



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

1190 St. Francis Drive, Room N2150

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**Constituent Agencies**

Environment Department  
State Engineer & Interstate Stream Commission  
Game and Fish Department  
Oil Conservation Division  
Department of Agriculture  
State Parks Division  
Soil and Water Conservation Commission  
Bureau of Geology and Mineral Resources  
Municipal/County Representative  
Members-at-Large

Minutes of the  
New Mexico Water Quality Control Commission Meeting  
March 12-14, 2002

The New Mexico Water Quality Control Commission (WQCC) meeting was held on March 12-14, 2002, at the Bataan Memorial Building, Room 238, 407 Galisteo, Santa Fe, New Mexico.

**MEMBERS PRESENT**

*Pete Maggiore	Chairman, New Mexico Environment Department
**David Johnson	State Parks Division
***Larry Bell	Department of Game and Fish
John Whipple	State Engineer & Interstate Stream Commission
Julie Maitland	Department of Agriculture
Howard Hutchinson	Soil and Water Conservation Commission
Bill Olson	Oil Conservation Division
Steve Glass	City of Albuquerque - Municipal/County Representative
Dr. Conrad Keyes	Member-at-Large
Jack Westman	Member-at-Large
Lynn Brandvold	Bureau of Geology and Mineral Resources

\*Ralph Gruebel, Director of the NMED Environmental Protection Division, substituted for Chairman Maggiore on March 14

\*\*Commissioner Johnson was present only on March 13

\*\*\* Mike Sloane of the Department of Game and Fish substituted for Larry Bell and was present only on March 12

**MEMBERS ABSENT**

Irene Lee Member-at-Large

OTHERS PRESENT:

Felicia Orth	Acting WQCC Administrator, NMED Hearing Officer
Carolyn Vigil	NMED Hearing Clerk
Tracy Hughes	Interim Commission Counsel, Attorney General's Office
Zachary Shandler	Commission Counsel, Attorney General's Office
Tannis Fox	NMED Deputy General Counsel
Eric Ames	NMED Assistant General Counsel
Julia Mullen	NMED Assistant General Counsel
Paul Halajian	NMED Assistant General Counsel
Louis Rose	Montgomery & Andrews Law Firm
Bruce Thomson	UNM
Jim Davis	NMED/SWQB
Glenn Saums	NMED/SWQB
Steven Pierce	NMED/SWQB
John Montgomery	NMED/SWQB
Marcy Leavitt	NMED/GWQB
Maura Hanning	NMED/GWQB
Sue Umshler	LRPA
Scott Cameron	Forest Guardians
Hoyt Pattison	Dairy Lobbyist
Kelly Bitner	TetraTech
Jay Lazarus	Glorieta GeoScience
Peter Wilkinson	NM Dept. of Game and Fish
David Propst	NM Dept. of Game and Fish
Jolene L. McCaleb	SJWC
L. Randy Kirkpatrick	
Sharon Lombardi	
A. Samuel Adelo	Interpreter of English/Spanish
Jerry D. Fanning, Jr.	
Maxine Goad	
Heather Green	Attorney, Environmental Law Center
Cathie Eisen	
Caren Cowan	
Callie Gnatkowski	
Russ MacRae	
Peter Luthiger	NMMA
Richard Virtue	Attorney, Virtue, Najjar Firm
Greg Mello	Los Alamos Study Group
David Bacon	
Joe I. Herrera	
Mary A. Herrera	
Eddie Ratliff	
Paul Elders	
Kerri Elders	
Deborah Seligman	

Ken Miller	
Del Brooks	
Greg Fitz-Gerald	
Joel Lusk	U.S. Fish and Wildlife
Brian Hanson	U.S. Fish and Wildlife
Cathy Ratliff	Glorieta GeoScience
Douglas Meiklejohn	Attorney, Environmental Law Center
Joni Arends	Concerned Citizens for Nuclear Safety
Juanita Girardin	
J.D. Bullington	
Jimi Gadzia	
David Jardine	
Larry Fielder	
Cecilia Abeyta	
Mark Valenzuela	
Dan Santantonio	City of Las Cruces Utilities Dept.
Chris Mechels	
Lisa Cummings	DOE Attorney
John W. Hernandez	Elephant Butte Irrigation District
Charles Nylander	LANL
Richard Meyerhoff	CDM
Mike Saladen	LANL
Deborah Woitte	LANL
Ben Neary	Reporter, Santa Fe New Mexican
Lermes Padilla-Moore	
William Hocker	Moquino MDWCA

**MARCH 12, 2002**

**Item #1: Roll Call**

Felicia Orth, Acting WQCC Administrator, took roll.

