



**STATE OF NEW MEXICO  
WATER QUALITY CONTROL COMMISSION  
1190 St. Francis Drive  
P.O. Box 26110  
Santa Fe, New Mexico 87502  
(505) 827-2842**

**CONSTITUENT AGENCIES:**

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

Minutes of the  
New Mexico Water Quality Control Commission Meeting  
August 12, 1997

The New Mexico Water Quality Control Commission (WQCC) held its meeting on August 12, 1997, at 9:00 a.m. at the State Capitol Building, Paseo de Peralta and Old Santa Fe Trail, Santa Fe, New Mexico. The following members were present.

Ed Kelley	NMED
Brian James	State Engineer Office
Bill Olson	Oil Conservation Division
David Johnson	Park & Recreation Division
James Davis	Department of Agriculture
Andrew Sandoval	Department of Game & Fish
Howard Hutchinson	Soil & Water Conservation Commission
Charles Chapin	Bureau of Mines & Mineral Resources
Paul Gutierrez	Member-at-Large
Alberto Gutierrez	Member-at-Large

Absent

Robert Castillo	Member-at-Large
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Others

Pamela Farnham	Acting WQCC Secretary
Patrick Simpson	WQCC Legal Counsel - AGO
Erik Galloway	NMED
David Hogge	NMED
Glenn Saums	NMED
Steven Pierce	NMED
Patrick Hanson	NMED
Charles Fink	Sandia National Labs
Joseph Bonaguidi	Sandia National Labs
Willie Lane	NMED/EPA/IPA
Carl Young	NMED/EPA/IPA
Bruce S. Garber	Garber and Hallmark, P.C.
Robert George	UOC Advisory Board

Charles Barnett	UOC Advisory Board
Marcy Leavitt	NMED
Dale Doremus	NMED
Clint Marshall	NMED
Greg Ridgley	Legal Counsel, NMED
Nicholas Persampieri	Legal Counsel, NMED
Alex Puglisi	Water Quality Association
John Horning	Forest Guardians
Steve Sugarman	Legal Counsel, Forest Guardians
Ian Hoffman	Albuquerque Journal
Sharon Lombardi	DPNM

**Item 1: Roll Call. (Tape 1 - Side 1 - 6)**

**Item 2: Approval of the Agenda (Tape 1 - Side 1 - 8)**

B. James stated that in Item 5, he thought that the issue of Acceptance of Settlement regarding Permit #DP-163 be considered before Findings of Fact and Conclusions of Law. N. Persampieri stated that the parties had agreed to a Stipulated Settlement and felt that the Commission didn't need to further consider Findings of Fact and Conclusions of Law.

E. Kelley decided that the agenda items would be left as is until they came up during the meeting.

D. Johnson moved to accept the agenda. A. Gutierrez seconded the motion. Motion passed unanimously.

**Item 3: Review of the proposed minutes of May 13, 1997. (Tape 1 - Side 1 - 25)**

A. Sandoval suggested that the first paragraph of Item 4 be changed, replacing the word "have" with "modify" and replacing "plan" with "permit".

After review and discussion, A. Sandoval moved to approve the changes to Paragraph 1 of Item 4. B. James seconded the motion. The motion passed unanimously.

The amended paragraph would read: "After a lengthy review and discussion of the appeal, T. Turney moved to modify the permitting action of the Environment Department regarding this application for a discharge permit to read as follows:"

D. Johnson stated that Peter Greene was his alternate and to change pages one and three. J. Davis said he was present instead of Wayne Cunningham and to change page three. Charles Chapin stated that Lynn Brandvold was present instead and to change page three.

D. Johnson moved to approve the minutes as amended. B. James seconded the motion. The motion passed. B. James and E. Kelley abstained.

