



STATE OF NEW MEXICO
WATER QUALITY CONTROL COMMISSION
1190 St. Francis Drive, Room N-4075
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Santa Fe, New Mexico 87502
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CONSTITUENT AGENCIES:

Environment Department
State Engineer & Interstate Stream Commission
Game and Fish Department
Oil Conservation Division
Department of Agriculture
State Park & Recreation Division
Soil and Water Conservation Bureau
Bureau of Mines and Mineral resources
Member-at-Large

Minutes of the
New Mexico Water Quality Control Commission Meeting
November 10, 1998

The New Mexico Water Quality Control Commission (WQCC) meeting was held on November 10, 1998, at 9:00 a.m. in the State Capitol Building, Room 321, Old Santa Fe Trail and Paseo de Peralta, The following members were present:

Peter Maggiore
Paul Ritzma
Bill Olson
Frank DuBois
Howard Hutchinson
Lynn Brandvold
Paul Gutierrez
David Johnson
Andrew Sandoval
Irene Lee

Chairperson, NMED
Office of the State Engineer
Oil Conservation Division
Department of Agriculture
Soil & Water Conservation Bureau
Bureau of Mines & Mineral Resources
Member-At-Large
State Parks Division
Department of Game & Fish
Member-At-Large

Absent

Alberto Gutierrez

Member-At-Large

Others Present

Tamella L. Gonzales
Tannis Fox
Marcy Leavitt
Mike Saladen
Paul Pizzoli
Erik Galloway
Dale Doremus
David Togge
Steven Pierce
Gary King
Richard Mertz

WQCC Secretary
WQCC Legal Counsel/AGO
NMED/Ground Water Bureau
LANL
Los Alamos County
NMED/Surface Water Quality Bureau
NMED/Ground Water Bureau
NMED/Surface Water Bureau
NMED/Surface Water Bureau
NMED/Surface Water Bureau
NMED/Surface Water Bureau
NMED/Office of General Counsel

Susan McMichael
Steve McWilliams
Jim Davis
Maxine Goad
Ned Kindrick
Sharon Lombardi
Bill Brancard

NMED/Office of General Counsel
United States Forest Service
NMED/Surface Water Bureau
Self
Montgomery & Andrews
Dairy Producers
State Land Office

Chairman Peter Maggiore called the meeting to order at 9:10 a.m.

Item 1: Roll Call.

The WQCC Administrator, Tammy Gonzales, took roll call.

Item 2: Approval of the Agenda.

David Johnson moved to approve the agenda. Howard Hutchinson seconded the motion. The motion passed unanimously.

Item 3: Review of the Proposed Minutes of October 13, 1998.

Bill Olsen informed the WQCC that he has received signed minutes from April 14, May 12 and August 11. These minutes were tabled at the October meeting and not reviewed by the WQCC prior to being finalized. Mr. Hutchinson informed Chairman Maggiore that the minutes must be on the agenda before the WQCC can approve them. Chairman Maggiore asked that the April 14, May 12 and August 11, 1998 minutes be placed on the December 8, 1998 agenda.

Mr. Johnson moved to approve the October 13, 1998 minutes as amended. Frank DuBois seconded the motion. The motion passed unanimously.

Item 4: Constituent Agency Accountability.

Mr. Hutchinson informed the WQCC that after a review of the Continuing Planning Process (CPP), Amigos Bravos provided suggested language to create accountability. Mr. Hutchinson read the suggested language that Amigos Bravos provided: such responsibility is granted by the WQCC not only through a work element, but through a statewide Water Quality Management Plan (WQMP), and may only be made to those meeting federal regulatory requirements of a designated management agency. Maintenance of such designation is strictly contingent upon showing that the agency is effectually dealing with the water quality concerns for which it was designated. Mr. Hutchinson explained that he did not necessarily agree with this language in the debate at the WQCC meeting, and the WQCC was having difficulty figuring out how accountability was going to be presented. Mr. Hutchinson stated he believes that in making a designation, the WQCC should demand some kind of accountability, and the 305(b) report could possibly be the vehicle for reporting the accountability. Mr. Hutchinson proposed that the WQCC amend the CPP to reflect that designated agencies, both State and Federal, report at a minimum every two years to the WQCC. In review of work element 13 and the assigned responsibilities of the Soil and Water Conservation Districts, Mr. Hutchinson has determined that the Soil and Water Conservation Commission has not been carrying out its mission. This has caused litigation and there should be some kind of review and accountability.