**Item #2: Approval of the Agenda**

Chairman Maggiore noted that Item #13 was added to the original agenda to provide for an Executive Session pursuant to NMSA 1978, Section 10-15-1 (H)(7), to discuss Defenders of Wildlife and Forest Guardians v. United States Environmental Protection Agency. Ms. Hughes requested that this Item be moved up for consideration today based on the schedule of the Commission counsel. The Chairman further noted he had received a Notice of Withdrawal for Item # 6, Gary Porte, P2-Diary, DP 689, CO WQA 2001-06. The Chairman suggested that, based on the length and scope of the agenda items, the Commission go late tonight and begin on Tuesday morning at 8:00 a.m.

Commissioner Westman suggested that the Commission go into Executive Session just before lunch so as to minimize the inconvenience to the audience and to accommodate the attorney arriving at 11:00 a.m.

Commissioner Brandvold moved to approve the agenda with the changes suggested. Commissioner Hutchinson seconded the motion. The motion passed unanimously.

**Item #3 Approval of the minutes of the December 11, 2001 meeting.**

After a brief discussion of minor corrections to the December 11, 2001 minutes, Commissioner Keyes moved to approve the minutes as corrected. Commissioner Olson seconded the motion. The motion passed unanimously.

**Item #4 Formal Adoption of an Open Meetings Act Resolution for 2002.**

Ms. Hughes discussed the Open Meeting Act Resolution for 2002. Copies of a revised Resolution were provided to the Commissioners.

Paragraph 2 now includes a clause requiring that, except for emergency meetings, the proposed agenda be available at least 24 hours before the meeting.

Paragraph 9 now provides for participation by a Commissioner by teleconference if it is otherwise difficult or impossible for a Commissioner to attend a meeting in person.

Paragraph 10-C was added to require that the decision to go into closed session be reflected with a roll call vote and that the minutes state whether the matters discussed in a closed meeting were limited only to those specified in the motion or notice for closure.

Ms. Hughes noted that they were not requesting that the Commission adopt the provisions as a rulemaking today, but that the provisions be adopted as a resolution. Rulemaking may follow at a later date.

Commissioner Westman moved the adoption of the Open Meetings Resolution. Commissioner Brandvold seconded the motion.

During discussion, Commissioner Keyes noted that pursuant to paragraphs 8 and 10-A, it seems a majority of a twelve-person Commission would be seven or more and not six or more members. The Chairman stated that he appreciated the observation and had requested additional guidance on the quorum issue in a letter that was copied to the rest of the Commission.

Commissioner Olson noted that Dan Rubin had advised them earlier on the quorum necessary. Commissioner Keyes, Commissioner Whipple and Mr. Sloan discussed the size of the quorum necessary for the transaction of Commission business.

Ms. Hughes advised that a majority of the Commission to constitute a quorum is seven and that not all twelve members need to be present at a meeting but that six affirmative votes are necessary to pass a motion.

Commissioner Glass and Mr. Sloane noted the potential conflict between the provisions allowing for notification of the Commission secretary in writing up to 24 hours prior to the meeting and the requirement that the Commission ratify all additions to the agenda at the meeting. Commissioner Hutchinson noted that the Secretary would not have enough time to make changes to the agenda if the changes were proposed 24 hours and 1 minute prior to the meeting.

Ms. Hughes stated that the law allows the Commissioners to add items with not less than 24 hours notice and to ratify all changes at the meeting. She distinguished between the legal issues involved and the practical issues involved, and noted that the Chair has discretion to state that there is insufficient time to make changes to an agenda already posted.

Ms. Tannis Fox, New Mexico Environment Department Deputy General Counsel, noted that the adoption of a resolution providing for a Commissioner's participation by telephone conference could be a problem insofar as a rule may be necessary for this to be effective.

Commissioner Westman requested placement on the April 2002 agenda of a formal rulemaking relating to the Open Meetings Resolution.

The motion to approve the Open Meetings Act Resolution for 2002 passed unanimously.

