pgs. 13-15; and Olson Testimony Tr. vol. 4, pg. 1010, line 16 to pg. 1012, line 18].

40. Mr. Olson proposed new amended language to address these discrepancies and provide initial public notice of submission of a petition for alternate standards, similar to that

required for submission of a Stage 2 abatement plan. His proposed amendments to this section also clarified that hearings on alternate standards are before the Commission and not the Secretary of the Department. [Olson Direct Written Testimony WCO Exhibit 1, pgs. 13-15; and Olson Testimony Tr. vol. 4, pg. 1010, line 16 to pg. 1012, line 18].

41. The Department agreed with Mr. Olson's testimony and supported his proposed public notice amendments to 20.6.2.4108 NMAC, if they were slightly modified. [Vollbrecht Testimony Tr. vol. 4, pg. 1006, line 21 to pg. 1007, line 13; Vollbrecht Rebuttal Testimony, NMED Exhibit 30, pgs. 20-22]. Mr. Olson testified that NMED's suggested modifications to his proposed amendments on abatement plan public notices were acceptable. [Olson Testimony Tr. vol. 4, pg. 1012, line 19 to pg. 1013, line 3].

42. The USAF/DoD, NMMA and Dairies objected to Mr. Olson's proposed amendments on the rationale that public notice of the Commission hearing under the adjudicatory procedures of the Commission is sufficient. None of these parties provided evidence contrary to Mr. Olson's testimony that the rule language in 20.6.2.4108 does not address initial public notice of submission of alternate abatement standards petitions. Nor did they provide evidence that contradicts Mr. Olson's testimony that the public may not have an opportunity to provide input on a petition prior to a Commission hearing if an alternate abatement standards petition is submitted outside of a Stage 2 abatement plan or abatement plan modification. [Olson Testimony Tr. vol. 4, pg. 1014, line 25 to pg. 1015, line 17].

43. NMMA also questioned whether public notices of abatement plan modifications already cover public notice of alternate abatement standards petition. Mr. Olson testified that they do not. Alternate abatement standards are separate actions that must be granted by the Commission before an abatement plan modification. Alternate abatement standards are a form of

variance from the Rules subject to a Commission hearing and approval, and are not approved by the Department under the modification process. If approved by the Commission, alternate abatement standards and the means of achieving them must be later incorporated into an abatement plan modification which is administratively approved by the Department. [Olson Testimony Tr. vol. 4, pg. 1015, line 18 to pg. 1016, line 23].

44. Consequently, the Commission adopts Mr. Olson's above-proposed language for 20.6.2.4108 NMAC, as modified and supported by NMED. This language ensures that the public is properly noticed when the alternate abatement standard process begins and gives the public the opportunity to provide information and concerns during the Department's review of the petition prior to a Commission hearing on the variance.

## **V. PROPOSED RULE AMENDMENTS NOT ADOPTED**

### **A. 20.6.2.3105 NMAC RCRA and CERCLA Proposed Rule Exemptions by LANS and USAF/DoD**

45. Both LANS and USAF/DoD proposed to exempt activities regulated under the federal Solid Waste Disposal Act, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and the Resource Conservation and Recovery Act (RCRA) from discharge permitting requirements of the Commission rules. William C. Olson testified that there is no statutory exemption in the Water Quality Act for these activities. In fact, some CERCLA and RCRA sites have operational discharge permits issued under Commission rules. [Olson Rebuttal Testimony, WCO Rebuttal Exhibit 1, pg. 3; and pgs. 5-6; and Olson Testimony Tr. vol. 3, pg. 706, line 21 to pg. 708, line 4].

46. Due to the lack of a statutory exemption and the need for the state to protect its interests in preventing and abating water pollution in New Mexico pursuant to its statutory



authority, the Commission does not adopt LANS' and USAF/DoD's proposed federal exemptions in 20.6.2.3105 NMAC.