Mr. Hutchinson moved to open up discussion on amending the CPP to require accountability of the designated agencies. Paul Gutierrez seconded the motion.

Paul Ritzma asked Mr. Hutchinson if there is a requirement under a federal law that mandates that the WQCC have this agency accountability. Mr. Hutchinson stated that the WQCC is not compelled to follow federal law, but believes that it is a matter of accountability to the people of the State of New Mexico, to assure that the constituent agencies are doing their job. Mr. Ritzma asked Mr. Hutchinson if he had discovered during his research that the WQCC has the authority to demand accountability from cabinet level agencies. Mr. Hutchinson said yes, this authority is granted in the New Mexico Water Quality Act. Mr. Hutchinson stated that in his review of the assignments given to the Soil & Water Conservation Division, he found out that it was not carrying out its duties, nor was it getting reports from the agencies that it oversees. He did not review the other agencies. Some oversight duties and accountability of the agencies are not listed in the 305(b) report.

Mr. Gutierrez asked if someone from the New Mexico Environment Department (NMED), could briefly address the issue of accountability in the 305(b) report. Dr. Jim Davis, Chief, Surface Water Quality Bureau stated to the WQCC that in his opinion, the CPP is probably not the right document to use for accountability by constituent agencies. The reason for this is that constituent agencies or designated management agencies are so designated in work element 13 of the WQMP. The WQMP will be updated and NMED realizes that it is significantly out-of-date. The last major revision was in 1988. Maxine Goad, Planner, Surface Water Quality Bureau stated that the Pueblo of Pojoque was added as a designated agency in 1991-1992. Dr. Davis stated that work element 13 does designate certain agencies to perform management activities. Dr. Davis advised the WQCC that when the WQMP is updated, that the WQCC's desired reporting requirements be added to work element 13. The citation at the beginning of work element 13 states that under the Federal Clean Water Act, WQMP's are to include an identification of agencies necessary to implement the plan. When the 305(b) report is being compiled, the various management agencies are contacted with regard to their management activities and this is incorporated into the report. This information does not appear as a separate addendum, but is incorporated into the text of the document. The accountability is solicited in this way every two years, but it is not readily identifiable.

Mr. Gutierrez asked Dr. Davis if the letters received from the management agencies would be incorporated into the text or added as an addendum to the 305(b) report to show accountability. Dr. Davis said that the NMED could do this as a means of demonstrating how accountability was solicited.

Mr. Hutchinson stated that each agency should be made to stand before the WQCC and answer questions regarding accountability instead of just submitting a letter to NMED to be transcribed into the 305(b) report.

Mr. Gutierrez stated that he believes the WQCC does not have the subpoena power to accomplish this.

Mr. Hutchinson stated that once an agency accepts its designation, it has to accept all the responsibilities that are attached thereto, and one responsibility should be reporting periodically to the WQCC.

Chairman Maggiore asked Mr. Hutchinson if his position is that all designated agencies, even those that are not constituent agencies should appear before the WQCC.

Tannis Fox, Counsel for the WQCC, asked how these agencies are designated. Dr. Davis explained that under Section 208 of the Clean Water Act, WQMP's are to include an identification of agencies necessary to implement the plan. The WQCC has the responsibility of designating these agencies, and the Governor must certify the agencies.

Mr. Hutchinson asked Dr. Davis if he reviewed the reports from the Santa Fe National Forest and the Gila National Forest and how these compare to past reports. Dr. Davis said that he assigned that task to someone on his staff.

Mr. Hutchinson stated that if there was proper reporting from designated agencies, the Clean Water Act lawsuit filed by Forest Guardians would probably not have occurred.

Mr. Ritzma stated that the only way non-constituent agencies would report to the WQCC is to put in their designation the requirement that in accepting this designation they acknowledge that they have to report to the WQCC. Mr. Ritzma believes that legally the WQCC could not do this.

