

**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
State Parks Division
Soil and Water Conservation Commission
Bureau of Geology and Mineral Resources
Municipal/County Representative
Members-at Large

Approved January 9, 2007

Minutes of the

New Mexico Water Quality Control Commission Meeting

November 14, 2006

9:00 a.m.

State Capitol Building, Room 321

490 Old Santa Fe Trail

Santa Fe, New Mexico 87503

MEMBERS PRESENT:

Cindy Padilla	NMED/GWB, Acting Chair
Maxine Goad	Member-at-Large
Cheryl Bada	State Parks Division
Howard Hutchinson	Soil and Water Conservation Commission
Greg Lewis	Office of the State Engineer
Wayne Price	Oil Conservation Division
Tim Darden	Department of Agriculture
Fred Lujan	Member-at-Large
Steve Glass	City of Albuquerque – Municipal/County Representative
Peggy Johnson	Bureau of Geology and Mineral Resources
Edward Vigil	Member-at-Large

MEMBERS ABSENT:

Mike Sloane	Department of Game & Fish
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OTHERS PRESENT:

Kelly Collins	Abel Camarena, US Forest Service
Alan Eschenbacher	Marcos Martinez, Rodey Law Firm

Marcy Leavitt, NMED/SWQB
Bryan Bird, Forest Guardians
Guy Bralley, Sandoval County
Felicia Orth, NMED
Jane De Rose Bamman, NMED/SWQB
Deby Sarabia, NMED
Charles Nylander
Paul Karas
Joyce Medina, NMED

Bill Olson, NMED/GWB
John C. Horning, Forest Guardians
Bruce Gallaher, LANL
Ernest Torrez
Elizabeth Shields, NMED
Tim Michael, NMED/GWB
Steve Fischer
Tannis Fox, NMED/OGC
Zachary Shandler, AG's Office

Acting Chair Cindy Padilla, called the meeting of the WQCC to order at 9:00 a.m.

Item 1. Roll Call:

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

Item 2. Approval of Agenda

Action: Mr. Hutchinson moved to approve the agenda. Mr. Lujan seconded. The motion passed unanimously.

Item 3. Approval of the October 10, 2006 meeting minutes.

Ms. Goad noted amendments to be made in the October 10, 2006 meeting minutes.

Action: Mr. Hutchinson moved to approve the October 10, 2006 meeting minutes as amended. Mr. Lewis seconded. The motion passed. Ms. Padilla and Ms. Bada abstained from the vote.

Item 4. Request for Hearing in the Matter of the Petition for Proposed Amendments to 29.6.4.9 NMAC Designation of Waters Within the Pecos River Headwaters as Outstanding National Resource Waters, WQCC 06-09 (R). Brian Bird, Forest Guardians.

Mr. Bird mentioned that the Commission might wish to set the hearing in this case after the adoption of proposed changes in the anti-degradation language for Outstanding National Resource Waters.

Mr. Hutchinson requested that the Petitioner provide more detailed maps to Commission members, specifically indicating the location of the waters to be designated as well as the road system in the area. He also requested that the Petitioner inform the Commission whether references set out in the petition had appeared in any scientific journals or other related publications.

Mr. Shandler asked about the required affidavit of publication of the hearing setting. Mr. Bird stated that publication issues would be dealt with after a hearing date had been set.

The Chair asked for comments, questions or statements of interest regarding this petition.

Abel Camarena, representing the US Forest Service, stated that the Forest Service's interest in this petition related to proposed language changes to the Anti-Degradation Policy Implementation Plan, undertaken by NMED's Surface Water Quality Bureau. Mr. Camarena stated that it was the Forest Service's position that the anti-degradation language changes should be finalized prior to a hearing setting in this matter.

Mr. Hutchinson mentioned that in order to comply with the Hatch Act prohibition against lobbying by government agencies, the Commission would need to extend an invitation to the Forest Service requesting that the Service be available to present testimony and/or answer questions during the hearing process. There ensued a short discussion relating to the need for the Commission to request the Forest Service's participation in the process.

Marcy Leavitt, representing NMED's Surface Water Quality Bureau, mentioned that concern had been expressed regarding the issue of language in the Surface Water Quality Standards at 20.6.4.8 NMAC, the Anti-degradation Policy Implementation Plan, during a past ONRW hearing. Ms. Leavitt stated that at that time the Bureau had committed to amending the language. She went on to note that the Bureau is currently in the initial stages of the process and that the staff wanted to have those amendments in place prior to scheduling this hearing. There was a short discussion of the Bureau's stakeholder notification procedures relating to the proposed language changes and the need to make every effort to include all interested parties.

There was a brief discussion regarding the Commission's obligation to schedule the hearing in a timely fashion. It was agreed that in this instance the time constraints were not in controversy.

Action: Mr. Glass moved that the Commission set the hearing in WQCC 06-09 (R) on the July 10, 2007 meeting agenda. Mr. Hutchinson seconded.