**Item 4: Appointment of Utility Operators Certification Advisory Board Members. (Tape 1 - Side 1 - 073)**

Patrick Hanson, NMED Program Manager for the SWQB and Executive Secretary for the Utility Operators Certification Advisory Board (UOCAB), introduced Robert George (Utility Operators Training Program) and

Charles Barnett (Los Alamos Johnson Controls Sanitary Waste Plant), both members of the UOCAB. P. Hanson stated that, as specified in the Utility Operators Certification Act, two members of the Board sit on the Commission to vote in matters relating to operator certification. R. George and C. Barnett took seats with the Commission for deliberation on this agenda item.

Mr. Hanson advised the Commission that the UOCAB is made of up seven regular members and two alternates whose terms are set at three years with terms staggered each year. Two terms ended June 30, 1997. According to the Commission's regulations, it must appoint new members.

The Advisory Board solicited nominations, reviewed the candidates and made its recommendations: John Eckley, employed by the City of Bloomfield, Water and Wastewater Operations; and Eric Lopez, employed by the City of Las Cruces, Wastewater Treatment Facility. Both nominations came highly recommended.

B. James made a motion to approve J. Eckley and E. Lopez for appointment to the Utility Operators Certification Advisory Board for the term June 30, 1997, to June 30, 2000. A. Gutierrez seconded the motion. The motion passed unanimously. (Tape 1, Side 1 - 118)

**Item 5: Discussion of Sundance Dairy's Findings of Fact and Conclusions of Law or Alternatively Acceptance of Settlement re Permit no DP-163. (Tape 1 - Side 1 - 124)**

N. Persampieri reported that a Settlement Agreement had been reached between the parties on the Sundance Dairy Appeal.

Discussions took place. B. James stated that in light of the violation becoming known in the early 1990's and subsequent hearings, a time frame should be inserted in order to make certain the Commission be assured of the completion of the project.

A. Sandoval stated he thought there was a slight deviation from what the Commission ordered in terms of modification and renewal of DP-163. For example: Specifications under Item 3 of the Settlement Agreement state that Sundance Dairy shall line one of the existing lagoons. In contrast, the Commission's Conclusion in Order 97-01, page 4, Order 2A stated that the wastewater lagoons achieve a permeability standard and that a reasonable leakage detection system be installed. (Tape 1 - Side 1 - 200)

After considerable discussion, C. Marshall stated that all rain water and processed water run-off from the milking barn will be directed to the synthetically-lined lagoon and will have sufficient capacity for 60 days. He also stated that the second, unlined lagoon, would not be used at all according to Mr. Davis. N. Persampieri, Legal Counsel for NMED, was in agreement with the assessment of the Agreement.

B. Olson raised the question of whether or not, over time, the single liner would not leak and therefore a leak detection system wasn't needed, and wanted to know what the rationale was for dropping the system.

C. Marshall stated that Mr. Davis is considering a 60 mil HTP liner to minimize any risks of damage, but that risks do persist with any synthetic-type of liner. He also stated that in negotiating with Mr. Davis, the Environment Department thought this was a reasonable solution. C. Marshall said that contingency plans were in place that address contamination in the future from any kind of rupture to the lining and that additional monitor wells will be installed in accordance with the permit.

B. James thought that whichever lagoon was not lined be taken out of service and have that clause inserted in the settlement modification. N. Persampieri was in agreement. B. Garber stated that he had not been included in the negotiations between NMED and Mr. Davis, but stated that he believed that there would be no discharge to the unlined lagoon. Mr. Garber stated that the Commission could approve the Stipulation condition upon agreement by both parties in setting a reasonable time frame with regard to completion of the lining of the ponds; or the Commission could instruct everyone involved to come back and work out those two issues. (Tape 1 - Side 1 - 279)

In response to statements presented by B. Garber and N. Persampieri regarding the 5 years of negotiating with Mr. Davis, B. James expressed concern that settlement was reached after day-long hearings, preparing Findings, Facts and Conclusions, and then the Commission making recommendations. (Tape 1 - Side 1 - 300)

B. James then moved to table the approval of the Settlement Agreement until the next meeting until this joint motion for approval of Settlement modification contains two items: 1. Agreement on the time frame for closure of the unlined lagoon 2; and, 2. A time frame for installation of the lining of lagoon 1. (Tape 1 - Side 1 - 348)

M. Leavitt's concern was that the window of opportunity to get the lagoon lined before bad weather set in may be lost if this Agreement was delayed any longer due to the fact that the Commission wasn't meeting on a monthly basis. She also stated that Mr. Davis was ready to move on lining lagoon 1 and that that process would stop further contamination.