**Item #5 Discussion and setting of hearing on petition from the New Mexico Game and Fish Department to use Antimycin A to renovate the upper reaches of West Fork Gila River in Catron County.**

Mr. David Propst and Mr. Peter Wilkinson from the Department of Game and Fish requested a hearing before a hearing officer in Silver City on the use of Antimycin A to renovate the upper reaches of the West Fork of the Gila River in Catron County. Ms. Hughes noted that the Commissioners' packets included a letter from the Surface Water Quality Bureau from July 2001 relating to the petition. Mr. Sloane noted that the petition was brought forward last summer but the Department of Game and Fish was not prepared to set it for hearing at that time. It is ready now.

Commissioner Keyes noted that the certificate for the year 2002 was not in the packet but was received in the mail.

Chairman Maggiore suggested moving the hearing forward and having the NMED hearing officer conduct the hearing rather than the Commission as a whole, as has been done in the past, then file her report for review and later adoption.

Commissioner Glass moved to follow the tradition described by the Chairman. Commissioner Olson seconded the motion, adding that the hearing officer should set the time of the hearing and that the hearing should be held in the vicinity of the area to be treated. Mr. Propst suggested

Silver City for the hearing location, which is not very close to the area to be treated, but is convenient for those participating. The motion passed unanimously, with Mr. Sloane recusing.

At this point Commissioner Westman made a motion to amend the agenda to move that portion of "Other Business" relating to the Game and Fish Department up to be heard now. Commissioner Keyes seconded the motion. The motion carried.

Mr. Wilkinson stated that he presented another petition for restoration of the Rio Grande Cutthroat Trout to the Environment Department Surface Water Quality Bureau for review. The petition relates to Animas Creek in Sierra County. He will request a hearing at a subsequent Commission meeting.

**Item #6 Discussion and Setting of hearing date for Gary Porte, P2-Diary, DP 689, CO WQA 2001-06. (WQCC 02-02 CO)**

Chairman Maggiore removed this item from the Agenda because he received a Notice of Withdrawal.

**Item #7 Hearing on New Mexico Environment Department Ground Water Quality Bureau's petition to amend Sections 20.6.2.7, 3106, 3108, 3109, 5003, and 5101 NMAC. (WQCC 01-17R)**

Ms. Tracy Hughes, appointed Hearing Officer, convened the hearing on the New Mexico Environment Department Ground Water Quality Bureau's petition to amend Sections 20-6.2.7, 3106, 3108, 3109, 5003, and 5101 NMAC. (WQCC 01-17R)

The hearing was transcribed almost entirely by Kathy Townsend Court Reporters, 110 Twelfth St. NW Albuquerque, NM 87102, 505 243-5018.

A portion of the hearing, the public comment period held beginning at 6 p.m. on March 12, was transcribed verbatim from 3 audiotapes by NMED staff. It may be obtained in hard copy or electronically by contacting the Commission Administrator.

Shortly before the Commission took its lunch break, a break in the hearing occurred for the following Item:

**Item #8 (formerly Item # 13) Executive Session pursuant to NMSA 1978, Section 10-15-1 (H)(7), to discuss Defenders of Wildlife and Forest Guardians vs. United States Environmental Protection Agency.**

Commissioner Westman moved that the Commission go into Executive Session pursuant to NMSA 1978, Section 10-15-1 (H)(7), to discuss Defenders of Wildlife and Forest Guardians vs. U.S. Environmental Protection Agency. Commissioner Maitland seconded the motion.

A roll call vote was conducted:

Pete Maggiore	yes
John Whipple	yes
Julie Maitland	yes
Steve Glass	yes
Dr. Conrad Keyes	yes
Jack Westman	yes
Lynn Brandvold	yes
Bill Olson	yes
Mike Sloane	yes
Howard Hutchinson	yes

After the closed session was ended, Chairman Maggiore stated in open session that matters discussed in the executive session were limited only to those specified in the motion.

Commissioner Westman moved to re-authorize counsel to intervene in the case of Defenders of Wildlife and Forest Guardians vs. United States Environmental Protection Agency. Commissioner Brandvold seconded the motion. The motion carried.

**The Hearing on Item No. 7 was reconvened after lunch and continued until approximately 8 p.m. March 12.**

## **March 13, 2002**

### **Meeting Reconvened**

### **Further Discussion and Changes to the Agenda**

Chairman Maggiore reconvened the meeting of the Commission during a recess in the hearing on Item #7. The Commissioners discussed their availability on the 13<sup>th</sup> and 14<sup>th</sup>.

