

STATE OF NEW MEXICO
WATER QUALITY CONTROL COMMISSION



In the Matter of)
PROPOSED AMENDMENT)
TO 20.6.6 NMAC (Dairy Rule))

Nos. WQCC 12-09(R) and 13-08(R)

ATTORNEY GENERAL’S MOTION TO DISQUALIFY HEARING OFFICER

Preliminary Statement

The Attorney General moves to disqualify the Hearing Officer in this matter because of the appearance of a financial conflict of interest. The Hearing Officer presently serves under contract with one of the parties appearing before him in this proceeding, the New Mexico Environment Department (“NMED”). *See* Environment Department Professional Services Contract 15-667-1800-003 (Aug. 8, 2014) (“Contract”) [Ex. A]. Under the Contract, the Hearing Officer (through his law firm, SaucedoChavez, P.C.) provides hearing officer services for NMED in assigned cases. Contract, ¶ 1. As such, the Hearing Officer and his law firm are dependent upon NMED for future hearing officer assignments and future income.

Due process requires the Water Quality Control Commission (“Commission”) to rely upon an impartial and neutral hearing officer. *Reid v. N.M. Bd. of Examiners of Optometry*, 1978-NMSC-005, ¶¶ 7-8, 92 N.M. 414, 416. Courts have uniformly held that, consistent with due process, a hearing officer may not be under contract with a party appearing before him or her, and thereby dependent upon that party for future income because of the structural bias in favor of that party created by such a financial relationship. *Esso Standard Oil Co. v. Lopez-Freytes*, 522 F.3d 136, 147 (1st Cir. 2008); *Lucky Dogs LLC v. City of Santa Rosa*, 913 F. Supp. 2d 853, 860-62 (N.D. Ca. 2012); *Hass v. Co. of San Bernadino*, 45 P.3d. 280, 289-90 (Cal. 2002). Consistent with due process, the Hearing Officer in this matter may not be under contract

with NMED, a party before him, and dependent upon NMED for future income. The Hearing Officer must be disqualified.

Argument

I. DUE PROCESS REQUIRES A NEUTRAL AND UNBIASED HEARING OFFICER

It is well established that due process requires a neutral and unbiased decision maker in administrative proceedings, including administrative rulemakings. *E.g., Reid*, 1978-NMSC-005, ¶¶ 7-8, 92 N.M. at 416; *Association of Nat'l Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1174 (D.C. Ct. App. 1980) (due process requires impartial decision maker in rulemakings). This principle extends to administrative hearing officers who make recommendations to the administrative decision maker. *See, e.g., City of Alb. v. Chavez*, 1997-NMCA-054, ¶ 11, 123 N.M. 428, 432.

It is also well established that disqualification of administrative decision makers may be based on the appearance of bias or partiality; a showing of actual bias is not required.

At a minimum, a fair and impartial tribunal requires that the trier of fact be disinterested and free from any form of bias or predisposition regarding the outcome of the case. In addition, our system of justice requires that the appearance of complete fairness be present. *The inquiry is not whether the [administrative body members] are actually biased or prejudiced, but whether, in the natural course of events, there is an indication of a possible temptation to an average man sitting as a judge to try the case with bias for or against any issue presented to him.*

Reid, 1978-NMSC-005, ¶ 7, 92 N.M. at 416 (emphasis added) (internal citations omitted). The *Reid* test “measures allegations of bias or prejudice by an objective standard.” *Chavez*, 1997-NMCA-054, ¶ 16, 123 N.M. at 433. New Mexico courts “. . . hold that where a reasonable person would have serious doubts about whether the hearing officer could be fair, it is inappropriate for the hearing officer to hear the case.” *Id.*

Relying upon Davis's *Administrative Law Treatise*, New Mexico courts have identified five kinds of bias that can form the basis to disqualify administrative decision makers. *Las Cruces Prof'l Fire Fights v. City of Las Cruces*, 1997-NMCA-031, ¶ 24, 123 N.M. 239, 246 (quoting 3 Kenneth Culp Davis, *Administrative Law Treatise*, § 19:1, at 371-72 (2d ed. 1980)). One basis is "[o]ne who stands to gain or lose by a decision either way has an interest that may disqualify" *Id.* Pertinent to this matter, which is a rulemaking and therefore has earmarks of legislation, the state courts recognize that "even a legislator may be disqualified on account of [this] conflict of interest." *Id.* Indeed, the appearance of a financial conflict is closely scrutinized by the courts:

Of all the types of bias that can affect adjudication, pecuniary interest has long received the most unequivocal condemnation and the least forgiving scrutiny. As the high court explained in Tumey v. Ohio (1927) 273 U.S. 510, 523, "[a]ll questions of judicial qualification may not involve constitutional validity But it certainly violates the Fourteenth Amendment, . . . to subject [a defendant] . . . to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case." Thus, while adjudicators challenged for reasons other than financial interest have in effect been afforded a presumption of impartiality, adjudicators challenged for financial interest have not. Indeed, the law is emphatically to the contrary. The high court has "ma[de] clear that [a reviewing court is] not required to decide whether in fact [an adjudicator challenged for financial interest] was influenced, but only whether sitting on the case . . . " "would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true." "

Hass, 45 P.3d at 286 (emphasis added) (internal citations omitted).

In this context, the high court has written: "It is sufficiently clear from our cases that those with substantial pecuniary interest in legal proceedings should not adjudicate these disputes *It has also come to be the prevailing view that '[m]ost of the law concerning disqualification because of interest applies with equal force to . . . administrative adjudicators.'*" Certainly due process allows more flexibility in administrative process than judicial process, even in the matter of selecting hearing officers. *But the rule disqualifying adjudicators with pecuniary interests applies with full force.*

Id. at 287 (emphasis added). The prohibition against administrative decision makers having a pecuniary interest in the outcome of a case applies to direct interests as well as to indirect or institutional interests. *See, e.g., Ward v. Village of Monroe*, 409 U.S. 57, 60 (mayor who imposed traffic fines which provided part of village income was disqualified because his executive responsibilities for maintaining village finances conflicted with his authority to impose fines).