B. Garber stated he didn't want the Commission to feel that the hearing was a waste of time. He also stated that the Commission came up with a viable resolution unable to be attained by Mr. Davis or NMED in their negotiations.

After discussion, the Commission was in agreement to have Mr. Garber call Mr. Davis to make resolution regarding these issues.

A. Sandoval seconded the motion.

B. James modified his motion to include that the tabled motion could be taken off the table before the end of this meeting if Mr. Garber could resolve the issues over the phone with Mr. Davis. (Tape 1 - Side 2 - 23)

The motion was seconded. The motion passed with one no vote by P. Gutierrez. (Tape 1 - Side 2 - 28)

In response to B. James remarks, P. Gutierrez stated that people have a right to plead their case. He felt that after all avenues were exhausted if they've learned something and have come to an agreement, he didn't feel that it was a waste of the Commission's time, Mr. Davis', or NMED.

Motion was made to recess. The meeting reconvened at 10:00 a.m.

N. Persampieri reported that the parties reached an agreement regarding the issues of concern to the Commission in the Settlement modification. In the first line of Paragraph 1, after the word "lagoons" add: "within 90 days of the date of this order." At the end of Paragraph 1 add: "All dairy waste water will be discharged to the synthetically-lined lagoon upon completion." The next sentence will read: "The manure in the unlined pond shall be removed within one year of the date of this order."

B. James made a motion to take Item 5 off the table. D. Johnson seconded. The motion passed unanimously. (Tape 1 - Side 2 - 68)

After a lengthy discussion on the modification of the Order, D. Johnson made a motion to approve the Stipulated Final Order as amended. B. Olson seconded the motion. The motion passed unanimously. (Tape 1 - Side 2 - 180)

**Item 6: Report by Surface Water Quality Bureau on the Status of Total Maximum Daily Load (TMDL) Development (Tape 1 - Side 1 - 191)**

Erik Galloway, NMED/SWQB, stated that he received a letter from Mr. Frank Dubois of the NM Department of Agriculture specifying a series of questions regarding the consent decree requiring the U.S. Environmental Protection Agency to insure that Total Maximum Daily Loads (TMDL's) be established for streams and rivers in New Mexico within a defined time.

E. Galloway introduced David Hogge, SWQB; Willie Lane and Carl Young, EPA/IPA (Interpersonal Agreement) who will be doing the bulk of the work with TMDL's as stated in the Consent Decree and Settlement Order. He then presented the TMDL schedule for the next 10 years.

A. Sandoval stated that the Canadian Drainage was absent from the TMDL schedule. E. Galloway stated that there were two parts to the agreement and that the State was not a party in the negotiations. He stated that the negotiations were between Forest Guardians, Southwest Environmental Center, and EPA.

The two parts of the agreement were: The Consent Decree regarding the "bundles" and, all other parts of the State that are on the 1996 303(d) list. E. Galloway stated that he believed that parts of the Canadian Drainage were included in the 303(d) list.

A lengthy discussion ensued. J. Davis stated that he would want the Commission to be kept informed and have the ability to comment and interact in the development of the TMDL's, which will eventually be adopted by the Commission. E. Galloway stated that the Commission is the responsible party for TMDL acceptance into the Water Quality Management Plan. D. Hogge stated that the TMDL doesn't set standards, rather, it is a plan to achieve the current water quality standards. Standards can only be set from the Commission through the Triennial Review or other process as specified.

