

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

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Constituent Agencies

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

New Mexico Water Quality Control Commission Meeting

April 14, 2009

9:00 a.m.

New Mexico State Capitol Building, Rm. 321

490 Old Santa Fe Trail

Santa Fe, New Mexico 87501

MEMBERS PRESENT:

Jon Goldstein	NMED/Deputy Secretary
Greg Lewis	Office of the State Engineer
Cheryl Bada	State Parks Division
Larry Dominguez	Department of Agriculture
Howard Hutchinson	Soil and Water Conservation Commission
Brad Jones	Oil Conservation Division
Steve Glass	County of Bernalillo, Municipal/County Representative
Len Flowers	Health Department
Maxine Goad	Member-at-Large
Edward Vigil	Member-at-Large

MEMBERS ABSENT:

Peggy Johnson	Bureau of Geology and Mineral Resources
Mike Sloane	Department of Game & Fish
Joseph Chavarria	Member-at-Large

OTHERS PRESENT:

Glenn Saums, NMED/SWQB	James Hogan, NMED/SWQB
Kathie Deal, NMED/GWQB	Pam Homer, NMED/SWQB
Adolfo Mendez, NMED/OGC	Bill Olson, NMED/GWQB
Heidi Henderson, NMED/SWQB	Dennis Romero, Esq.

Mike Freebourn
Chet Wyant
Karen Gallegos, NMED
Pete Domenici, Jr., Esq.
T. J. Trujillo, Gallagher & Kennedy
Walter Bradley
Eddie Schaap
Rick Edleman
Link Summers
Joyce Medina, NMED

Alberto Baros
Cathy Wyant
Michael Nivison
Sebastiao Faria
Jay Lazarus, Glorieta Geoscience
Steve Hanson
Gary Bonestroo
Caren Cowan
Zachary Shandler, Asst. Atty. Gen.

The meeting was called to order by Mr. Goldstein at 9:05 a.m.

Item 1. Roll Call:

The Commission administrator took roll and noted a quorum was present.

Item 2. Approval of Agenda

Mr. Goldstein noted that Item 6, request for hearing in re: Petition for Nomination of Caballo Reservoir and portions of the Rio Grande for ONRW status, would be removed from the agenda at the request of the Petitioner.

Action: Mr. Glass moved approval of the agenda as amended. Mr. Hutchinson seconded. The motion passed unanimously.

Item 3. Approval of meeting minutes of January 13, 2009.

Two typographical errors were noted.

Action: Mr. Lewis moved to approve the minutes as corrected. Mr. Dominguez seconded. The motion passed unanimously.

Item 4. Approval of Final Draft TMDL for the Dry Cimarron River Watershed, Oklahoma border to headwaters. Heidi Henderson, NMED/SWQB.

Ms. Henderson requested that the final draft of the Dry Cimarron River TMDL, that had been delivered to the Commission, be approved. She reviewed the development process relating to this TMDL and explained the contents of the document.

Commission discussion with Ms. Henderson and Surface Water Quality Bureau staff with respect to the contents of the TMDL followed the presentation.

Action: Mr. Glass moved to approve the final draft of the Dry Cimarron River Watershed, Oklahoma border to headwaters TMDL with typographical error correction as noted. Mr. Hutchinson seconded. The motion passed

unanimously.

Item 5. Program update by NMED's Construction Programs Bureau in re: NM Clean Water State Revolving Fund and the federal American Recovery and Reinvestment Act, Richard Rose, NMED/CPB; Adolfo Mendez, NMED/OGC.

Mr. Rose discussed several pertinent New Mexico construction program funding matters, including, but not limited to, federal stimulus funds allotted to the State. He noted that his presentation was intended to give the Commission a brief update on projects that may currently be underway as well as those that are anticipated in the near future.

Mr. Mendez briefly noted that the legal framework is present in New Mexico's existing laws and regulations to give grant and loan combinations to projects including those financed with federal stimulus funds through the Construction Programs Bureau.

Item 6. Noted earlier as removed from the Agenda.

Item 7. In the Matter of the Appeal by Sebastiao Faria (Faria Dairy East) of Permit conditions in re: DP 923, WQCC 08-09 (A); Commission decision regarding Faria East's Motion for Order Requiring De Novo Hearing. Pete V. Domenici, Jr., Esq., Faria Dairy East; Adolfo Mendez, NMED/OGC .