**B. 20.6.2.4103.E NMAC Proposed Amendments by Roswell**

47. Roswell proposed to amend 20.6.2.4103.E NMAC by deleting existing Commission language requiring that subsurface water and surface water abatement is not complete until "*a minimum of eight (8) consecutive quarterly standards from all compliance sampling stations*" meets standards. Roswell proposed to replace this explicit requirement with language that abatement is complete when "*sufficient*" samples meet standards. William C. Olson testified that he was a member of the Commission during the 1995 adoption of the abatement rules and subsequently implemented and enforced abatement rules with both the Department and Oil Conservation Division. The intent of this requirement is to ensure that water pollution has definitively been abated prior to closure. The existing Commission rule language was adopted because, during abatement of water pollution, the concentration of water contaminants at individual monitoring stations can vary throughout the year and year to year due to fluctuations in the water levels from seasonal and climatic influences that affect recharge of water. Mr. Olson testified that he was a hydrologist implementing and enforcing New Mexico water pollution abatement rules for both the Department and Oil Conservation Division for 25 years and frequently observed this phenomenon. [Olson Rebuttal Testimony, WCO Rebuttal Exhibit 1, pgs. 12-14; and Olson Testimony Tr. vol. 4, pg. 877, line 5 to pg. 878, line 6].

48. Roswell argued that sites can be satisfactorily monitored with semi-annual or annual sampling to complete abatement. Mr. Olson testified that less frequent monitoring schedules during abatement activities are often approved and the abatement rules in 20.6.2.4106.C(3) NMAC and 20.6.2.4106.E(4) NMAC allow flexibility in monitoring water

quality during implementation of abatement activities, including sampling frequencies such as those referenced by Roswell. However, upon closure it is necessary that cessation of abatement activities, or clean closure, be demonstrated by 8 quarters of sampling to account for variations in water quality, as discussed above. In addition, Mr. Olson testified that the language proposed by Roswell is vague and subjective and will lead to disputes over abatement closure requirements with no consistent closure requirement from site to site. Under Roswell's proposed language it is likely that different standards of closure will be applied to different parties at different sites. Due to limited water supplies in New Mexico and the fact that approximately 90 % of New Mexico residents rely on ground water as a source of drinking water, it is imperative that water pollution be definitively abated by a responsible party to standards. Mr. Olson testified that this is best accomplished as demonstrated by 8 consecutive quarters of clean water quality sampling to account for repeated fluctuations in water levels. [Olson Rebuttal Testimony, WCO Rebuttal Exhibit 1, pgs. 13-14; and Olson Testimony Tr. vol. 4, pg. 878, line 7 to pg. 879, line 19].

49. For the above reasons, the Commission does not adopt Roswell's proposed amendments to 20.6.2.4103.E NMAC.

**C. 20.6.2.4103.F(1)(d) NMAC Proposed Amendments by Roswell**

50. Roswell proposed to amend 20.6.2.4103.F(1)(d) NMAC by deleting existing Commission language requiring that an alternate standard for technical infeasibility is only applicable at sites where the reduction in the concentration of water contaminants "*would be less than 20 percent of the concentration at the time technical infeasibility is proposed*". Roswell proposed to replace this with language that allows technical infeasibility in cases where the reduction in the concentration of water contamination is "*substantially*" less. Roswell's also proposed to delete other existing Commission language requiring that a statistically valid decrease

“cannot” be demonstrated by fewer than 8 consecutive sampling events and instead allows less frequent “sufficient sampling as set forth in 20.6.2.4103(E)...”. William C. Olson testified that the language proposed by Roswell is vague and subjective, allows wide variation in criteria for considering technical infeasibility and will lead to disputes over what is “substantial”, and that there would be no explicit consistent requirement applied from site to site, such that different criteria will be applied to different parties and sites. Mr. Olson also testified about the need for 8 consecutive quarters of sampling in making decisions on abatement closure and that the same arguments he made regarding Roswell’s proposed amendments to 20.6.2.4103.E above also apply here regarding decisions on technical infeasibility. [Olson Rebuttal Testimony, WCO Rebuttal Exhibit 1, pgs. 14-15; and Olson Testimony Tr. vol. 4, pg. 879, line 25 to pg. 881, line 15].

51. For the above reasons and the reasons in Findings of Fact 47-48, the Commission does not adopt Roswell’s proposed amendments to 20.6.2.4103.F(1)(d) NMAC.