II. THE HEARING OFFICER HAS AUTHORITY TO MAKE SIGNIFICANT RULINGS AFFECTING THE OUTCOME OF THIS MATTER

Under the *Guidelines for Commission Regulation Hearings* (“*Guidelines*”) and the Procedural Order in this case, the Hearing Officer – who is required to “conduct a fair and impartial hearing” -- is empowered to make significant, adjudicatory-type rulings that can affect the outcome of this rulemaking. *Guidelines*, § 104(B). The Hearing Officer has authority to rule on all evidentiary matters, including all evidentiary matters relating to expert testimony; all non-dispositive motions; and even whether parties may participate in this rulemaking¹. *See Guidelines*, §§ 104(B), 401(B), 402(B) & (C), 405, 405; Procedural Order, p. 1 (adopting Part I of *Guidelines*), §§ 302(C) & (E), 402(B) & (C), 405 (Oct. 3, 2014). Given the Hearing Officer’s critical role in this proceeding, it is imperative that he be without the appearance of conflict or bias.

¹ The first decision made by the Hearing Officer in this matter was to grant NMED’s motion to exclude the Attorney General as a party. Order on NMED’s Mot. to Exclude/Strike William Olson and Mot. to Strike Attorney General’s Appearance, ¶¶ 5-9 (Nov. 26, 2014). That unusual and highly prejudicial ruling was not based state or federal precedent in which any party, let alone a state attorney general, was excluded from a rulemaking. *See id.*

The Hearing Officer’s exclusion of the Attorney General required the Attorney General to take the extraordinary action of bringing a Petition for Writ of Mandamus to the New Mexico Supreme Court in order to participate in the rulemaking which, by statute, “all interested persons” including any state agency (such as the Attorney General’s Office) may participate. NMSA 1978, §§ 74-6-2(I), - 6(D); *see* Pet. for Writ of Mandamus, No. 35,000 (N.M.S. Ct.) (Dec. 1, 2014) [Ex. B]. The Supreme Court summarily and unanimously reversed the Hearing Officer’s ruling and ordered the Commission to allow the Attorney General to participate in this rulemaking. Order, No. 35,000 (N.M.S. Ct.) (Dec. 11, 2015) [Ex. C].

As a result of the Hearing Officer’s ill-advised decision in favor of NMED, this rulemaking was delayed four months, from December 9, 2014 to April 6, 2015. *See* DIGCE Unopposed Mot. for Continuance, pp. 1-2 (Dec. 3, 2015); Order Continuing Hearing (Dec. 3, 2015); Draft Comm’n Agenda, p. 2 (Jan. 13, 2015).

III. THE HEARING OFFICER'S CONTRACT WITH A PARTY APPEARING BEFORE HIM GIVES THE APPEARANCE OF A FINANCIAL CONFLICT OF INTEREST

The Hearing Officer is presently under contract to provide hearing officer services to NMED, in addition to the Commission and the Environmental Improvement Board. *See* Contract, ¶ 1. Under the Contract, the Hearing Officer and his law firm receive an hourly rate of \$200, up to a maximum contract amount of \$95,000 over the one-year term of the Contract. Contract, ¶¶ 2, 3. Under the Contract, the Hearing Officer and his law firm are assigned cases at the discretion of NMED. Contract, ¶ 1. As such, the future income of the Hearing Officer and his law firm are dependent upon NMED's willingness to continue to assign cases to them.

The contractual relationship between the Hearing Officer and NMED, in which Hearing Officer and his law firm are dependent upon future income from NMED, a party before him, gives the appearance of a financial conflict of interest. A "reasonable person" would be tempted to rule in favor of a party upon whom future income is dependent and against parties in opposition. This is the type of financial conflict of interest for which courts uniformly disqualify hearing officers. For example, in *Esso Standard Oil Co. v. Lopez-Freytes*, the Puerto Rico Environmental Quality Board ("EQB") contracted with hearing examiners to hear administrative matters and to give recommendations to the EQB. In those administrative matters, the EQB appeared before the hearing examiners to present the case. *Esso Standard Oil v. Cotto*, 389 F.3d 212, 214 n.1 (1st Cir. Ct. App. 2004). Under their contracts, the hearing examiners were dependent upon the discretion of the EQB to assign them cases. *Esso Standard Oil Co. v. Lopez-Freytes*, 522 F.3d at 147. The First Circuit Court of Appeals found this contractual relationship created a "structural bias" for the hearing examiners to favor the EQB. *Id.* "Given that a Hearing Examiner's pay is entirely dependent upon the discretionary assignment of cases from

the EQB, the examiner is vulnerable to the temptation to make recommendations favorable to the EQB.” *Id.*; see also, e.g., *Lucky Dogs*, 913 F. Supp. 2d at 860-62 (city’s policy of contracting with hearing officers to preside over tax liability disputes violated business’s due process rights; in all cases, the city was a party before the hearing officers; hearing officers had incentive to find in favor of city in order to curry favor and to encourage city to renew officers’ contracts in future); *Hass*, 45 P.3d. at 294-95 (county prosecutor retained through contract hearing officer to make recommendation to county board in licensing matter in which county prosecutor was litigant; the hearing officer had prospect of county attorney using her in the future for hearing officer assignments; court held that county prosecutor’s retention of hearing officer violated due process “when [hearing officer’s] future income from judging depends on the goodwill of frequent litigants who pay the adjudicator’s fees”).²

The standard for disqualification of administrative decision makers in New Mexico essentially paraphrases a federal statute governing disqualification of judicial branch judges and New Mexico’s Code of Judicial Conduct governing disqualification of state judges. *Chavez*, 1997-NMCA-054, ¶ 16, 123 N.M. at 433 (citing Rule 21-400(A) NMRA (“[a] judge is disqualified and shall recuse himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned”). A judge in New Mexico cannot sit in case in which a party with whom the judge contracts appears before that judge. Under the Code of Judicial Conduct, a judge may not engage in “frequent transactions or continuing business relationships” with persons “likely to come before the court on which the judge serves.” Rule 21-500(D)(1)(b)

² “While the rules governing the disqualification of administrative hearing officers are in some respects more flexible than those governing judges, *the rules are not more flexible on the subject of financial interest*. Applying those rules, courts have consistently recognized that a judge has a disqualifying financial interest when plaintiffs and prosecutors are free to choose their judge and the judge’s income from judging depends on the number of cases handled. No persuasive reason exists to treat administrative hearing officers differently.” *Hass*, 45 P.3d at 285-86 (emphasis added).