Mr. Mendez stated that Mr. Domenici's original Motion for Order Requiring a De Novo Hearing was filed with the Commission on March 2, 2009, followed by the Department's Response to that Motion filed on March 13, 2009. On April 13, 2009, Mr. Domenici filed a Reply to the Department's Response; the Department then filed its Motion to Strike Petitioner's Untimely Reply in Support of Motion for Order Requiring De Novo Hearing. Mr. Mendez went on to note that the April 13, 2009 Reply by Mr. Domenici was not timely filed under the Commission's adjudicatory rules governing appeals or under the New Mexico Rules of Civil Procedure.

Mr. Domenici then explained his view of the background of the case and presented his rebuttal of Mr. Mendez' position relating to whether or not the Reply was timely filed.

Mr. Mendez noted that with respect to the Commission's adjudicatory procedures, there was the presumption that even if a portion of the procedures was found to be invalid, those remaining are still in effect.

Following a brief discussion, Mr. Shandler, Commission Counsel, noted that the Commission could take the matter under advisement.

Action: Mr. Glass moved that the Commission take the Motion to Strike Petitioner's Untimely Response in Support of De Novo Hearing under advisement. Mr. Hutchinson seconded. The motion passed unanimously.

Mr. Domenici proceeded to set out his view of the legal standing of his client Faria Dairy. He went on to present a lengthy analysis of the entire de novo hearing issue with respect to this case stating that, in his opinion, the matter has been pending since December 2004, before the Water Quality Act was amended in 2005 to provide for record review before the WQCC. He further stated that, in his view, the Commission is compelled to hold a de novo hearing in this case.

Mr. Mendez presented the Department's position with respect to this case. He specifically noted the basic disagreement the Department has with Mr. Domenici's contention that merely filing a permit application constitutes a pending adjudicatory proceeding. He argued that the adjudicatory proceeding started with the filing of the appeal in 2008. He noted several legal references pertaining directly to that issue and discussed the definition of an adjudicatory proceeding.

Rebuttal was provided by both parties.

A lengthy Commission discussion with Mr. Domenici and Mr. Mendez ensued.

Following those discussions, Mr. Shandler summarized the arguments presented by both parties for Commission members. He further described the Commission's jurisdiction and authority with respect to these issues. He also discussed the legal ramifications of the issues.

Additional Commission discussion followed Mr. Shandler's comments. The Commission also requested information relating to this matter from NMED Ground Water Quality Bureau staff.

Mr. Shandler summarized possible options available for action by the Commission members.

Commission discussion followed regarding the options set out by Mr. Shandler as well as options mentioned by Commission members.

Action: Mr. Hutchinson moved that the Commission remand this matter back to the Department for discussion between the Applicant and NMED to conduct negotiations relating to the permit in question and determine if another draft permit can be issued without the necessity of a hearing and further that during the negotiation process the Applicant would be allowed to present information it had not submitted during earlier negotiations.

Mr. Hutchinson explained his reasoning with respect to his motion.

There was discussion and additional options set out relating to the process outlined in Mr. Hutchinson's motion and its ramifications.

Mr. Shandler suggested that the Commission recess for lunch and direct the parties to discuss possible solutions to the problems previously mentioned.

Action: Mr. Hutchinson agreed with Mr. Shandler's suggestion and withdrew his motion.

The Commission agreed to postpone further discussion relating to Agenda Item 7 and move to

Agenda Item 8.

Item 8. Presentation by NMED's Ground Water Quality Bureau of amendments to the Water Quality Act and plans for development of regulations applicable to discharges from dairy facilities under the amended Act. William Olson, NMED/GWQB; Adolfo Mendez, NMED/OGC.

Mr. Olson presented an overview of the bills relating to amendments to the Water Quality Act enacted by the Legislature during the 2009 Session and signed by the Governor. He noted that Senate Bill 206 was a bill that dealt with several significant changes. He went on to summarize the impact of SB 206 on the Commission and its function. He also noted a number of specific section and sub-section amendments to the Water Quality Act relating to the Department's issuance of permits, including a mandate for the development of dairy facility regulations.

