

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

1190 St. Francis Drive, Room N2150

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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

July 13-16, 2010

9:00 a.m.

New Mexico State Capitol Building Room 317

490 Old Santa Fe Trail

Santa Fe New Mexico 87505

MEMBERS PRESENT:

Sarah Cottrell	Acting Chair
Cheryl Bada	State Parks Division
Larry Dominguez	Department of Agriculture
Mike Sloane	Department of Game & Fish
Doug Bland	Bureau of Geology and Mineral Resources
Howard Hutchinson	Soil and Water Conservation Commission
Greg Lewis	Office of the State Engineer
Edward Vigil	Member-at-Large
Maxine Goad	Member-at-Large
Harold W. Tso	Member-at-Large

MEMBERS ABSENT:

Steve Glass	County of Bernalillo, Municipal/County Representative
Heidi Krapfl	Department of Health
Brad Jones	Oil Conservation Division
Joseph Chavarria	Member-at-Large

OTHERS PRESENT:

Please see attached sign-in sheets

Jennifer Hower, NMED/OGC

Louis Rose, Esq., Montgomery Andrews

Felicia Orth, NMED/OOTS

Joyce Medina, NMED/OOTS

The meeting was called to order by Ms. Cottrell at 9:10 a.m.

Item 1. Roll Call:

Roll was taken, it was noted that a quorum was present.

Item 2. Approval of Agenda

Action: Mr. Lewis moved Commission adoption of the Agenda. Mr. Hutchinson seconded.

The motion passed unanimously.

Item 3. Approval of June 8, 2010 meeting minutes

Action: Mr. Dominguez moved Commission approval of the June 8, 2010 meeting minutes. Mr. Vigil seconded.

The motion passed unanimously.

Item 4. Hearing in re: WQCC 10-02 (R), Amendment of 20.1.3 NMAC, WQCC General Provisions. Jennifer Hower, NMED/OGC. Hearing Officer: Commission Chair.

At 9:15 a.m., the Chair announced the convening of the hearing in the above-referenced matter. Additionally, she set out the background of the regulations and the need to amend them to comply with the relevant statutory provisions.

The hearing was convened at 9:10 a.m. by the Chair. Kathy Townsend Court Reporters transcribed the hearing. All Notices of Intent to Present Technical Testimony were filed and are available for review, as well as public comment, correspondence and the hearing transcript in the office of the Water Quality Control Commission Administrator, New Mexico Environment Department, 1190 St. Francis Drive, Runnels Building Room 2150, Santa Fe, New Mexico 87505.

The record was closed, the hearing concluded and the regular meeting was reconvened at 11:35 a.m. by the Chair.

A lengthy discussion among the Commission and several interested parties relating to various aspects and impacts of the proposed amendments ensued. These minutes must be read in conjunction with the Order and Statement of Reasons for Adoption of Regulations prepared in this matter.

Action: Mr. Vigil moved for Commission approval of the Department's proposed amendments to 20.1.3 NMAC in WQCC 10-02 (R), General Provisions, set forth in NMED Exhibits 2 and 7, as revised by the Commission. Mr. Lewis seconded.

Discussion on the ramifications of the motion followed.

The motion passed, eight votes in the affirmative; two votes in the negative.

Mr. Sloane initiated discussion of proposed language relating to briefs filed in Commission cases and a schedule for reply brief filing. A brief Commission discussion followed.

Action: Ms. Bada moved Commission approval of a filing schedule as follows: an administrative record must be filed within fifteen days of the filing of a petition; petitioner's initial brief must be filed within twenty-five days of the record filing date; an answer brief must be filed within twenty-five days of the initial brief filing and a reply brief must be filed within ten days of the answer brief filing date. Mr. Sloane seconded.

The motion passed unanimously.

Ms. Orth noted that there were two minor clarification matters to be acted upon relating to the same section, specifically, Mr. Rose's suggestion that briefs may include findings of fact and conclusions of law (Section 4) and additionally, that no new evidence is allowed to be introduced during oral argument (Section F. 1).

Action: Mr. Sloane moved the Commission include the amendments Ms. Orth referenced above. Mr. Bland seconded.

The motion passed unanimously.

Mr. Sloane brought up the matter of general public comment.

Action: Mr. Hutchinson moved that the Commission include all of the language relating to participation by the general public in Sections 20.1.3.17 NMAC to 20.1.3.18 NMAC. Ms. Bada seconded.

There was brief Commission discussion.

The motion passed unanimously.