NMRA. In this case, the Hearing Officer has a continuing business relationship with a party who *is* before him. Such a business relationship would be prohibited if the Hearing Officer were a judge, and should be prohibited here as an unacceptable conflict of interest.

Conclusion

Based on the foregoing, the Attorney General respectfully requests the Commission to disqualify the Hearing Officer in this matter.

Respectfully submitted,

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NEW MEXICO ATTORNEY GENERAL



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Certificate of Service

I certify the following were served March 9, 2015 by email with the foregoing pleading:

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STATE OF NEW MEXICO

ENVIRONMENT DEPARTMENT
PROFESSIONAL SERVICES CONTRACT # 15-667-1800-0003

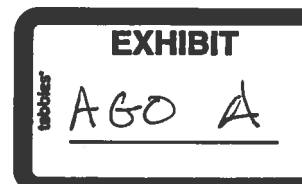
THIS AGREEMENT is made and entered into by and between the State of New Mexico, **New Mexico Environment Department**, hereinafter referred to as the "Agency," and **SaucedoChavez, P.C.**, hereinafter referred to as the "Contractor," and is effective as of the date set forth below upon which it is executed by the Department of Finance and Administration (DFA).

IT IS AGREED BETWEEN THE PARTIES:

1. Scope of Work.

The contractor shall work with the Deputy Secretary of the Agency, the Agency Hearing Clerk, and the Boards and Commissions Administrator for the Agency to coordinate and schedule hearings as the need arises. When scheduling the hearing, the Contractor will work with the aforementioned Agency contacts to determine the approximate number of hours that will be required for the Hearing Officer to execute his or her duties related to the proceedings. The Contractor shall perform the following work under this Contract:

- A. Conduct hearings, establish hearing dates, issue subpoenas, conduct pre-hearing conferences, accept testimony and written filings, administer oaths and affirmations, rule on motions and objections (both prior to and during the hearing) to assure an impartial hearing, and explain issues and applicable laws to parties involved;
- B. Ensure that hearings are held in a timely manner and are conducted fairly and in accordance with all applicable procedural rules, statutes and guidelines;
- C. Assure all parties' due process rights are observed and the public is offered a reasonable opportunity to be heard, when applicable;
- D. Consider evidence, argument and research and prepare timely Hearing Office Reports;
- E. Advise the Secretary or designees or Board or Commission as to evidence presented; it may also be necessary to advise the Secretary on legal issues surrounding specific proceedings, as well, or any other legal issues that require the expertise of the Hearing Officer;
- F. Assist the Secretary in drafting final decisions;
- G. Prepare records upon appeal;



- H. During proceedings, the Hearing Officer will be expected to be capable of managing multiple participants, including the public. The Hearing Officer will also be expected to properly manage stressful and contentious interactions amongst parties. The Hearing Officer will also be expected to properly manage technical and/or expert testimony and public participation;
- I. Work with the Boards and Commissions Administrator and the Hearing Clerk to ensure proper administration of hearings, filings and other proceedings;
- J. Timely manage large case loads; and;
- K. Provide scripts and other procedural assistance for Secretary or designees or Board/Commission members designated as hearing officers.

2. **Compensation.**

A. The Agency shall pay to the Contractor in full payment for services satisfactorily performed at the rate of **two hundred dollars (\$200.00) per hour for each term**, such compensation not to exceed **ninety-five thousand dollars (\$95,000.00)**, including gross receipts tax. The New Mexico gross receipts tax levied on the amounts payable under this shall be paid by the Agency to the Contractor. **The total amount payable to the Contractor under this Agreement, including gross receipts tax and expenses, shall not exceed ninety-five thousand dollars (\$95,000.00) for each term.**

E. **This amount is a maximum and not a guarantee that the work assigned to be performed by Contractor under this Agreement shall equal the amount stated herein. The parties do not intend for the Contractor to continue to provide services without compensation when the total compensation amount is reached. Contractor is responsible for notifying the Agency when the services provided under this Agreement reach the total compensation amount. In no event will the Contractor be paid for services provided in excess of the total compensation amount without this Agreement being amended in writing prior to those services in excess of the total compensation amount being provided.**

F. Payment is subject to availability of funds pursuant to the Appropriations Paragraph set forth below and to any negotiations between the parties from year to year pursuant to Paragraph 1, Scope of Work, and to approval by the DFA. All invoices **MUST BE** received by the Agency no later than fifteen (15) days after the termination of the Fiscal Year in which the services were delivered. Invoices received after such date **WILL NOT BE PAID.**

G. Contractor must submit monthly invoices, which include a detailed statement accounting for all services performed and expenses incurred. If the Agency finds that the services are not acceptable, within thirty days after the date of receipt of the invoice which includes written notice from the Contractor that payment is requested, it shall provide the Contractor a letter of exception explaining the defect or objection to the services, and outlining steps the Contractor may take to provide remedial action. Upon certification by the Agency that the services have been received and accepted, payment shall be tendered to the Contractor within thirty days after the date of acceptance. If payment is made by mail, the payment shall be

deemed tendered on the date it is postmarked. However, the agency shall not incur late charges, interest, or penalties for failure to make payment within the time specified herein.