Ms. Goad stated that the WQCC or NMED needs to figure out how Section 319, Non-Point Source Management Plan, of the federal Clean Water Act fits in with the statewide WQMP. Some of the reporting from the U.S. Forest Service is under the Non-Point Source Management Plan. Dr. Davis stated that on several occasions the NMED has acknowledged the fact that both the statewide WQMP and the Non-Point Source Management Plan need to be updated.

Mr. Olson asked Dr. Davis when he expects to seek input from the WQCC to update these plans. Dr. Davis replied by April 1999 at the earliest.

Mr. DuBois asked Mr. Hutchinson if he would entertain an amendment to his motion. Mr. DuBois would like to have two things from NMED.

1. A background fact sheet for the WQCC on Designated Management Agencies and the structure of the agency and how each agency operates now.
2. Lists of all the designated management agencies and under each agency give the WQCC a summary of the agency's responsibilities. List for the WQCC to whom each agency reports, whether it has reported, and if so, whether to the correct entity. Under each agency, list if it has a memorandum of understanding.

Mr. Hutchinson stated that he would withdraw his motion if the NMED will submit this report to the WQCC.

Chairman Maggiore asked if there could be a comment box referencing specific documents that could be referred back to. This would allow the WQCC to assess the quality of the reporting.

Mr. Hutchinson stated that the NMED continues to make grants under section 319 fund to agencies without some system for accountability, and they do not accomplish the ends to which they are assigned. Mr. Hutchinson suggested that these agencies be cited and fined, then redirect the money to an agency that will carry out the assigned duties.

Mr. DuBois moved to have the report on designated management agencies be submitted from the NMED in a timely manner. Dr. Davis stated that the report could be ready by the January 1999 WQCC meeting. Mr. Gutierrez withdrew his earlier second, and seconded Mr. DuBois's motion. The motion passed unanimously.

Item 5: Distribution of the 1998 305(b) Report.

Erik Galloway, Program Manager, Surface Water Quality Bureau, asked the WQCC to review the 305(b) report that was handed out to them, have comments prepared for the December 8, 1998 meeting, and adopt the report during that meeting. Mr. Galloway stated that the 1996 version of this report with the 1998 updates will soon be available on the NMED web site.

Chairman Maggiore asked Mr. Galloway when he would like the WQCC to have their comments on the report to him. Mr. Galloway asked that the WQCC have their comments ready for discussion at the December 8, 1998 meeting. The whole day has been requested for the WQCC to discuss any comments or changes.

Mr. Hutchinson asked Mr. Galloway if the whole report is up for review and if there will be a public comment period. Mr. Galloway stated that there is no requirement that the 305(b) report go out for public review, but the Bureau welcomes all interested party comments. Mr. Hutchinson asked if there is any way that the WQCC could get the public comments that are received by the Bureau. Mr. Galloway stated that all comments would be sent to the WQCC.

Ms. Fox asked Mr. Galloway about the public notice that was given on the review of the 305(b) report, and whether the WQCC will be accepting oral comments during the next meeting. Mr. Galloway stated that there has not been a notice published in the newspapers. The way this has generally been handled is the 305(b) report is put on the WQCC agenda and distributed to the regular WQCC mailing list.

Mr. Hutchinson advised the WQCC to very carefully look at the report to make sure that the WQCC is reporting to the public, Congress, Legislature and the Governor as to what is actually occurring in the State of New Mexico.

Item 6: Premier Motors of Santa Fe.

Ms. Fox informed the WQCC that this issue was discussed at the last WQCC meeting. The requirement of a discharge permit for Premier Motors had been settled. Ms. Fox asked counsel for an order so that the WQCC could formally dismiss the appeal.

Mr. Hutchinson moved to dismiss the appeal. Mr. Ritzma seconded the motion.

Mr. Ritzma asked why the WQCC is dismissing this without prejudice. Ms. Fox stated that it is being dismissed without prejudice in the event NMED imposes a discharge plan in the future.

The motion passed unanimously.

Mr. Hutchinson asked the Department if all car washes are required to have a discharge permit. Ms. Dale Doremus, (Health Program Manager) Ground Water Quality Bureau, explained to the WQCC that the Bureau looks at each car wash on a case-by-case basis. They look for total recycling and the amount of discharge. Ms. Doremus said that the Bureau has a system for evaluating each case. Mr. Hutchinson asked if all car washes are required to submit a notice of intent to discharge. Ms. Doremus stated that they are all required to submit a Notice of Intent.