H. Hutchinson stated he would like the preparation for the draft of the Triennial Review for Water Quality Standards. G. Ridgley, NMED attorney, stated that a draft is being processed for public review for presentation for the first week of September. A series of other public meetings are planned where interested parties can participate to discuss the draft. Individual meetings are planned with key participants to develop a dialog between interested parties. In November, the plans are to ask the Commission for a date to go to hearing.

H. Hutchinson specifically requested that all the soil and water conservation districts be on the list to participate in the review of the draft.

The meeting adjourned for lunch.

The meeting reconvened at 1:15 P.M.

**Item 7: Discussion of Litigation on Forest Guardians Regarding Antidegradation Policy. (Tape 3 - Side 1 252)**

P. Simpson briefed the Commission on the Complaint filed by Forest Guardians against EPA for Declaratory, Mandatory, and Injunctive Relief, pages 7 and 8. The policy was sent to EPA who signed off on it and that is why the Plaintiffs in the law suit sued EPA and not the WQCC. However, it doesn't make the WQCC exempt from the lawsuit.

P. Simpson explained the allegations of the Complaint that compare the Antidegradation Policy and Implementation Plan of the State, Section 1101 of the Standards for Interstate and Intrastate Streams, to the federal antidegradation policy. His explanation followed. The New Mexico policy tracks the Tier 3 language of the federal policy, except that it freezes the designation just to that narrative description and does not include the "such as" waters. The State policy limits itself just to waters of designated national and state monuments, parks, and wildlife refuges, and does not give room to include other waters of similar quality which are not within the land designations. Tier 3 waters protects the streams for all uses, whereas the federal policy is a water quality-based protection, not a use-based protection. The State policy protects the uses that are tied to the federal or state land designation as opposed to federal policy which protects all water uses across the board, whether or not those water uses are tied to the federal or state land or water designation. The federal law is broader in its protection than the State law.

In the federal policy, third tier streams are protected in all events. There are no economic or social justifications for degradation. The state policy states that under the Tier 3 surface water quality there can be degradation if it economically and socially necessary. The state policy does allow for degradation of all of the tiers so long as there is justifiable necessity. Whereas the Tier 3 protection under the federal law is absolute and there is no economical or social justification that will allow for degradation. The Tier 3 protection is inadequate.

The Complaint also states there is a Tier 2 procedural problem in Paragraph 25 regarding pollutants being introduced into a Tier 2 river under exceptional circumstances

P. Simpson stated that the Plaintiffs filed suit against EPA as opposed to taking part in the Triennial Review under Statute 74-6-6, Subsection B because denial of petition shall not be subject to judicial review. **(Tape 3 - Side 2 - 68)**

A. Sandoval referred to Section 1101 regarding the failure to protect Tier 3 waters and wondered if NMED and the Commission erred when the State antidegradation policy was approved, or if there was ambiguity in terms of the semantics in terms of the language. **(Tape 3 - Side 2 - 138)**

P. Simpson stated the the State antidegradation policy protects most of the Tier 3 waters in the state and probably covers most of them. Some of the waters that belong in Tier 3 aren't getting the Tier 3 absolute protection because Tier 3 waters are still subject to degradation if it's socially and economically necessary.

S. Sugarman, attorney for Forest Guardians, stated that the law suit was filed after discussions and preliminary negotiations with NMED over the problems identified with New Mexico's antidegradation policy. After an impasse, it was decided to sue EPA in an attempt to get concerns addressed. The policy is a critical part of the water quality standards of the state for preventing the introduction of pollutants into a stream that has already maintained the fishable/swimmable standard if the fishable/swimmable standard will be violated by the introduction of those pollutants.