3. **Term.**

THIS AGREEMENT SHALL NOT BECOME EFFECTIVE UNTIL APPROVED BY THE DFA. This Agreement shall terminate one (1) year from the DFA approval date "initial term", unless terminated pursuant to paragraph 4 (Termination), or paragraph 5 (Appropriations). The agency, at the Agency's sole discretion, shall have the option to renew the Agreement for subsequent one (1) year Terms (each a "Renewal Term") for a maximum of three (3) additional years. The Agency shall give the Contractor written notice of the Agency's intent to enter a Renewal Term within sixty (60) days prior to the expiration of the current term. The Agency's failure to give the Contractor written notice of the Renewal Term shall be treated as the Agency's intent to terminate the Agreement at the end of the current Term. In accordance with NMSA 1978, § 13-1-150, no contract term for a professional services contract, including extensions and renewals, shall exceed four years, except as set forth in NMSA 1978, § 13-1-150.

4. **Termination.**

A. **Grounds.** The Agency may terminate this Agreement for convenience or cause. The Contractor may only terminate this Agreement based upon the Agency's uncured, material breach of this Agreement.

B. **Notice; Agency Opportunity to Cure.**

1. Except as otherwise provided in Paragraph (4)(B)(3), the Agency shall give Contractor written notice of termination at least thirty (30) days prior to the intended date of termination.

2. Contractor shall give Agency written notice of termination at least thirty (30) days prior to the intended date of termination, which notice shall (i) identify all the Agency's material breaches of this Agreement upon which the termination is based and (ii) state what the Agency must do to cure such material breaches. Contractor's notice of termination shall only be effective (i) if the Agency does not cure all material breaches within the thirty (30) day notice period or (ii) in the case of material breaches that cannot be cured within thirty (30) days, the Agency does not, within the thirty (30) day notice period, notify the Contractor of its intent to cure and begin with due diligence to cure the material breach.

3. Notwithstanding the foregoing, this Agreement may be terminated immediately upon written notice to the Contractor (i) if the Contractor becomes unable to perform the services contracted for, as determined by the Agency; (ii) if, during the term of this Agreement, the Contractor is suspended or debarred by the State Purchasing Agent; or (iii) the Agreement is terminated pursuant to Paragraph 5, "Appropriations", of this Agreement.

C. **Liability.** Except as otherwise expressly allowed or provided under this Agreement, the Agency's sole liability upon termination shall be to pay for acceptable work performed prior to the Contractor's receipt or issuance of a notice of termination; provided, however, that a notice of termination shall not nullify or otherwise affect either party's liability for pre-termination defaults under or breaches of this Agreement. The Contractor shall submit an invoice for such work within thirty (30) days of receiving or sending the notice of termination. **THIS PROVISION IS NOT EXCLUSIVE AND DOES NOT WAIVE THE AGENCY'S OTHER LEGAL RIGHTS AND REMEDIES CAUSED BY THE CONTRACTOR'S DEFAULT/BREACH OF THIS AGREEMENT.**

D. **Termination Management.** Immediately upon receipt by either the Agency or the Contractor of notice of termination of this Agreement, the Contractor shall: 1) not incur any further obligations for salaries, services or any other expenditure of funds under this Agreement without written approval of the Agency; 2) comply with all directives issued by the Agency in the notice of termination as to the performance of work under this Agreement; and 3) take such action as the Agency shall direct for the protection, preservation, retention or transfer of all property titled to the Agency and records generated under this Agreement. Any non-expendable personal property or equipment provided to or purchased by the Contractor with contract funds shall become property of the Agency upon termination and shall be submitted to the agency as soon as practicable.

5. **Appropriations.**

The terms of this Agreement are contingent upon sufficient appropriations and authorization being made by the Legislature of New Mexico for the performance of this Agreement. If sufficient appropriations and authorization are not made by the Legislature, this Agreement shall terminate immediately upon written notice being given by the Agency to the Contractor. The Agency's decision as to whether sufficient appropriations are available shall be accepted by the Contractor and shall be final. If the Agency proposes an amendment to the Agreement to unilaterally reduce funding, the Contractor shall have the option to terminate the Agreement or to agree to the reduced funding, within thirty (30) days of receipt of the proposed amendment.

6. **Status of Contractor.**

The Contractor and its agents and employees are independent contractors performing professional services for the Agency and are not employees of the State of New Mexico. The Contractor and its agents and employees shall not accrue leave, retirement, insurance, bonding, use of state vehicles, or any other benefits afforded to employees of the State of New Mexico as a result of this Agreement. The Contractor acknowledges that all sums received hereunder are reportable by the Contractor for tax purposes, including without limitation, self-employment and business income tax. The Contractor agrees not to purport to bind the State of New Mexico unless the Contractor has express written authority to do so, and then only within the strict limits of that authority.

7. **Assignment.**

The Contractor shall not assign or transfer any interest in this Agreement or assign any claims for money due or to become due under this Agreement without the prior written approval of the Agency.

8. **Subcontracting.**

The Contractor shall not subcontract any portion of the services to be performed under this Agreement without the prior written approval of the Agency. No such subcontract shall relieve the primary Contractor from its obligations and liabilities under this Agreement, nor shall any subcontract obligate direct payment from the Procuring Agency.

9. **Release.**

Final payment of the amounts due under this Agreement shall operate as a release of the Agency, its officers and employees, and the State of New Mexico from all liabilities, claims and obligations whatsoever arising from or under this Agreement.

10. **Confidentiality.**

Any confidential information provided to or developed by the Contractor in the performance of this Agreement shall be kept confidential and shall not be made available to any individual or organization by the Contractor without the prior written approval of the Agency.

11. **Product of Service -- Copyright.**

All materials developed or acquired by the Contractor under this Agreement shall become the property of the State of New Mexico and shall be delivered to the Agency no later than the termination date of this Agreement. Nothing developed or produced, in whole or in part, by the Contractor under this Agreement shall be the subject of an application for copyright or other claim of ownership by or on behalf of the Contractor.

12. **Conflict of Interest; Governmental Conduct Act.**

A. The Contractor represents and warrants that it presently has no interest and, during the term of this Agreement, shall not acquire any interest, direct or indirect, which would conflict in any manner or degree with the performance or services required under the Agreement.