Chairman Maggiore asked Dr. Davis for the deadline on Item No. 9, the 305(b) Report. Dr. Davis stated that nominally the deadline is April 1, but that this year the Report could be submitted after April 1 and still be in compliance with the Clean Water Act. EPA headquarters is debating the April 1 portion of the "every two year" clause and has issued a memorandum saying that it could be submitted later. Chairman Maggiore suggested sending a letter asking for more time. Dr. Davis stated that the state runs only a small risk in not making the deadline.

With respect to Item No. 10, Chairman Maggiore stated that the time sensitivity is that the public comment period ends in six days, and the Surface Water Bureau wanted the Commissioners to participate in it. Dr. Davis stated that there is no legal timeline requirement associated with the Plan. Chairman Maggiore suggested that item No. 10 be stricken, that the Commissioners forward their comments to the Bureau individually prior to March 19 and that at the next meeting the Bureau brief the Commission on the Plan.

With respect to Item No. 9 Chairman Maggiore suggested that the Commissioners forward any comments to Dr. Davis, and that a letter be prepared for his signature concurring in the EPA interpretation that allows submissions after April 1, and stating an intention to finalize the Report at the Commission's April meeting.

Chairman Maggiore then asked Dr. Davis for input on the urgency of adopting the surface water quality standards proposed in Item No. 8. Dr. Davis noted that EPA sent to the state their decision on the last Triennial Review 14 months ago. At that time they found certain deficiencies in the New Mexico Quality Standards. The state has been working since then to address the deficiencies identified by EPA. This is the last deficiency that would require a rule making or modification to the standards by the Commission. He cannot predict EPA's actions on this matter, but can only refer to their letter of January 2001. It is important to move forward on this issue for a variety of practical reasons: the Department's main witness is Steve Pierce, who is retiring on Thursday, March 21, 2002. A delay would work considerable hardship on the Environment Department.

Chairman Maggiore suggested that they finish the hearing on Item No. 7, work through lunch, decide whether to leave the record open or render a decision, and receive the testimony from Mr. Pierce.

Further discussion occurred among the Commissioners on the question of how to proceed through the agenda.

Eric Ames clarified the Department's position on 2 points: In context he does not perceive that EPA will pose much of a problem here. They don't move very fast either. However, Mr. Pierce is a very important part of their presentation and his testimony won't make very much sense if the hearing is not held in its entirety; he will not be available for cross examination and rebuttal if the hearing is split in two parts. He requests that the hearing go forward in its entirety before March 21<sup>st</sup>.

Jolene L. McCaleb, Counsel for San Juan Water Commission, stated that her client feels that this is an important petition, that it is very important that the Commission sit as a whole, and that the hearing proceed as a whole. Ms. McCaleb and her client will make themselves available next week if necessary. Ms. McCaleb proposed that the Commission postpone the hearing based on purported insufficient notice from the NMED of significant changes in their technical testimony. NMED counsel rebutted the proposal, and the Commission decided to proceed with the hearing.

Further discussion occurred among the Commissioners on their availability.

The Commissioners available did agree to hear the Surface Water Quality Bureau's petition to amend Sections 20.6.4.10, 20.6.4.11, 20.6.4.113 and 20.6.4.900 NMAC of the Commission's Standards for Interstate and Intrastate Surface Waters following the hearing on Item No. 7. (WQCC 01-18R)

Commissioner Brandvold moved to consider adoption of the State's 305(b) Report on New Mexico Water Quality to Congress and the presentation by the New Mexico Environment Department's Surface Water Quality Bureau on the Draft Statewide Water Quality Management Plan at the April Commission meeting. Commissioner Westman seconded the motion. The motion carried.

### **Item #7 Hearing Continued**

Ms. Hughes, as Hearing Officer, reconvened the hearing on Item No. 7. The hearing was ended on March 13 at approximately 12:30 p.m.

### **Meeting Reconvened**

### **Further Discussion of Proceedings**

Chairman Maggiore reconvened the meeting for discussion of plans to proceed.

Commissioner Maitland stated her desire to get the next hearing underway.

Commissioner Whipple asked for an estimation of the length of time for the Bureau's direct presentation; Dr. Davis and Mr. Ames answered that it would be between 90 minutes and two hours.

Chairman Maggiore suggested that the Commission proceed to deliberate on Item No.7 prior to hearing Item No. 8, insofar as the proposed regulations seemed straightforward and narrowly focused, but he agreed to wait until Commissioner Westman returned from a personal meeting to make the decision.