There followed a discussion relating to compliance. Mr. Sloane noted that the issue was whether the Commission wanted to take public comment on a matter that is essentially between the Department and a permittee. Discussion continued.

Action: Mr. Sloane moved Commission adoption of the rest of the rule. Mr. Hutchinson seconded.

The motion passed unanimously.

Ms. Bada brought up the matter of individuals who have not participated below wishing to become part of a record review as an intervenor or filing documents as an amicus party. Commission discussion ensued.

Action: Ms. Bada moved the addition at the end of Line 46 in Section 16 immediately before the semi-colon the following language “and upon motion to the Commission any person permitted to intervene pursuant to Rule 1-024 NMRA.” Mr. Hutchinson seconded.

The motion passed unanimously.

Commission discussion of the changes made in the rules was conducted.

Action: Mr. Sloane moved the adoption of the rule as the Commission has amended it including all earlier motions and adoptions. Mr. Hutchinson seconded.

The motion passed unanimously.

Item 5. Commission deliberations in WQCC 08-13 (R), Triennial Review of 20.6.4 NMAC Standards for Interstate and Intrastate Surface Waters, as required by §303(C) of the federal Clean Water Act.

The Chair summarized the background relating to WQCC 08-13 (R), the post-hearing process and post-hearing submittals. She noted that there was an item to be dealt with prior to the commencement of deliberations in this case. She mentioned Ms. Orth’s Hearing Officer’s Report and comments that were received from NMED, Chevron Mining and Peabody Energy regarding the content of the Report. Peabody objected to the fact that Ms. Orth, in her Report, did not set forth any recommendations.

At the Chair’s request, Ms. Orth responded to Peabody’s objection, stating that she disagreed with Peabody’s position that her decision to not make recommendations compromised its due process rights. She noted that due process does not require that she make recommendations. She went on to state that the rulemaking guidelines do indicate that a hearing officer will make recommendations and further that she had signed a procedural order indicating that she would do so. Additionally, she stated that perhaps entering an amended procedural order indicating that she would not make recommendations would have been in order. She stated that in her opinion, after a reading of relevant statutes and case law, there was absolutely no jeopardy to due process in this matter. She indicated that the issue regarding making recommendations is between herself, as Hearing Officer, and the Commission. She also mentioned that in fact she made very few recommendations with respect to the previous triennial review report. She added that in her view deliberations were made easier in that the Commission was not burdened with consideration of recommendations. In conclusion she indicated that she not believe there were issues in this matter that necessitated her making recommendations. She did however indicate that if the Commission disagreed with her assessment of these matters, she would prepare recommendations for review.

The Chair asked for discussion by the Commission. Mr. Dominguez requested clarification of possible future procedural ramifications of action by the Commission. Mr. Shandler stated that he did not find the motion persuasive, saw no tangential connection to alleged due process violations, felt it impeded the process and thought the Commission should deny the motion.

Commission discussion resumed. These minutes must be read in conjunction with the Order and Statement of Reasons for Adoption of Regulations prepared in this matter.

Action: Mr. Hutchinson moved Commission dismissal of Peabody's motion. Ms. Bada seconded.

The motion passed, eight votes in the affirmative; two votes in the negative.

The Chair asked for discussion regarding procedural matters. It was agreed that the Commission would begin with the major issues. Additionally, she noted that if the Commission adopted sections of the report for reasons other than those stated in documents filed by the parties, it was important to be very clear with respect to that circumstance.

The Chair stated the first matter to be discussed appears at page 11 of the Hearing Officer's Report, VII The Major Issues, Paragraph A, the definition of "perennial" in Section 20.6.4.7.P (2). She noted that the Department's proposed definition begins at page 18 of the Report followed by those proposed by Dairy Producers of New Mexico, Freeport-McMoRan and Amigos Bravos.

A lengthy Commission discussion of the proposed definition was conducted.

Action: Ms. Bada moved Commission approval of the following definition: "Perennial" when used to describe a surface water of the state means the water body typically contains water throughout the year and rarely experiences dry periods. Mr. Bland seconded.

Commission discussion continued.

The motion passed unanimously.

The Chair indicated that the next item for discussion is Paragraph B, also under The Major Issues, Background Conditions and Exceedances in 20.6.4.10.D and 20.6.4.56, referencing Attachment A, pages 42-44 and 120-122.

Ms. Orth provided the Commission with background information relating to the issue of site-specific criteria based on natural background.

Commission discussion ensued with respect to the parties' various proposals.

Action: Mr. Sloane moved Commission adoption of the Department's recommendations relating to site-specific criteria. Ms. Bada seconded.