B. The Contractor further represents and warrants that it has complied with, and, during the term of this Agreement, will continue to comply with, and that this Agreement complies with all applicable provisions of the Governmental Conduct Act, Chapter 10, Article 16 NMSA 1978. Without in anyway limiting the generality of the foregoing, the Contractor specifically represents and warrants that:

1) in accordance with NMSA 1978, § 10-16-4.3, the Contractor does not employ, has not employed, and will not employ during the term of this Agreement any Agency employee while such employee was or is employed by the Agency and participating directly or indirectly in the Agency's contracting process;

2) this Agreement complies with NMSA 1978, § 10-16-7(A) because (i) the Contractor is not a public officer or employee of the State; (ii) the Contractor is not a member of the family of a public officer or employee of the State; (iii) the Contractor is not a business in which a public officer or employee or the family of a public officer or employee has a substantial interest; or (iv) if the Contractor is a public officer or employee of the State, a member of the family of a public officer or employee of the State, or a business in which a public officer or employee of the State or the family of a public officer or employee of the State has a substantial interest, public notice was given as required by NMSA 1978, § 10-16-7(A) and this Agreement was awarded pursuant to a competitive process;

3) in accordance with NMSA 1978, § 10-16-8(A), (i) the Contractor is not, and has not been represented by, a person who has been a public officer or employee of the State within the preceding year and whose official act directly resulted in this Agreement and (ii) the Contractor is not, and has not been assisted in any way regarding

this transaction by, a former public officer or employee of the State whose official act, while in State employment, directly resulted in the Agency's making this Agreement;

4) this Agreement complies with NMSA 1978, § 10-16-9(A) because (i) the Contractor is not a legislator; (ii) the Contractor is not a member of a legislator's family; (iii) the Contractor is not a business in which a legislator or a legislator's family has a substantial interest; or (iv) if the Contractor is a legislator, a member of a legislator's family, or a business in which a legislator or a legislator's family has a substantial interest, disclosure has been made as required by NMSA 1978, § 10-16-7(A), this Agreement is not a sole source or small purchase contract, and this Agreement was awarded in accordance with the provisions of the Procurement Code;

5) in accordance with NMSA 1978, § 10-16-13, the Contractor has not directly participated in the preparation of specifications, qualifications or evaluation criteria for this Agreement or any procurement related to this Agreement; and

6) in accordance with NMSA 1978, § 10-16-3 and § 10-16-13.3, the Contractor has not contributed, and during the term of this Agreement shall not contribute, anything of value to a public officer or employee of the Agency.

C. Contractor's representations and warranties in Paragraphs A and B of this Article 12 are material representations of fact upon which the Agency relied when this Agreement was entered into by the parties. Contractor shall provide immediate written notice to the Agency if, at any time during the term of this Agreement, Contractor learns that Contractor's representations and warranties in Paragraphs A and B of this Article 12 were erroneous on the effective date of this Agreement or have become erroneous by reason of new or changed circumstances. If it is later determined that Contractor's representations and warranties in Paragraphs A and B of this Article 12 were erroneous on the effective date of this Agreement or have become erroneous by reason of new or changed circumstances, in addition to other remedies available to the Agency and notwithstanding anything in the Agreement to the contrary, the Agency may immediately terminate the Agreement.

D. All terms defined in the Governmental Conduct Act have the same meaning in this Article 12(B).

13. Amendment.

A. This Agreement shall not be altered, changed or amended except by instrument in writing executed by the parties hereto and all other required signatories.

B. If the Agency proposes an amendment to the Agreement to unilaterally reduce funding due to budget or other considerations, the Contractor shall, within thirty (30) days of receipt of the proposed Amendment, have the option to terminate the Agreement, pursuant to the termination provisions as set forth in Article 4 herein, or to agree to the reduced funding.

14. Merger.

This Agreement incorporates all the Agreements, covenants and understandings between the parties hereto concerning the subject matter hereof, and all such covenants, Agreements and understandings have been merged into this written Agreement. No prior Agreement or

understanding, oral or otherwise, of the parties or their agents shall be valid or enforceable unless embodied in this Agreement.

15. **Penalties for violation of law.**

The Procurement Code, NMSA 1978 §§ 13-1-28 through 13-1-199, imposes civil and criminal penalties for its violation. In addition, the New Mexico criminal statutes impose felony penalties for illegal bribes, gratuities and kickbacks.

16. **Equal Opportunity Compliance.**

The Contractor agrees to abide by all federal and state laws and rules and regulations, and executive orders of the Governor of the State of New Mexico, pertaining to equal employment opportunity. In accordance with all such laws of the State of New Mexico, the Contractor assures that no person in the United States shall, on the grounds of race, religion, color, national origin, ancestry, sex, age, physical or mental handicap, or serious medical condition, spousal affiliation, sexual orientation or gender identity, be excluded from employment with or participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity performed under this Agreement. If Contractor is found not to be in compliance with these requirements during the life of this Agreement, Contractor agrees to take appropriate steps to correct these deficiencies.

17. **Applicable Law.**

The laws of the State of New Mexico shall govern this Agreement, without giving effect to its choice of law provisions. Venue shall be proper only in a New Mexico court of competent jurisdiction in accordance with NMSA 1978, § 38-3-1 (G). By execution of this Agreement, Contractor acknowledges and agrees to the jurisdiction of the courts of the State of New Mexico over any and all lawsuits arising under or out of any term of this Agreement.

18. **Workers Compensation.**

The Contractor agrees to comply with state laws and rules applicable to workers compensation benefits for its employees. If the Contractor fails to comply with the Workers Compensation Act and applicable rules when required to do so, this Agreement may be terminated by the Agency.