He stated that in Tier 3 waters there can be no introduction of pollutants except in a short-term situation that is in conjunction with some construction policy. There can be no water that qualifies as a Tier 3 water until the Commission specifically identifies that particular stream reach as a Tier 3 water. There is no standard that automatically qualifies a water as a Tier 3 water. (Tape 3 - Side 2 - 250)

S. Sugarman also stated that the Plaintiffs view, contrary to P. Simpson's statements, is that the problems lie within Tier 2. From the Plaintiffs perspective, the State policy doesn't even contain a Tier 3. Tier 2 does exist but that it is limited in ways that violate the Clean Water Act. Rio Frijoles that runs through Bandelier National Monument was given as an example. (Tape 3 - Side 2 - 280)

The Plaintiffs feel that the State's antidegradation policy has been in violation of the Clean Water Act for the past decade, and because of that some high quality waters in NM have been lost. They also would like to seek the designation of certain waters in NM as Tier 3 waters during the Triennial Review, and have adequate legally-complied policy be in effect at the time of the hearings for the Triennial Review go forward so that members of the public will have the opportunity to present testimony to the Commission as to why specific waters should be designated as Tier 3 waters. (Tape 3 - Side 2 - 340)

B. James asked S. Sugarman if the case could be solved if the Commission redrafted the State's antidegradation policy to mimic the federal policy. S. Sugarman stated that if that was done, Forest Guardians would have no complaints and that the lawsuit would be dismissed. (Tape 4 - Side 1 - 32)

Other questions and answers followed. S. Sugarman stated that Forest Guardians would be willing to dismiss the action if the Commission was going to prepare an antidegradation policy that complied with the Clean Water Act, in a time frame that was allowed by pertinent federal and state regulations. (Tape 4 - Side 1 - 49)

G. Ridgley, attorney for NMED, explained that the timing was the core of the issue. He stated that the State's antidegradation policy had been approved by EPA and was legal under the Clean Water Act. He urged Forest Guardians and other interested parties to bring these kinds of issues before the Commission at the next Triennial Review. He emphasized that the Triennial Review is the proper forum for Forest Guardian's concerns.

G. Ridgley informed the Commission that the proper way to handle the issue is to have all parties agree that the issues concerning the antidegradation policy will be addressed during the Triennial Review when all water quality standards are up for review. He urged the Commission not to consider having a separate mini rule-making session just on antidegradation that precedes and is separate from the Triennial Review. He explained that it was not necessary to have a revised antidegradation policy in place before the Triennial Review begins, as Forest Guardians stated they want, because proposed changes to the antidegradation policy and proposed designation of particular stream reaches as Tier 3 waters can all be presented and heard at the Triennial Review hearing. It would not only delay the start of the Triennial Review until the mini rule-making was completed, but also would be wasteful of the resources of the Commission, the Department, and the public because the same issues likely would be re-opened at the Triennial Review anyway. (Tape 4 - Side 1 - 80)

A. Gutierrez made a motion to go into Executive Session. D. Johnson seconded the motion. A roll call vote was taken.

J Kelley	YES
Brian James	YES
Bill Olson	YES

David Johnson	YES
James Davis	YES
Andrew Sandoval	ABSTAIN
Howard Hutchinson	YES
Charles Chapin	YES
Alberto Gutierrez	YES
Paul Gutierrez	YES

The motion passed. (Tape 4 - Side 1 - 171)

D. Johnson made a motion to go back into regular session. B. James seconded the motion. The motion passed.

P. Simpson stated that the item discussed in Executive Session was the litigation pending between the Environmental Protection Agency and the Forest Guardians and other parties regarding the State's antidegradation policy. (Tape 4 - Side 1 - 193)

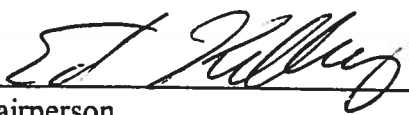
**Item 8: Next Meeting. (Tape 4 - Side 1 - 198)**

C. Chapin complimented E. Galloway and his staff for their presentation. D. Johnson also acknowledged and complimented Mr. Galloway.

B. James wanted to know that if there was a meeting in September or not, would the Commission be able to get the Triennial Review draft document. It was stated that the draft would represent the Department's position.

The next meeting date was left open.

C. Chapin made a motion to adjourn the meeting. A. Gutierrez seconded the motion. The motion passed.

  
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 Chairperson