**D. 20.6.2.4108 NMAC Roswell Proposed Reduced Public Notice Requirements**

52. Roswell proposed to amend 20.6.2.4108.B(4) NMAC by reducing the existing public notice *radius* for notifying owners and residents of adjacent surface property of a proposed Stage 2 abatement plan from “one (1) mile” to “1/3 of a mile”. As a rationale for this amendment, Roswell argued that its proposal is consistent with the notice requirements regarding discharge permits under 20.6.2.3108 NMAC. William C. Olson testified that it is inappropriate to compare discharge permit public notice requirements with those for abatement of water pollution. The purpose of a discharge permit is to prevent water pollution at a facility. A shorter radius for discharge permits is appropriate because water pollution is not allowed by Commission rules and should not occur. Mr. Olson also testified that once water pollution has occurred in violation of Commission rules, the effects of that contamination can extend for large distances from a facility.

A more extensive landowner public notification radius is warranted under an abatement plan to notify persons who could potentially be affected by pollution. Mr. Olson testified that this issue was addressed at the original Commission abatement hearings in 1995 and that the Commission has been presented technical evidence at adjudicatory hearings (Dona Dairies and Tyrone mine), alternate abatement standards hearings (LAC Minerals, L-Bar uranium mine) and other rule-making hearings (Dairy Rule and Copper Mine Rule) regarding the extent of water pollution, once it has, occurred and how the effects of that pollution can extend over 1 mile in distance. Mr. Olson testified that during his 25 years of experience in working on water pollution abatement with both the Department and Oil Conservation Division there were numerous examples of extensive water pollution within Department and Oil Conservation Division case files across different industries and that he personally worked on many of these sites. In some cases, water pollution at these sites has extended over 1 mile. [Olson Rebuttal Testimony, WCO Rebuttal Exhibit 1, pgs. 15-16; and Olson Testimony Tr. vol. 4, pg. 1013, line 4 to pg. 1014, line 24].

53. For the above reasons, the Commission does not adopt Roswell's proposed amendments to 20.6.2.4108.B(4) NMAC.

**E. 20.6.2.4113 and 20.6.2.4114 NMAC Dispute Resolution Amendments**  
**Proposed by Dairies**

54. The Dairies proposed to add language to 20.6.2.4113 NMAC and 20.6.2.4114 NMAC to allow for appeal of a secretary decision on a dispute resolution. William C. Olson testified that he was a member of the Commission during the rulemaking hearings on the adoption of the abatement rules. Mr. Olson also implemented and enforced the abatement rules with both the Department and Oil Conservation Division for approximately 16 years after their adoption. Mr. Olson testified that the intent of the dispute resolution of 20.6.2.4113 NMAC was to allow a

responsible party to contest technical decisions of Department staff implementing the rule by disputing staff requirements to the Secretary of the Department for a Secretary decision on a specific technical issue. Agency actions based on the Secretary's decision are incorporated into an abatement plan approval with conditions (subject to a public hearing for final action) or a notice of deficiency regarding the overall abatement plan. Final agency action in this form is explicitly appealable to the Commission under 20.6.2.4114 NMAC. The Rule would be unwieldy for both the Department and the Commission if disputes of each individual technical rule requirement are appealed to the Commission outside either approval of an overall abatement plan or agency issuance of a notice of deficiency. In addition, Mr. Olson testified that dispute resolution under 20.6.2.4113 NMAC is a non-public process between the agency and the responsible party for achieving compromise on technical issues. There is no public participation in dispute resolution. Private resolution of technical issues between the agency and the responsible person does not mean that the public may not object to the Secretary's technical resolution decision during a public hearing on the abatement plan where agency actions become final. [Olson Rebuttal Testimony, WCO Rebuttal Exhibit 1, pgs. 10-11; and Olson Testimony Tr. vol. 3, pg. 584, line 11 to pg. 586, line 15].

55. The Department in its hearing testimony confirmed Mr. Olson's above analysis of the Dairies proposed amendment to this section and reiterated that the outcome of dispute resolution is not a final appealable agency action and that any Department action resulting from dispute resolutions would be incorporated into a broader final decision or approval that could then be appealed to the Commission. [Vollbrecht Testimony Tr. vol. 3, pgs. 582, line 14 to pg. 583, line 17].