19. **Records and Financial Audit.**

The Contractor shall maintain detailed time and expenditure records that indicate the date; time, nature and cost of services rendered during the Agreement's term and effect and retain them for a period of three (3) years from the date of final payment under this Agreement. The records shall be subject to inspection by the Agency, the Department of Finance and Administration and the State Auditor. The Agency shall have the right to audit billings both before and after payment. Payment under this Agreement shall not foreclose the right of the Agency to recover excessive or illegal payments

20. **Indemnification.**

The Contractor shall defend, indemnify and hold harmless the Agency and the State of New Mexico from all actions, proceeding, claims, demands, costs, damages, attorneys' fees and all other liabilities and expenses of any kind from any source which may arise out of the

performance of this Agreement, caused by the negligent act or failure to act of the Contractor, its officers, employees, servants, subcontractors or agents, or if caused by the actions of any client of the Contractor resulting in injury or damage to persons or property during the time when the Contractor or any officer, agent, employee, servant or subcontractor thereof has or is performing services pursuant to this Agreement. In the event that any action, suit or proceeding related to the services performed by the Contractor or any officer, agent, employee, servant or subcontractor under this Agreement is brought against the Contractor, the Contractor shall, as soon as practicable but no later than two (2) days after it receives notice thereof, notify the legal counsel of the Agency and the Risk Management Division of the New Mexico General Services Department by certified mail.

21. New Mexico Employees Health Coverage.

A. If Contractor has, or grows to, six (6) or more employees who work, or who are expected to work, an average of at least 20 hours per week over a six (6) month period during the term of the contract, Contractor certifies, by signing this agreement, to have in place, and agree to maintain for the term of the contract, health insurance for those employees and offer that health insurance to those employees if the expected annual value in the aggregate of any and all contracts between Contractor and the State exceed \$250,000 dollars.

B. Contractor agrees to maintain a record of the number of employees who have (a) accepted health insurance; (b) declined health insurance due to other health insurance coverage already in place; or (c) declined health insurance for other reasons. These records are subject to review and audit by a representative of the state.

C. Contractor agrees to advise all employees of the availability of State publicly financed health care coverage programs by providing each employee with, as a minimum, the following web site link to additional information: <http://insurenemexico.state.nm.us/>.

22. Employee Pay Equity Reporting.

Contractor agrees if it has ten (10) or more New Mexico employees OR eight (8) or more employees in the same job classification, at any time during the term of this contract, to complete and submit the PE10-249 form on the annual anniversary of the initial report submittal for contracts up to one (1) year in duration. If contractor has (250) or more employees contractor must complete and submit the PE250 form on the annual anniversary of the initial report submittal for contracts up to one (1) year in duration. For contracts that extend beyond one (1) calendar year, or are extended beyond one (1) calendar year, contractor also agrees to complete and submit the PE10-249 or PE250 form, whichever is applicable, within thirty (30) days of the annual contract anniversary date of the initial submittal date or, if more than 180 days has elapsed since submittal of the last report, at the completion of the contract, whichever comes first. Should contractor not meet the size requirement for reporting at contract award but subsequently grows such that they meet or exceed the size requirement for reporting, contractor agrees to provide the required report within ninety (90 days) of meeting or exceeding the size requirement. That submittal date shall serve as the basis for submittals required thereafter. Contractor also agrees to levy this requirement on any subcontractor(s) performing more than 10% of the dollar value of this contract if said subcontractor(s) meets, or grows to meet, the stated employee size thresholds during the term of the contract. Contractor further agrees that, should one or more subcontractor not meet the size requirement for reporting at contract award but subsequently grows such that they meet or exceed the size requirement for reporting,

contractor will submit the required report, for each such subcontractor, within ninety (90 days) of that subcontractor meeting or exceeding the size requirement. Subsequent report submittals, on behalf of each such subcontractor, shall be due on the annual anniversary of the initial report submittal. Contractor shall submit the required form(s) to the State Purchasing Division of the General Services Department, and other departments as may be determined, on behalf of the applicable subcontractor(s) in accordance with the schedule contained in this paragraph. Contractor acknowledges that this subcontractor requirement applies even though contractor itself may not meet the size requirement for reporting and be required to report itself.

Notwithstanding the foregoing, if this Contract was procured pursuant to a solicitation, and if Contractor has already submitted the required report accompanying their response to such solicitation, the report does not need to be re-submitted with this Agreement.

23. Invalid Term or Condition.

If any term or condition of this Agreement shall be held invalid or unenforceable, the remainder of this Agreement shall not be affected and shall be valid and enforceable.

24. Enforcement of Agreement.

A party's failure to require strict performance of any provision of this Agreement shall not waive or diminish that party's right thereafter to demand strict compliance with that or any other provision. No waiver by a party of any of its rights under this Agreement shall be effective unless express and in writing, and no effective waiver by a party of any of its rights shall be effective to waive any other rights.

25. Notices.

Any notice required to be given to either party by this Agreement shall be in writing and shall be delivered in person, by courier service or by U.S. mail, either first class or certified, return receipt requested, postage prepaid, as follows:

To the Agency:
Butch Tongate
Deputy Secretary
NM Environment Department
P.O. BOX 5469
1190 St. Francis Drive S4100
Santa Fe, NM 87502
butch.tongate@state.nm.us

To the Contractor:
Morris J. Chavez
SaucedoChavez, P.C.
PO Box 1886
100 Gold Ave. SW
Suite 206
Albuquerque, NM 87103
mo@saucedochavez.com


Contract ID# 15-667-1800-0003

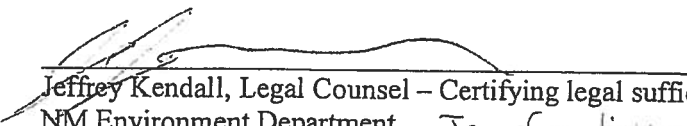
26. Authority.

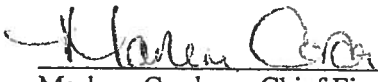
If Contractor is other than a natural person, the individual(s) signing this Agreement on behalf of Contractor represents and warrants that he or she has the power and authority to bind Contractor, and that no further action, resolution, or approval from Contractor is necessary to enter into a binding contract.

Contract ID# 15-667-1800-0003

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date of signature by the DFA Contracts Review Bureau below.