Item 7. Proposed Budget for the Water Quality Control WQCC.

Ms. Doremus, and Mr. Galloway submitted a proposed budget to the WQCC, (Attachment A). Lynn Brandvold asked if this budget would require a change in the Water Quality Act. Marcy Leavitt, Chief, Ground Water Quality Bureau, explained that it would require a change. The Act states that the cost of the WQCC will be born by the NMED. The NMED is suggesting that be changed and the WQCC have its own budget. Mr. Olson voiced his concern regarding the WQCC Secretary's full-time salary being completely paid by the WQCC's budget since the Secretary has other duties besides support for the WQCC.

Mr. Olson asked the NMED why three appeal hearings were covered under Contractual Services. Ms. Doremus explained that there may be an appeal hearing that sets precedent or is important enough for the Bureau to retain the services of a court reporter. It is in the regulations that the Bureau only has to tape the proceeding, but in some cases the Bureau may wish to hire a court reporter.

Andrew Sandoval asked the NMED who pays for the hearing officer. Ms. Doremus explained that the cost is born by the NMED. Mr. Sandoval stated that the proposed budget for capitol outlay appears to be inadequate and suggested that the amount should be doubled.

Ms. Brandvold stated that in the past the WQCC has contracted out for a hearing officer. Chairman Maggiore explained that the NMED has an in-house attorney, whose primary function is to be a hearing officer

Proposed budget after WQCC review:

WATER QUALITY CONTROL WQCC BUDGET		
LINE ITEM	PROJECTED \$ AMOUNT	DESCRIPTION
000 Salaries	24,015.00	WQCC Secretary Salary
010 Benefits	8,405.00	Benefits
020 In State Mileage	4,050.00 2,250.00	Per Diem for 3 Public Members to attend 12 WQCC Meetings and One 6 Day Hearing. Mileage for 3 Public Members to attend 12 WQCC Meetings and One 6 Day Hearing
030 Maintenance & Repairs	0	No Cost
040 Supplies	1,000.00	Recording Tapes, Printer Paper, Toner for Printer and General Office Supplies
050 Contractual Services	20,000.00	Kathy Townsend Court Reporting Services 3-4 Hearings before the WQCC. 1 Regulatory Change and 3 Appeal Hearings.
060 Operating Costs	2,000.00 2,000.00 1,500.00 1,200.00	Printing and Photocopying Charges Postage and Mail Services Telephone Charges for 1 Phone Line Advertising for 12 WQCC Meetings and 3-4 Hearings Before the WQCC
080 Capital Outlay	3,000.00	Office Furnishings and Data Processing Equipment
090 Out of State Travel	0	No Cost
TOTAL	69,420.00	

Item 8: Discussion on Legislative Issues and the Sunset Review.

Susan McMichael, Attorney with the NMED presented the NMED's proposed legislative changes with Sunsetting the WQCC on July 1, 2000. The LFC submitted a questionnaire to the Department that was answered by Dr. Ed Kelley, Director Water & Waste Management Division, and Ms. McMichael at a LFC meeting. The Department is seeking comments from the WQCC regarding the proposed legislative changes.

1. **Composition of the WQCC.**

The Department proposed that Members-at-Large represent diverse public interest.

2. **The statute that relates specifically to the WQCC's role in Appeals of permit decisions, 74-6-5.O.**

Ms. McMichael stated that this statute has created a lot of confusion as to whether the appeal of a permit decision is a brand new hearing. The Appeal Hearing has already been established as *de novo*, but the question is, *de novo* of what. The Department has asked to clarify the statute to clearly spell out that Appeal Hearings before the WQCC are *de novo* based on the agency record.

Mr. Hutchinson asked Ms. McMichael if what is being presented to the WQCC at this time is the same as what was presented to the LFC. Ms. McMichael said that it is not. Mr. Hutchinson asked what the difference is. Ms. McMichael stated that the Sub-Committee reviewed a proposal that requested all Appeals be given directly to the Court of Appeals. The Department went back, got input and re-evaluated what the intent was, and the intent was to preserve the WQCC's check and balance. Mr. Hutchinson asked if this re-evaluation has been clarified to the Sub-Committee. Ms. McMichael stated that it has not been, the purpose of today's presentation to the WQCC is to get their input, then talk to the LFC.