Commission discussion clarified that the motion related to Paragraphs D on page 35 and E on page 44 of the Report.

The motion passed unanimously.

Following discussion, it was agreed that the Commission should consider the LANS/DOE and Freeport-McMoRan proposals relating to the natural background issue.

Action: Mr. Sloane moved that the Commission reject both the LANS/DOE and Freeport-McMoRan proposals. Mr. Bland seconded.

The motion passed unanimously.

The Chair indicated that the next item for discussion is Paragraph C, also under The Major Issues, Mixing zones and their limitations in Sections 20.6.4.11.D and E. Amigos Bravos proposes to require that all water quality standards are met at the point of discharge, thereby eliminating mixing zones. However, in the event mixing zones are retained, Amigos Bravos wants to restrict their use to avoid impairment and health risks. The other parties oppose that proposal.

Commission discussion followed.

Action: Mr. Lewis moved Commission approval of the Department's language with respect to mixing zones and their limitations.

Mr. Sloane proposed a friendly amendment that would include the rejection of Amigos Bravos language, which Mr. Lewis accepted and added:

And further, that Amigos Bravos' language be rejected. Ms. Bada seconded.

The motion passed unanimously.

The Chair noted that the next item is Paragraph D, also under The Major Issues, Sampling methodologies for compliance determination in Section 20.6.4.12. An in depth Commission discussion regarding the different proposals set forth by the parties took place.

Action: Mr. Sloane moved that the Commission reject Freeport-McMoRan's and Amigos Bravos' recommendations relating to 20.6.4.12. Mr. Bland seconded.

The motion passed, eight votes in the affirmative; one in the negative.

There was a brief discussion regarding Paragraphs C and D.

Action: Ms. Bada moved Commission adoption of the Department's recommendations for 20.6.4.12., C and D. Mr. Sloane

seconded.

The motion passed, eight votes in the affirmative; one in the negative.

The Chair stated that the next item for consideration would be Paragraph E, Compliance Schedules and their limitations.

There was discussion relating to proposals of the Department and Amigos Bravos.

Action: Mr. Dominguez moved Commission adoption of the Department's minor edit on Page 77, Line 9 of the Report and simultaneous rejection of other proposals. Ms. Bada seconded.

The motion passed unanimously.

The Chair stated that the next item for consideration would be Paragraph F, a proposed new section exempting man-made ponds and wetlands that are not waters of the U.S. from primary and secondary human contact standards.

A lengthy discussion was held among Commission members relating to the practicality and ramifications of this matter.

Action: Mr. Sloane moved Commission rejection of Peabody's proposal and urged the Department to develop some way to address the issues raised by the Commission.

Mr. Dominguez proposed a friendly amendment changing the word "urge" to "strongly encourage." Mr. Sloane agreed to the change in text. Mr. Dominguez seconded.

Mr. Hutchinson noted that, in his view, the Department seemed adamant about requiring UAAs.

The motion passed, seven votes in the affirmative; two votes in the negative.

The meeting recessed until 9:00 a.m. Wednesday, July 14, 2010.

The Chair called the resumption of the deliberations in the triennial review case to order at 9:00 a.m. noting that the next issue before the Commission, under "VII Major Issues" is Paragraph G, The adoption of "informational" radionuclide standards in Section 20.6.4.114 for the Rio Grande below LANL. She noted that the proposals for monitoring standards by Amigos Bravos and NMED were purely for informational purposes since the State has no jurisdiction in this area. She went on to discuss the various additional proposals that were filed. There was a brief discussion with Mr. Shandler relating to the Commission adopting the standards proposal as a policy. He stated that in his opinion there was nothing that would limit adoption of the proposal as a policy decision.

Ms. Cottrell excused herself to attend another meeting, Ms. Bada acted as Chair in her absence.

A lengthy Commission discussion ensued relating to monitoring, standards and stringency issues.

Action: Mr. Sloane moved Commission adoption of the Department's proposed radionuclide standards. Mr. Lewis seconded.

A lengthy discussion followed.

Roll Call Vote:

Mr. Lewis	yes
Ms. Bada	yes
Mr. Dominguez	no
Mr. Sloane	yes
Mr. Hutchinson	no
Mr. Bland	yes
Mr. Tso	no
Ms. Goad	yes
Mr. Vigil	yes

The motion passed, six votes in the affirmative; three in the negative.

Discussion continued with respect to Amigos Bravos' proposals relating to radionuclide standards in two additional segments of the river and also a proposal for a combined criterion.