By:  Date: 7/23/14
Ryan Flynn, Cabinet Secretary, NM Environment Department

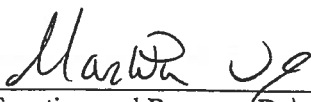
By:  Date: 7/23/14
Jeffrey Kendall, Legal Counsel - Certifying legal sufficiency
NM Environment Department *Jennifer Hanks, Deputy General Counsel*

By:  Date: 7/24/14
Marlene Cordova, Chief Financial Officer
NM Environment Department

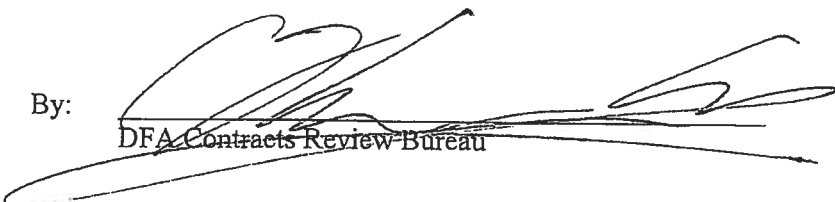
By:  Date: 9/21/15
Saucedo Chavez, P.C.

The records of the Taxation and Revenue Department reflect that the Contractor is registered with the Taxation and Revenue Department of the State of New Mexico to pay gross receipts and compensating taxes.

ID Number: 03-196021-00-9

By:  Date: 5/24/14
Taxation and Revenue Department

This Agreement has been approved by the DFA Contracts Review Bureau:

By:  Date: 08-08-14
DFA Contracts Review Bureau

SUPREME COURT
STATE OF NEW MEXICO

ORIGINAL

STATE OF NEW MEXICO,
ex rel. GARY KING, ATTORNEY GENERAL OF
THE STATE OF NEW MEXICO,

Petitioner,

No. _____

v.

NEW MEXICO WATER QUALITY CONTROL
COMMISSION,

SUPREME COURT OF NEW MEXICO
FILED

DEC - 1 2014

SUPREME COURT OF NEW MEXICO
FILED

NOV - 1 2014

Respondent.

[Signature]
**PETITION FOR WRIT OF MANDAMUS
AND REQUEST FOR EXPEDITED CONSIDERATION OR,
ALTERNATIVELY, REQUEST FOR STAY**

Nature of the Petition

1. Petitioner Gary King, Attorney General of the State of New Mexico, on behalf of the State of New Mexico, hereby requests the Court to issue a Writ of Mandamus to Respondent New Mexico Water Quality Control Commission ("Commission") ordering the Commission to allow the Attorney General to participate as a party in a rulemaking presently being held by the Commission pursuant to the New Mexico Water Quality Act ("WQA").

2. The rulemaking, captioned *In the Matter of Proposed Amendment to 20.6.6 NMAC (Dairy Rule)*, WQCC Nos. 12-09(R) and 13-08(R) ("Rulemaking"), is based on a second petition from Dairy Industry Group for a Clean Environment

EXHIBIT

AGO B

(“DIGCE”) to amend 20.6.6 NMAC, referred to as the “Dairy Rule.”¹

3. On November 26, 2014, the Commission struck the Attorney General’s Entry of Appearance in the Rulemaking, denying the Attorney General the right to appear as a party. Order on NMED’s Motion to Exclude William Olson and Motion to Strike Entry of Appearance of Attorney General (“Commission Order”), ¶¶ 6-8 [Ex. 1].

4. The Commission has a mandatory, nondiscretionary duty to allow the Attorney General to participate in the Rulemaking on two grounds.

5. First, the Attorney General has statutory authority to represent the State before “regulatory officers, agencies and bodies” “when in his judgment the public interest of the state requires such action” NMSA 1978, § 8-5-2(J); *see also id.* § 8-5-2(B).

6. As such, the Attorney General has clear authority under Section 8-5-2 to participate in a Rulemaking before the Commission if he determines – which he has – that the public interest requires such participation.

7. Accordingly, the Commission has a clear and mandatory duty to allow him to participate in the Rulemaking.

8. Second, the WQA mandates that the Commission “*shall* allow all

¹ All pleadings and orders from the Rulemaking may be found at <http://www.nmenv.state.nm.us/wqcc/Matters/13-08R/index.html>.

interested persons” to participate in a rulemaking under the WQA. *Id.* § 74-6-6(D) (emphasis added).

9. “Persons” under the WQA include “the state or a political subdivision of the state.” *Id.* § 74-6-2(I).

10. Accordingly, the Commission has a mandatory, nondiscretionary duty to allow the Attorney General, representing the State, to participate in the Rulemaking.

11. The Attorney General respectfully requests the Court to issue a writ of mandamus ordering the Commission to allow the Attorney General to appear as a party in the Rulemaking.

12. The public hearing on the proposed amendments to the Dairy Rule is scheduled to begin in approximately one week, on *Tuesday, December 9, 2014* at 9:00 a.m. in Roswell, New Mexico.²

13. The Attorney General therefore requests expedited consideration of this Petition in light of the impending hearing date.

14. Alternatively, the Attorney General requests the Court to stay the Rulemaking pending decision on this Petition.

² http://www.nmenv.state.nm.us/wqcc/Matters/13-8R/Item008_NewspaperPublications-NMRegister.pdf.

Jurisdiction

15. This Court has jurisdiction over this Petition pursuant to Article VI, Section 3 of the New Mexico Constitution. *State ex rel. Sandel v. N.M. Pub. Util. Comm'n*, 1999-NMSC-019, ¶ 10, 127 N.M. 272, 276.

Procedural Background

16. The original Dairy Rule promulgated by the Commission became effective in 2011. *See* 20.6.6.1 NMAC [history note].

17. The purpose of the Dairy Rule is to prevent ground water from becoming contaminated from dairy operations. NMSA 1978, § 74-6-4(E), -(K).

18. In New Mexico, ground water is a scarce and valuable resource. Ground water, in our State, is not owned by individuals but belongs to the public. NMSA 1978, § 72-12-1.