Mr. Ritzma asked the WQCC to endorse the Department's request for *de novo* Hearings based on the agency record.

3. **Budget.**

The last item is a budget for the Water Quality Control WQCC, and this would require a legislative change.

Mr. DuBois asked Ms. McMichael if the Department clarified diverse public interest in its proposal. Ms. McMichael stated that the Department felt it would be better to let the Governor decide what diverse public interest is. Mr. DuBois asked if the Governor has the authority to define diverse public interest. Ms. McMichael said that the Governor has that authority.

Mr. Gutierrez asked Ms. McMichael if it is possible to put a line item within the Department's budget to cover WQCC expenses, and what statutory line would need to be changed. Ms. McMichael stated that statutory line 74-6-3.A.9 would have to be changed, and as to the question about putting a line item in the budget, Ms. McMichael could not answer that. Ms. Leavitt stated that it is possible to create a line item, but what the NMED is trying to clarify is that the WQCC needs separate funding.

Mr. DuBois stated that it is perfectly rational for the NMED to have a budget for the WQCC. If the Legislature appropriates the money for the WQCC to the NMED, why would there have to be a statutory change?

Chairman Maggiore stated that his belief is that the WQCC would rather have a discreet line item for the WQCC within the NMED's budget, instead of creating a separate budget that would require a statutory change.

Mr. Gutierrez asked if a bill has been drafted yet and a sponsor identified. Chairman Maggiore stated that he is still trying to identify the best process for getting this bill introduced.

Ms. Brandvold asked how the Environmental Improvement Board's establishing legislative act deals with its funding verses the Water Quality Act and the WQCC. Ms. McMichael stated that the Environmental Improvement Board is administratively attached to the NMED, but this is an issue that should be looked into.

Mr. Ritzma moved to adopt the first two proposals as is, and adopt the third with the WQCC's changes and to let Chairman Maggiore and Mr. Gutierrez proceed with presenting the budget to the Legislature.

Mr. Gutierrez seconded the motion.

Ms. Brandvold asked if these proposed changes would be presented to the Legislature as the WQCC recommendations. Chairman Maggiore stated that he feels the Agency is looking toward the WQCC for either concurrence with the proposals or alternative recommendations.

Ms. Brandvold asked what would happen if there were new evidence in an appeal hearing that would show the agencies decision was wrong. Ms. McMichael stated that the purpose of the first hearing is to allow the introduction of all information at that point in time so the agency's decision is based on available information and evidence.

Bill Brancard, State Land Office, stated that a record review is a good idea, but there should be a stipulation in the procedural rules to allow, under certain circumstances, new evidence to be presented.

Mr. Ritzma stated that there are already a couple of mechanisms in the procedural rules to allow new evidence to be presented. One allows for a petition to be submitted to the hearing officer to re-open the hearing if new evidence is discovered. The other provision would be the idea that the WQCC could remand if it determined that more facts were needed to make a determination.

Ms. Fox asked the NMED what type of hearings it holds. Ms. McMichael stated to the WQCC that the NMED hearings are identical to the hearings held before the WQCC. Anyone has an opportunity to request a hearing, present data and views, argue orally and examine witnesses. It is a complete due process hearing. The agency tapes all hearings unless the applicant requests a court reporter. The applicant is responsible for the bill. In all other permit programs, once a permit has been issued, and new evidence comes up, there is usually an administrative mechanism that allows for the applicant, the agency, or anyone to request the agency look at the permit to determine if the new evidence should result in a modification, denial, or revocation of the permit. Ms. McMichael believes this to be true for discharge permits, but would have to research this.

Mr. Gutierrez commented on the three points before the WQCC. One, he would rather not try to restrict the Governor, just leave the public members-at-large. Two, regarding *de novo* hearings, spell that out to make sure there is clarity, and third, work on the budget as a line item.

Mr. Olson asked Ms. McMichael if she had a comment on Mr. Brancard's concern where there has not been a hearing, there is no record, and it is being appealed to the WQCC. Ms. McMichael stated that the opportunity for a hearing exists at the first level. What they are addressing specifically is permitting actions.