Action: Mr. Sloane moved Commission rejection of Amigos Bravos' proposal to include two additional river segments in the radionuclide standards. Mr. Bland seconded.

The motion passed unanimously.

A discussion of the Amigos Bravos proposal relating to long-lived TRU.

Action: Mr. Sloane moved Commission rejection of Amigos Bravos' proposal relating to long-lived TRU, along with alpha TRU. Mr. Bland seconded.

The motion passed unanimously.

The Hearing Officer suggested that the Commission now proceed through the document beginning with "Definitions" on page 2.

There was a brief discussion, at which time Mr. Sloane moved Commission adoption of the Department's definitions set out on pages 2 through line 7 on page 14. The Commission agreed.

Ms. Goad proposed a definition of “human health - organism only.” There was discussion relating to Ms. Goad’s proposal and whether it could be characterized as a logical outgrowth. Mr. Shandler stated that with the provision of context to build the record, adding the definition would be a logical outgrowth. The Commission established that the proposed definition would not conflict with “human health - organism only” as used in the Report.

A lengthy discussion followed.

Action: Ms. Goad moved Commission adoption of the definition “human health – organism only,” means the health of humans who ingest fish or other aquatic organisms from waters that contain pollutants.” Mr. Sloane seconded.

The motion passed unanimously.

Ms. Bada noted that the next issue for discussion was the definition of “intermittent.” The Commission agreed to adopt the Department’s definition of “intermittent.”

The next matter for discussion on page 24, was the definition of “public water supply.” The Commission agreed to adopt the Department’s definition of “public water supply” and agreed to the deletion of the definition of “Picocurie.”

The next matters for discussion are located on page 27 of the Report, Paragraph S. “Terms beginning with the letter ‘S’.” The Commission agreed to adopt the Department’s definitions as set forth on page 27 of the Report.

The next matters for discussion are located on page 28 of the Report, Paragraph T. “Terms beginning with the letter ‘T’.” The Commission agreed to adopt the Department’s definitions as set forth on page 28 of the Report.

The next matter for consideration was the deletion of the definition of “Water quality based controls” on page 29, as proposed by the Department. The Commission agreed to that deletion.

The next matter for consideration appears on page 30, “Antidegradation Policy and Implementation Plan.” There was discussion relating to the Dairy Producers’ proposal. The Commission agreed with the Department’s proposal to leave the language as it is.

The next matter for consideration was the replacement of the word “classify” with the word “designate” on page 33, “Outstanding National Resource Waters: Paragraph A., Procedures for Nominating an ONRW” at line 6, and additionally, also on page 33, at line 33, deleting the words “gold medal fishery” and inserting “special trout water.”

The next proposed changes in text to be considered appear on page 34, Subparagraph (3) at lines 6 and 7 and at line 29. There was a lengthy discussion regarding the addition of Powderhouse Creek at line 29, subparagraph (a), as a water in the US Forest Service Valle Vidal special management unit. Mr. Bland suggested approving the addition of Powderhouse but explicitly including in the text of the Statement of Reasons specific language stating that by approving the addition, there is no

intent to establish a policy precedent for future designation of ONRWs. The Commission agreed to adopt the changes on page 34 of the Report.

The Chair returned to the meeting.

The next matter for consideration appears on pages 48-50, "Applicability of Water Quality Standards." Commission discussion was conducted relating to the Department's proposed deletion of Paragraph A., "Waters Created by Discharge."

Action: Ms. Bada moved Commission approval of the deletion of Paragraph A, "Waters Created by Discharge," and additionally reject the Dairy Producers' suggested sentence. Mr. Hutchinson seconded.

The motion passed unanimously.

The next matter for consideration appears on page 61, "Multiple Uses," where proposals by the Department and the Dairy Producers appear.

Action: Mr. Vigil moved Commission adoption of the Department's proposed language. Mr. Lewis seconded.

The motion passed unanimously.

The next matter for consideration appears on pages 62 and 66, Paragraph H., "Unclassified Waters of the State," where proposals by the Department and Dairy Producers are set out respectively. After consideration of the proposals as presented, the Commission approved the adoption of the Department's proposal. There were no objections to that adoption.

The next matter for consideration appears on page 67, Paragraph I., "Exceptions." Freeport-McMoRan New Mexico Operations' proposal to expand the number of exceptions. After discussion, the Commission approved the Department's recommendation to reject Freeport-McMoRan's proposal.

The next matter for consideration appears on page 91, Paragraph J., "Turbidity." The Dairy Producers' proposes to exempt permitted discharges from the criterion. After discussion, the Commission approved the Department's recommendation to reject the Dairy Producers' proposal.