Chairman Maggiore asked for other business, and for any scheduling conflicts associated with the next Commission meeting, or other agenda items.

Glenn Saums and Dr. Davis distributed new compact discs to the Commissioners containing a draft Water Quality Management Plan designed to work with an Internet browser.

Commissioner Lee's request to postpone the deliberations on the proposed ground water regulations (Item No. 7) until she could participate was noted.

Chairman Maggiore summarized the prior discussion as to whether to deliberate or not for Commissioner Westman, who had returned.

Commissioner Westman noted that he was ambivalent, but that the hearing information is fresh in our minds today.

Commissioner Johnson mentioned it is unusual to delay deliberations based on an individual commissioner.

Commissioner Hutchinson noted that the problem with Commissioner Lee is ironic since the hearing was postponed to March due to a public notice failure in January.

Commissioner Westman noted that there are a number of recommended changes to the ground water regulations, and asked whether the Department was prepared to come forward and identify the changes they supported.

Chairman Maggiore said that he had heard the Environment Department make several adjustments to its petition as part of its closing remarks, and that this could be rolled into the motion. This includes changes to the definition of "discharge sites."

Commissioner Hutchinson noted that the commissioners do not have the transcripts sitting in front of them for reference.

Commissioner Maitland suggested that the public notice language in the Solid Waste Act be distributed and considered.

Ms. Hughes suggested that the Commission vote on whether to deliberate today.

Chairman Maggiore made a motion to conduct deliberations today. Commissioner Maitland seconded the motion. A roll call vote was conducted:

Pete Maggiore	yes
John Whipple	yes
Julie Maitland	no
Steve Glass	no
Dr. Conrad Keyes	yes
Jack Westman	yes
Lynn Brandvold	no
Bill Olson	no
Howard Hutchinson	no
David Johnson	yes

The motion failed. The Commission decided to meet in a special meeting on April 4, 2002 for the sole purpose of deliberating and rendering a decision on Agenda Item # 7. The meeting will be held in Santa Fe and will begin at 9:00 a.m.

**Item #9 (formerly Item #8) Hearing on New Mexico Environment Department Surface Water Quality Bureau's petition to amend Sections 20.6.4.10, 20.6.4.11, 20.6.4.12, 20.6.4.113 and 20.6.4.900 NMAC of the Commission's Standards for Interstate and Intrastate Surface Waters. (WQCC 01-18R)**

Ms. Tracy Hughes, appointed Hearing Officer, convened the hearing on the New Mexico Environment Department Surface Water Quality Bureau's petition to amend Sections 20.6.4.10, 20.6.4.11, 20.6.4.12, 20.6.4.113 and 20.6.4.900 NMAC of the Commission's Standards for Interstate and Intrastate Surface Waters. (WQCC 01-18R)

The hearing was transcribed in its entirety by Kathy Townsend Court Reporters, 110 Twelfth St. NW Albuquerque, NM 87102, 505 243-5018.

The hearing proceeded through the remainder of March 13, and was continued to March 14.

### **March 14, 2002**

**Item #9 (formerly Item #8), continued. Hearing on New Mexico Environment Department Surface Water Quality Bureau's petition to amend Sections 20.6.4.10, 20.6.4.11, 20.6.4.12, 20.6.4.113 and 20.6.4.900 NMAC of the Commission's Standards for Interstate and Intrastate Surface Waters. (WQCC 01-18R)**

The hearing ended on March 14, at approximately 5 p.m.

**Item #10 (formerly Item #11) Other Business, continued.**

Commissioner Whipple asked about the possibility of making changes to the Commission Guidelines.

Ms. Hughes advised that the Commission should brainstorm and consult with counsel.

Mr. Nylander stated that about a year and a half ago a group of petitioners approached the Commission on revising the Guidelines. The Commission asked Dan Rubin, its counsel at the time, to help form a working group of interested parties. That working group has conducted 14 or 15 meetings in the last year. The task is very near completion and they would like the opportunity to bring it to the Commission sometime in May, June or July 2002.

**Item #11 (formerly Item #12) Next Meeting**

The next regular Commission meeting is scheduled for April 9, 2002 in Santa Fe.

### **Adjournment**

Mr. Gruebel requested a motion to adjourn.

Commissioner Keyes moved to adjourn and Commissioner Brandvold seconded the motion. The motion carried.

  
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Chairperson