Mr. Hutchinson asked Chairman Maggiore if it would help if the WQCC drafted some suggested language on this issue and present it at the next WQCC meeting.

Mr. Ritzma amended his motion to reflect Mr. Gutierrez's statement regarding "diverse public interest" and to leave the decision of members-at-large up to the Governor. Leave item two, adjudicatory hearings as-is, and have Chairman Maggiore and Mr. Gutierrez go forward with the budget issue in any manner they deem appropriate.

Mr. DuBois seconded the motion.

Mr. Ritzma withdrew his motion and moved to approve item one with the words "diverse public interest" left out.

Mr. Sandoval stated that he has a problem with striking out "diverse public interest". The WQCC represents all of the citizens of New Mexico and the composition of the WQCC should reflect that. The WQCC should provide some language and guidance to the Governors Office regarding the need for Commission members to represent a cross-section of the public.

The WQCC Secretary took roll call.

Alberto Gutierrez	- Absent
Paul Gutierrez	- Absent
Paul Ritzma	- Yes
Bill Olson	- No
David Johnson	- No
Frank DuBois	- Yes
Andrew Sandoval	- No
Lynn Brandvold	- Yes
Irene Lee	- Yes
Howard Hutchinson	- Yes
Peter Maggiore	- No

The motion did not carry.

Mr. Ritzma moved to approve item number two as written. Mr. Johnson seconded the motion.

Mr. Olson, Ms. Brandvold and Ms. Lee stated that they find it difficult to vote on these issues without having specific language and a chance to review them with their directors and legal counsel.

The WQCC Secretary took roll call.

Alberto Gutierrez	-Absent
Paul Gutierrez	- Absent
Paul Ritzma	- Yes
Bill Olson	- abstain
David Johnson	- Yes
Frank DuBois	- Yes
Andrew Sandoval	- Yes
Lynn Brandvold	- No
Irene Lee	- Abstain
Howard Hutchinson	- No
Peter Maggiore	- Yes

The motion did not carry.

Mr. Hutchinson re-stated his motion that counsel brings the proposed language on adjudicatory hearings before the WQCC at the December meeting. Mr. Olson seconded the motion.

The motion carried.

Mr. Ritzma moved to approve item three with the Commission's revisions and to allow Chairman Maggiore and Mr. Gutierrez to go forward with the proposal. Mr. Johnson seconded the motion.

Ms. Brandvold asked if Mr. Ritzma would amend his motion to state that the budget will be presented to the WQCC before it is presented to the legislature. Mr. Ritzma stated that he believed there would not be sufficient time to bring the budget back to the WQCC.

Mr. Sandoval stated that he would like to have some language added to the budget showing that the WQCC's budget will only be responsible for members-at-large.

The motion carried.

Item 9: Other Business.

Mr. DuBois passed out a resolution to follow up on a discussion that was held at the WQCC meeting in Las Cruces. The resolution concerns the state's inability to intervene in cases due to budget restrictions. The resolution deals with the issue of a litigation fund that state agencies could apply to when unforeseen legal issues come up and a need exists to protect the state's resources.

Mr. Johnson moved to table the issue and place it on the December agenda. Mr. Olson seconded the motion. The motion carried.

Mr. Hutchinson stated that on September 3, 1998, the Environmental Protection Agency (EPA), gave notice on the availability of, and request for, comments regarding the Water Quality Criteria and Standards Plan priorities future. Mr. Hutchinson asked if the NMED had made comments on this and if so, what were the comments. Dr. Davis responded that the NMED did not comment on this. Mr. Hutchinson asked the NMED to review the plan and make a recommendation to the WQCC as to how they should comment to EPA.

Mr. Olson moved to present Ms. Goad with a commendation letter for all her years of service to the WQCC and the State of New Mexico. Mr. Hutchinson seconded the motion. The motion carried.

Ms. Fox asked the WQCC to get their comments on the back minutes to the Secretary for changes and have the minutes put on the December agenda.

Item 10: Report on Litigation and Adjudicatory Matters.

Ms. Fox informed the WQCC that the transcript in the standards hearing has been filed and parties have 60 days to file their briefs.

Item 11: Next Meeting.

The next WQCC meeting will be held on December 8, 1998.

Chairman Maggiore adjourned the meeting.

John Maggiore 12/15/98
Chairperson