56. For the above reasons, the Commission does not adopt the Dairies proposed amendments for 20.6.2.4113 NMAC and 20.6.2.4114 NMAC.

## **CONCLUSIONS OF LAW**

### **I. STATUTES AND REGULATIONS**

1. This case is to consider amendments to 20.6.2 NMAC pursuant to the Water Quality Act as proposed by the Department.

2. The Commission has the authority to adopt the amendments pursuant to 74-6-4(D) and 74-6-4(E) NMSA 1978.

3. The decisions of the Commission with regard to amendments to 20.6.2 NMAC in this proceeding shall not be (1) arbitrary, capricious or an abuse of discretion, (2) unsupported by the substantial evidence in the record, or (3) otherwise not in accordance with the law. Section 74-6-7(B) NMSA 1978.

4. This case is to consider adoption of amended water quality standards for ground waters to protect designated uses of water and amended rules to prevent or abate water pollution. Section 74-6-4(D) and Section 74-6-4(E) NMSA 1978.

5. Section 74-6-4(D) NMSA 1978 sets forth the duties of the Commission and matters to be considered in the adoption of water quality standards. The standards are to be based on credible scientific data and shall include narrative standards, and as appropriate, the designated uses of the waters and the water quality criteria necessary to protect such uses. The standards shall at a minimum protect public health or welfare, enhance the quality of water and serve the purposes of the Water Quality Act. In making standards, the Commission shall give weight it deems appropriate to all facts and circumstances, including the use and value of the water for

water supplies, propagation of fish and wildlife, recreational purposes and agricultural, industrial and other purposes.

6. Section 74-6-4(E) NMSA 1978 sets forth the duties of the Commission and matters to be considered in the adoption of rules to prevent or abate water pollution. Section 74-6-4(E) NMSA 1978 states that in adopting rules to prevent or abate water pollution, the Commission shall give weight it deems appropriate to all relevant facts and circumstances, including: (1) character and degree of injury to or interference with health, welfare, environment and property; (2) the public interest, including the social and economic value of the sources of water contaminants; (3) technical practicability and economic reasonableness of reducing or eliminating water contaminants from the sources involved and previous experience with equipment and methods available to control the water contaminants involved; (4) successive uses, including but not limited to domestic, commercial, industrial, pastoral, agricultural, wildlife and recreational uses; (5) feasibility of a user or a subsequent user treating the water before a subsequent use; (6) property rights and accustomed uses; and (7) federal water quality requirements.

7. Section 74-6-4(H) NMSA 1978 gives the Commission the authority to grant exceptions to its rules, subject to limitations, after a public hearing and specifies that *“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 is granted”*.

8. Section 74-6-4(K) NMSA 1978 states that the Commission “*shall specify in regulations the measures to be taken to prevent water pollution and to monitor water quality*” and that “*the commission shall consider, in addition to the factors listed in Subsection E of this section, the best available scientific information.*”

9. Section 74-6-5(E)(3) NMSA 1978 of the Water Quality Act requires that the constituent agency deny a discharge permit if “*the discharge would cause or contribute to water contaminant levels in excess of any state or federal standard. Determination of the discharge’s effect on ground water shall be measured at any place of withdrawal of water for present and reasonably foreseeable future use*”.

10. The Commissions rulemaking authority is limited in Section 74-6-12(F) NMSA 1978 which states that in adopting regulations “*reasonable degradation of water quality resulting from beneficial use shall be allowed. Such degradation shall not result in impairment of water quality to the extent that water quality standards are exceeded*”.

11. Under 20.6.2.3101.A NMAC, the purpose of Commission discharge permitting rules is for “*controlling discharges onto or below the surface of the ground [is] to protect all ground water of the state of New Mexico which has an existing concentration of 10,000 mg/l or less TDS, for present and potential future use as domestic and agricultural water supply.....*”.

12. Under 20.6.2.4101.A NMAC, the purpose of the Commission rules on prevention and abatement of water pollution is to “*abate pollution of subsurface water so that all ground water of the state of New Mexico which has an existing concentration of 10,000 mg/l or less TDS, is either remediated or protected for use as domestic and agricultural water supply .....*”.