The next matter for consideration appears on pages 92 and 93, Paragraph M., "Biological Integrity." The Department, Dairy Producers and Freeport-McMoRan have set forth proposals relating to this issue. After discussion, the Commission agreed to reject the proposals of the Dairy Producers and Freeport-McMoran and adopt the Department's proposal amended to read: "Surface waters of the state shall support and maintain a balanced and integrated community of aquatic organisms considering species composition, diversity and functional organization."

The next matter for consideration appears on page 97, Paragraph N., "Flow." Amigos Bravos proposes Commission adoption of its proposal to ensure that water quality and quantity are not artificially separated. The Department and the San Juan Water Commission are opposed to Amigos

Bravos' proposal. After discussion the Commission adopted the Department's proposal and rejected that of Amigos Bravos.

The next matter for consideration appears on page 107, "Use Attainability Analysis." The Department's proposal begins on pages 100 through 104; Amigos Bravos' proposal and concerns with the Department's proposal begins on page 107 and continues through page 115. The San Juan Water Commission indicated its opposition to Amigos Bravos' proposal. There was a brief discussion with Mr. Shandler regarding Commission authority. After a lengthy discussion, the Commission adopted the Department's proposal and rejected that of Amigos Bravos. However, two Commissioners, Mr. Sloane and Mr. Dominguez, expressed concern regarding the Department's proposal.

The next matter for consideration, the Department's proposal, appears on page 122, "Ephemeral Waters." The Dairy Producers' proposal appears on page 126. The Department indicated its opposition to the Dairy Producers' proposal. After discussion, the Commission adopted the Department's proposal.

The next matter for consideration appears on pages 126 through 129, "Intermittent Waters." The Department, Dairy Producers and Freeport-McMoRan submitted proposals on this issue. After discussion, the Commission adopted the Department's proposal.

The next matter for consideration commences on page 214, "20.6.4.128 Rio Grande Basin." The Department, Amigos Bravos and LANL submitted proposals relating to this segment. After discussion, the Commission adopted the Department's proposal.

The next matter for consideration appears on page 272, "(4) Coolwater)." The Department submitted a proposal on this issue. Amigos Bravos did not submit a proposal but did specify its concerns with respect to the Department's proposal. After discussion, the Commission adopted the Department's proposal.

The next matter for consideration appears on pages 275 through 277, "(7) Limited Aquatic life." Proposals were filed by the Department and Amigos Bravos. The Department and San Juan Water Commission oppose the adoption of Amigos Bravos proposal. After discussion, the Commission adopted the Department's proposal.

The Commission adopted proposals by Chevron and LANL relating to revised criteria for aluminum, cadmium, zinc, manganese and molybdenum.

The next matter for consideration initially appears on page 301, "J. Use-Specific Numeric Criteria." Proposals were filed by the Department and Amigos Bravos. After discussion, the Commission adopted the Department's proposal and rejected that proposed by Amigos Bravos.

The next matter for consideration initially appears on page 301. The Department proposes revised criteria to protect the domestic water supply. Amigos Bravos opposes the Department's proposal alleging that it will weaken the domestic water supply criteria. After discussion, the Commission adopted the Department's proposal and rejected that proposed by Amigos Bravos. Additionally, the Commission suggested that in the future the Department should evaluate the need to add a column

which combines the data and to evaluate the values reported for water only and human-health organism only.

The next matter for consideration appears on page 318, relating to the adoption of a percholate standard. In its arguments, Amigos Bravos urges the adoption of a percholate standard to protect public health and safety however, at this time such a standard lacks support in the record. After discussion, the Commission adopted the Department's proposal.

As part of adopting the final version of the standards for interstate and intrastate surface waters the Commission agrees to give the Department authority to correct errata, make formatting changes and renumber as necessary, as well as noting the corrections made by Chevron and LANL relating to a rounding error.

Action: Mr. Sloane moved Commission adoption of the rule as discussed, amended and agreed to in the deliberations. Mr. Bland seconded.

The motion passed unanimously.

Item 6. Other business

None

Item 7. Next meeting: August 9-11, 2010; if necessary August 12-13, 2010, 9:00 a.m., State Capitol Room 317, 490 Old Santa Fe Trail, Santa Fe, NM

There was a discussion relating to the Commission's future meeting and hearing schedules.

Item 8. Adjournment:

The Chair adjourned the meeting.



Carlos Romero for Sarah Cottrell, Acting Chair