Mr. Hutchinson proposed a friendly amendment to Mr. Glass's motion setting the hearing in Las Vegas, New Mexico, and appointing Ms. Padilla as hearing officer. The motion passed unanimously.

Item 5. Request for Hearing Officer In the Matter of Reggie's Septic Service, WQCC 06-03 (CO). Brent Moore, NMED/OGC; Jose Sandoval, Reggie's Septic Service (not present).

Mr. Moore discussed the need to name a hearing officer in this matter. He noted that Felicia Orth was available to act as hearing officer.

Following a short discussion, Mr. Moore stated that he had informed Mr. Sandoval of his intention to request the appointment of a hearing officer in this case and Mr. Sandoval did not object to the appointment of Ms. Orth.

Action: Mr. Hutchinson moved that Ms. Orth act as hearing officer in WQCC 06-03 (CO), In the Matter of Reggie's Septic Service. Mr. Lewis seconded. The motion passed unanimously.

Item 6. Deliberations re: In the Matter of the Appeal of the Rio Puerco TMDL, WQCC 06-06 (A). Felicia Orth, Hearing Officer.

The Chair briefly reiterated the schedules of the Commission's September and October meetings in Cuba, NM with respect to this case. She noted that although she had been absent from the October meeting she had listened to the audio tapes of the meeting as well as having extensively reviewed the Acting Chair's meeting notes and stated that she would participate in the Commission's deliberations and vote in this case.

Prior to opening Commission deliberations, Ms. Padilla stated that she would appreciate advice of counsel with respect to the issue of Mr. Torrez's Motion to Reopen the Record in this matter. Mr. Shandler noted that the Motion was simply requesting the admission of additional exhibits into the record. Mr. Shandler stated that a hearing officer has the right to disallow irrelevant material, however, he pointed out that the Commission had the authority to overrule such a decision if it felt that the material had weight however limited that might be. He also indicated that the Commission could receive the exhibits without formally reopening the record, could consider them and apply an appropriate weight to the documents.

Mr. Hutchinson asked if reopening the record would open it to all parties. Mr. Shandler noted that while that was an option, this particular item was a limited request for the inclusion of Mr. Torrez's specific exhibits.

There was a lengthy discussion regarding the options available to the Commission with respect to accepting the exhibits.

Action: Mr. Price moved to reopen the record and admit Mr. Torrez's additional exhibits. Mr. Hutchinson seconded the motion for purposes of discussion.

Mr. Hutchinson asked for the other parties in this case to comment on the impact of reopening the record to admit the exhibits and whether they objected or concurred. Tannis Fox set out the Department's position in its objection to reopening the record but also noted that the Department was amenable to Mr. Torrez supplementing the record with the additional exhibits.

Mr. Torrez explained his reasoning in requesting that the hearing be reopened or, in the alternative, that the record be supplemented with the additional exhibits.

Commission discussion ensued regarding avenues available for the inclusion of the exhibits.

Ms. Goad proposed a friendly amendment to Mr. Price's motion allowing the record to be reopened solely for the purpose of receiving Mr. Torrez's additional exhibits. Ms. Johnson seconded.

Mr. Price accepted Ms. Goad's friendly amendment.

Ms. Fox stated that Mr. Torrez's exhibits refer to a TMDL that exceeds two hundred pages. She noted that by reference the entire TMDL was being admitted and that NMED had no objection to the entire document being admitted into the record.

The motion passed unanimously.

Mr. Shandler noted that with respect to deliberations, the Commission had the option of going into a closed session if the Commission wished to do so. The Chair explained the parameters of going into a closed session.

Mr. Hutchinson asked Mr. Shandler if it was possible to restrict the use, by outside persons, of comments made during open deliberations in any appeal process.

A discussion followed regarding WQCC rules pertinent to adjudicatory proceeding sections and the impact on individual rights. Ms. Fox noted that in this circumstance an impact on individual rights was not applicable. She went on to state that should the Commission go into a closed session such action could provide a point of appeal.

The Chair mentioned the difficulty of the task facing the Commission with respect to these deliberations and its ultimate decision and additionally that the Commission must be responsible, thoughtful and open in this process. She then asked the Commission if there was any member who had an interest in going into a closed session for the deliberations. No member expressed interest in conducting a closed session.

Mr. Shandler noted that the deliberations were to be conducted only among Commission members, there would be no comment accepted from the public and since a report had not been requested of the Hearing Officer, she would not be involved in the deliberations.

The Chair then opened the deliberations. Mr. Hutchinson asked the Commission members who had not been present at the hearing to identify themselves and state whether they planned to be part of the deliberations and ultimate vote.

Mr. Price acknowledged that he had missed the second meeting in Cuba but had been very involved in this case from the outset, had also been briefed extensively regarding the second meeting and additionally stated that he was very confident in his knowledge of this case and the issues.