There was a lengthy discussion among the Commission, Mr. Olson and various individuals interested in the impact of amendments on the dairy industry.

Following discussion, Mr. Olson set out how the Department proposes to deal with the changes that have been made in the Act. He stated that in the next several months the Bureau will be establishing procedures and processes for implementing those changes including development of dairy regulations. He additionally noted that the Bureau will be coming to the Commission in August to request that a hearing be set regarding these new dairy discharge regulations in October.

The Chair suggested that the Commission recess for lunch.

The meeting reconvened at 2:05 p.m.

Mr. Goldstein acknowledged the resignation from the Commission of Ms. Flowers, who represents the New Mexico State Health Department, and thanked her for her contributions to the Commission.

Item 9. In the Matter of the Appeal Petition for Record Review in re: WQCC 07-11 (A) Groundwater Discharge Permit No. 1498, Alta Vista Subdivision, Taos County. Dennis Romero, Esq., for Appellant/Applicant Alta Vista; Tannis Fox, NMED/OGC; Michael Freebourn, Carol Richman, Sheila Shepard and Link Summers, pro se Intervenors. Oral argument by parties in re: Alta Vista petition; and possible decision on petition by WQCC.

Mr. Romero, representing Alta Vista Subdivision, noted that the petition had been filed as a result of the NMED Secretary's final order denying Discharge Permit No. 1498. Mr. Romero went on to state that the issues involved in this matter had been briefed by all parties to the case. He then summarized his client's position noting at the outset that the Secretary had denied the permit though it had been recommended for approval, with conditions, by NMED staff. He concluded by asking the Commission to reverse the Department Secretary's decision.

Ms. Fox, on behalf of the Department, set out its position with respect to the Secretary's order denying the discharge permit, noting that the denial focused on two issues, the first is based on the

Applicant's knowing misrepresentation of material fact in the application and the second, the Secretary's adoption of the Hearing Officer's report recommending that an advanced treatment system be installed on the property. Ms. Fox set out in some detail the Department's view of the Applicant's course of conduct with respect to this discharge permit as well as the requirement relating to installation of an advanced treatment system. Ms. Fox concluded stating that if the Commission agreed to grant the discharge permit that it require the Applicant to install the advanced treatment system, to which the Applicant objects.

Mr. Summers, as one of the Intervenors, introduced Michael Freebourn, also an Intervenor. Mr. Freebourn stated his opposition and the reasons for that opposition to the Commission granting the discharge permit to the Applicant. He concluded by requesting that the Commission uphold the Secretary's decision to deny the permit.

Mr. Summers, on behalf of the remaining Intervenors, asked that the complete administrative record as well as any objections or exceptions set out during the course of the application and review process be included in the record of the case. The Commission agreed to do so.

Mr. Summers continued at some length, setting out his position, as well as that of the remaining Intervenors, in opposition to the granting of Applicant's discharge permit. He too requested that the Secretary's denial of the permit be upheld.

Mr. Summers noted a series of what he considered to be direct interference by the Department in the conduct of the 2006 hearing before Ms. Orth with respect to Department staff being prohibited from testifying at the original Department hearing in Taos.

At this point, Ms. Fox objected to Mr. Summers' line of argument. She stated that in her view this was appropriate as an appeal point on the part of Intervenors if they wanted to appeal the decision of the Hearing Officer not to issue subpoenas to Department staff. She went on to note that the Hearing Officer did make Findings regarding the issues raised by Mr. Summers. She additionally stated that none of these issues are properly brought before the Commission at this juncture.

Mr. Summers noted that he felt his issues were appropriate at this time and were part of the current record.

Mr. Shandler noted that Intervenors' documentation supported the Department's position in denying the permit and asked if Mr. Summers was alternatively proposing a new hearing or did he propose another process or procedure.

Mr. Summers stated that the Intervenors support the Secretary's decision but mentioned that in the event the Commission should overturn that decision he thought the Intervenors would ask that the hearing be reopened to admit evidence that had been excluded in the initial Department hearing.

The Chair sustained Ms. Fox's objection.

Mr. Summers reiterated that the Intervenors support the Secretary's decision in this case.

The Chair asked if any meeting attendees wished to make public comment. No one stated that he

or she wished to do so.

There was brief discussion regarding the contents of the record in this matter.