## **II. DETERMINATIONS**

13. The mechanisms for adopting water quality standards and preventing and abating



water pollution in all Commission rules must be consistent with the statutory provisions of the Water Quality Act.

14. It is important that the statutes and rules for preventing and abating water pollution be implemented by the constituent agencies in a fair and consistent manner.

15. The mechanisms for preventing and abating water pollution in all Commission rules must be consistent with prior decisions of the Commission.

16. Primary functions of the Commission's duties and powers are to adopt water quality standards for surface and ground water as set out in 74-6-4(D) NMSA 1978 and to adopt rules to prevent and abate water pollution as set out in 74-6-4(E) NMSA 1978.

17. Section 74-6-4(H) NMSA 1978 contemplates that there are circumstances under which a permit applicant may be allowed, through the granting of a variance, to cause temporary pollution of water as long as it is abated within a reasonable period of time. However, a person is limited from being granted approval of a variance that allows permanent water pollution.

18. Section 74-6-5(E)(3) NMSA 1978 prohibits approval of a discharge permit that allows ground water to be contaminated above water quality standards at any place of withdrawal of water for present or reasonably foreseeable future use.

19. Allowing a discharge to intentionally cause ground water pollution in excess of Commission standards without a variance petition subject to a public hearing violates the Water Quality Act and the authority granted the Commission.

20. Section 74-6-12(F) NMSA 1978 allows degradation of ground water quality but prohibits degradation in excess of the water quality standards.

21. Amendments to 20.6.2 NMAC, as contained in this Statement of Reasons, are necessary to protect uses of water and prevent and abate water pollution in an effective, efficient

manner consistent with the Water Quality Act and agency interpretations and application of the Water Quality Act and Commission rules.

22. 20.6.2 NMAC, as amended in this Statement of Reasons, is in the public interest, considering the social and economic value of the sources of water contaminants.

23. 20.6.2 NMAC, as amended in this Statement of Reasons, ensures that discharges of water contaminants will not injure or interfere with health, welfare, environment and property.

24. Compliance with the 20.6.2 NMAC, as amended in this Statement of Reasons, will not unreasonably impair the social and economic value of the sources of water contaminants.

25. 20.6.2 NMAC, as amended in this Statement of Reasons, strikes a fair balance between the interests of the state and public in maintaining uncontaminated ground water resources, including the social and economic value of the sources of water contaminants.

26. Compliance with 20.6.2 NMAC, as amended in this Statement of Reasons, is technically practical and economically reasonable for preventing and abating water pollution and is achievable through available control technologies and proper operating methods. On a site-specific basis, a permittee has the opportunity to petition for a variance from requirements of the rule.

27. 20.6.2 NMAC, as amended in this Statement of Reasons, will limit contaminant concentrations to levels that allow for all successive future uses of ground water resources. Potential future uses make preservation of water resources important to the state and its citizens.

28. 20.6.2 NMAC, as amended in this Statement of Reasons, will help prevent ground water pollution thereby protecting property rights and allow for accustomed uses of ground water resources. A person does not have a right to contaminate ground water in excess of the water

quality standards promulgated by the Commission. Ground water is public property and is protected as a public resource.

29. 20.6.2 NMAC, as amended in this Statement of Reasons, is consistent with federal water quality requirements as they relate to the application of water quality standards and the permitting and abatement of water pollution.

30. 20.6.2 NMAC, as amended in this Statement of Reasons, protects public health or welfare, enhances the quality of water and serves the purposes of the Water Quality Act.

31. 20.6.2 NMAC, as amended in this Statement of Reasons, meets all statutory criteria for adoption.

32. The preponderance of the evidence demonstrates that 20.6.2 NMAC, as amended in this Statement of Reasons, should be approved.

**THE COMMISSION HEREBY ORDERS:**

The Ground and Surface Water Protection Regulations of 20.6.2 NMAC, as amended in this Statement of Reasons, including any non-substantive amendments necessary for reformatting and filing with the State Records Center, are hereby adopted.

Respectfully submitted,

February 16, 2018

By



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