Ms. Bada stated that she had also missed the second meeting and that she intended to abstain.

Mr. Vigil acknowledged that he had not been able to attend either of the Cuba meetings and that he would abstain.

The Chair noted that she had indicated earlier in the meeting that she had listened to the tapes, had reviewed Mr. Olson's notes and intended to vote in this case.

A discussion ensued which continued for several hours regarding various technical and non-technical repercussions of the TMDL and the areas of controversy surrounding NMED's technical term

definitions, particularly those of “perennial” and “impairment” as applied to the Rio Puerco. The Commission also noted and discussed the varied opinions of the residents in the Cuba area that had been presented, as well as the immediate and the long-range impact of a Commission decision to reject or to adopt the revised TMDL. The need to revise the sedimentation assessment protocol was also explored at some length. The point was made during the deliberations that if the Commission did not adopt this locally developed TMDL by year’s end there would be one put in place by the EPA District Office in Dallas under the Consent Decree and it might not necessarily reflect any sensitivity to the concerns of the local community.

Action: Mr. Glass moved for the adoption of NMED’s revised TMDL dated October 16, 2006. Ms. Goad seconded.

Mr. Glass then suggested inserting a sentence in Section 6.1, at paragraph 2, page 30 of the TMDL entitled “Coordination” that would expand the stakeholder outreach requirements of NMED. The entire Commission then discussed the need for expanded outreach as well as increased flexibility on the part of NMED in developing landowner relationships and also committing the Department to more actively encouraging citizen participation.

Mr. Glass further moved for the insertion of a fourth sentence at the end of paragraph 2, Section 6.1, Coordination, Page 30 of the TMDL reading “SWQB will proactively pursue the involvement of land owners, cattle owners and acequia associations in their commitment to citizen participation in this program.”

Mr. Hutchinson proposed the addition of another sentence that would set out the intent of any proposed TMDL and coordinate with the federal designated management agencies in order to maximize best management practices in the area specified by the TMDL.

Mr. Glass was then asked by the Commission Chair to restate his motion.

Mr. Glass moved for the adoption of NMED’s TMDL as modified through October 16, 2006 with the addition of the following sentence at the end of paragraph 2, Section 6.1, Coordination, Page 30 reading “SWQB will actively pursue the engagement of local land owners and acequia associations as stakeholders in the implementation of this TMDL.”

Mr. Hutchinson proposed a friendly amendment to Mr. Glass’s restated motion adding this sentence to the paragraph 3, Section 6.1, Coordination, page 30 reading “SWQB will communicate the intent of the TMDL and the desire that best management practices be developed through the above coordination.”

There was Commission discussion regarding the designation of the federal land management agencies as the agencies to carry out the intent of the New Mexico Water Quality Act and regulations which WQCC promulgated. It was noted that those agencies actually implement the WQCC rules and regulations and that the language proposed by Mr. Glass and Mr. Hutchinson simply further clarifies the TMDL process for those agencies.

Mr. Glass accepted Mr. Hutchinson’s proposed friendly amendment.

Mr. Lewis proposed an additional friendly amendment to Mr. Glass’s restated motion, as follows “...local land owners, ranchers and acequia associations...”.

Ms. Goad seconded.

Mr. Glass accepted Mr. Lewis’s proposed friendly amendment.

The Chair requested a roll call vote on Mr. Glass’s restated motion as amended.

Roll Call

Ms. Padilla	yes
Mr. Lewis	yes
Mr. Price	no
Mr. Glass	yes
Mr. Darden	no
Mr. Hutchinson	no
Ms. Johnson	yes
Ms. Goad	yes
Mr. Lujan	yes

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

The Chair granted Mr. Hutchinson the opportunity to explain his vote. He stated that even after the deliberations he did not believe that the evidence that was presented was convincing enough to say that the Rio Puerco is a perennial stream and therefore he could not agree with the adoption of the TMDL.

The Chair granted Mr. Darden the opportunity to explain his vote. He stated that he agreed entirely with Mr. Hutchinson’s statements and that he also could not agree with the adoption of the TMDL.

Various Commission members complimented Mr. Torrez for his interest on behalf of his family, the community and on his efforts in bringing this matter to hearing.

Item 7. Other Business

Mr. Glass noted a complaint he had received regarding the availability of documents pertaining to issues before the Commission. He suggested that efforts be made to make all documents available electronically on the WQCC website.

Mr. Hutchinson suggested that if the website is being updated or off-line that some notification of that status be posted on the web.

Item 8. Next Meeting: December 12, 2006, Santa Fe, New Mexico

Item 9. Adjournment:

Mr. Glass moved for adjournment. Ms. Darden seconded. The motion passed unanimously. The meeting adjourned at 2:45 p.m.

Signature on File

Cindy Padilla, Acting Chair
Water Quality Control Commission