Following the discussion Mr. Shandler suggested that the Commission go into executive session.

**Action: Ms. Bada moved that the Commission go into executive session.
Mr. Glass seconded.**

Roll Call Vote:

Mr. Vigil	yes
Ms. Goad	yes
Ms. Flowers	yes
Mr. Dominguez	yes
Mr. Hutchinson	yes
Mr. Glass	yes
Ms. Bada	yes
Mr. Jones	yes
Mr. Lewis	yes
Mr. Goldstein	yes

Action: Mr. Hutchinson moved that the Commission return to its public meeting. Mr. Lewis seconded.

Roll Call Vote:

Mr. Lewis	yes
Mr. Jones	yes
Ms. Bada	yes
Mr. Glass	yes
Mr. Dominguez	yes
Mr. Hutchinson	yes
Ms. Flowers	yes
Ms. Goad	yes
Mr. Vigil	yes
Mr. Goldstein	yes

Mr. Shandler asked that the Chair verify that only the matters discussed in the Motion were discussed in the executive session. Mr. Goldstein stated that Mr. Shandler's statement relating to matters discussed in the executive session was correct.

Mr. Shandler additionally asked Mr. Goldstein, as Deputy Secretary of NMED, whether he had any involvement in this case. Mr. Goldstein stated that he had not been involved in the case in any manner.

Action: Mr. Glass moved that the Commission table WQCC 07-11 (A) pending the members having access to the Hearing Officer's Report and the transcripts of the hearings and further that this matter be placed on the

Commission's May 12, 2009 agenda. Mr. Dominguez seconded. The Motion passed unanimously.

Following a brief discussion relating to the missing Hearing Officer's Report and the hearing transcripts, the Chair reintroduced Item 7.

Item 7. In the Matter of the Appeal by Sebastiao Faria (Faria Dairy East) of Permit conditions in re: DP 923, WQCC 08-09 (A); Commission decision regarding Faria East's Motion for Order Requiring De Novo Hearing. Pete V. Domenici, Jr., Esq., Faria Dairy East; Adolfo Mendez, NMED/OGC.

Mr. Mendez, on behalf of the Department, and Mr. Domenici, on behalf of Faria Dairy East, asked the Commission to table the Dairy's request for a de novo hearing at this time. Mr. Mendez further stated that Mr. Domenici will file another motion requesting that the record be opened for limited written comment and that that motion be heard and a decision made at the Commission's May 12, 2009 meeting. Mr. Mendez noted that the Department will respond to that motion. Depending upon the outcome of that motion, Mr. Domenici would either keep the motion for de novo hearing active or withdraw it. Mr. Mendez went on to note that regardless of the outcome of action on the pleadings in this case, they will pursue mediation in this matter.

Mr. Domenici reiterated the current agreed upon schedule for pleading filing in the future as well as his client's proposed alternative action with respect to the pleadings previously filed in this case.

There was brief discussion relating to the scheduling proposed by Mr. Mendez and Mr. Domenici.

Action: Mr. Glass moved that the Commission accept the proposals set out by the parties and that the Commission also table the motion for de novo hearing and further that the matter be placed on the May 12, 2009 meeting agenda. Mr. Hutchinson seconded. The motion passed unanimously.

Mr. Mendez asked if the parties should consolidate these agreements into a stipulated order for signature. The Commission indicated that should be done.

Mr. Shandler noted that still pending was the Department's motion to strike Faria Dairy's most recent filing. He noted that there were several options for the Commission to consider with respect to the motion.

Action: Mr. Hutchinson moved that the Commission grant NMED's Motion to Strike Petitioner's Untimely Reply in Support of Motion for Order Requiring De Novo Hearing. Mr. Lewis seconded. The motion passed unanimously.

Following the Commission's consideration of Item 7, there was a brief discussion regarding the filing of the transcripts and Hearing Officer's Report in WQCC 07-11 (A) Alta Vista Subdivision.

Item 10. Next public meeting: May 12, 2009, 9:00 a.m. State Capitol Building

Room 317, 490 Old Santa Fe Trail, Santa Fe.

Item 9. Other business

None.

10. Adjournment

Action: The Chair adjourned the meeting at 4:10 p.m.

Signature on File

Jon Goldstein, Acting Chair