19. On August 5, 2013, DIGCE filed a second petition to amend the Dairy Rule.³

20. The Commission scheduled a public hearing on the second petition for December 9, 2014.⁴

21. On October 3, 2014, the Hearing Officer appointed by the

³ <http://www.nmenv.state.nm.us/wqcc/Matters/13-08R/Item001-SecondPetitiontoAmendDairyRule.pdf>.

⁴ http://www.nmenv.state.nm.us/wqcc/Matters/13-08R/Item008_NewspaperPublications-NMRegister.pdf.

Commission issued a Procedural Order establishing *inter alia* a schedule for the Rulemaking.⁵

22. Pursuant to the Procedural Order, parties were required to enter their appearances by October 17, 2014. *See* Procedural Order, § 302(A).

23. On October 17, 2014, the Attorney General entered his appearance as a party in the Rulemaking.⁶

24. The Attorney General entered his appearance because he was concerned that the proposed amendments to the Dairy Rule weaken protections for ground water quality, and will lead to increased contamination of the public's ground water resource.

25. That same day, the New Mexico Environment Department ("NMED") filed written direct testimony in general support of the proposed amendments.⁷

26. On October 27, 2014, NMED filed a Motion to Strike Entry of Appearance of the Attorney General ("NMED Motion to Strike").⁸

⁵ http://www.nmenv.state.nm.us/wqcc/Matters/13-08R/Item009_ProceduralOrder.pdf.

⁶ http://www.nmenv.state.nm.us/wqcc/Matters/13-08R/Entry_of_app_Tannis_Fox.pdf.

⁷ [http://www.nmenv.state.nm.us/wqcc/Matters/13-08R/WQCC_12-09\(R\)___13-08\(R\)001_NMED's_Notice_of_Intent_to_Present_Technical_Testimony.pdf_v0_0_1.pdf](http://www.nmenv.state.nm.us/wqcc/Matters/13-08R/WQCC_12-09(R)___13-08(R)001_NMED's_Notice_of_Intent_to_Present_Technical_Testimony.pdf_v0_0_1.pdf).

27. NMED claimed that the Attorney General was not authorized to participate in the Rulemaking because NMED had “primary jurisdiction” over environmental matters and, therefore, is the *only* state entity authorized to participate in a rulemaking before the Commission under the WQA. NMED Mot. to Strike, pp. 4-6.

28. On November 5, 2014, the Attorney General filed a timely objection to NMED’s Motion to Strike, asserting his authority under Section 8-5-2(B) and (J) to participate in the Rulemaking and his right to do so under the WQA. *See* NMSA 1978, §§ 74-6-2(I), -6(C), -6(D), -9(G).⁹

29. On November 17, 2014, NMED filed a reply in support of its motion.¹⁰

30. On November 18, 2014, the Commission voted during a regular meeting to delegate decision on NMED’s Motion to Strike to its appointed Hearing Officer. Comm’n Order, p. 1.

⁸ <http://www.nmenv.state.nm.us/wqcc/Matters/13-08R/documents/WQCCMotiontoStrikeAG.pdf>.

⁹ <http://www.nmenv.state.nm.us/wqcc/Matters/13-08R/documents/AttorneyGeneralsResponsetoNMEDsMotiontoStrikeEntryofAppearanceofAttorneyGeneral.pdf>.

¹⁰ <http://www.nmenv.state.nm.us/wqcc/Matters/13-08R/documents/ReplyinSupportofNewMexicoEnvironmentDepartmentsMotiontoStrikeEntryofAppearance.pdf>.

31. On November 26, 2014, the Hearing Officer, who serves primarily as an NMED Hearing Officer, granted NMED's Motion to Strike. *See* Comm'n Order, ¶¶ 6-8.

32. The Hearing Officer, in his three paragraph analysis, framed the question presented as, "whether the Attorney General may 'insert[] himself to be heard on behalf of the State in matters where the legislature has designated another agency to be heard on behalf of the State.'" Comm'n Order, ¶ 6.¹¹

33. The Hearing Officer determined that the Attorney General may only "bring an action of behalf of the State if no other provision has been made for it to be brought, or to step into litigation brought by another where the interests of the State are not being adequately represented or protected," quoting *State ex rel. Attorney Gen. v. Reese*, 1967-NMSC-172, ¶ 14, 78 N.M. 241, 245. Comm'n Order, ¶ 7.

34. Finding that the Attorney General "provided no evidence or argument that the interests of the State are not being *adequately represented or protected* by NMED, which is the department specifically designated to represent the State's interests in environmental matters," the Hearing Officer struck the Attorney General's Entry of Appearance. *Id.* ¶ 8 (emphasis in original).

¹¹ The Hearing Officer did not cite to the reference quoted, and a Westlaw search did not identify a case from which the quoted reference comes.

Mandamus

35. The Supreme Court exercises original jurisdiction in mandamus in instances where a petitioner seeks to restrain one branch of government from unduly encroaching or interfering with the authority of another branch in violation of Article III, Section 1 of the state constitution. *State ex rel. Sandel*, 1999-NMSC-019, ¶ 11, 127 N.M. at 276; *State ex rel. Taylor v. Johnson*, 1998-NMSC-015, ¶ 17, 125 N.M. 343.

36. Exercise of jurisdiction is appropriate when the petitioner presents a purely legal issue concerning the nondiscretionary duty of a government official that (1) implicates constitutional questions of public importance, (2) can be answered on the basis of virtually undisputed facts, and (3) calls for an expeditious resolution that cannot be obtained through other channels such as a direct appeal. *State ex rel. Sandel*, 1999-NMSC-019, ¶ 11, 127 N.M. at 276; *State ex rel. Clark v. Johnson*, 1995-NMSC-048, ¶ 19, 120 N.M. 562, 570.

37. Mandamus from the Supreme Court is appropriate to direct state officers who violate a nondiscretionary duty. *State ex rel. King v. Lyons*, 2011-NMSC-004, ¶ 28, 149 N.M. 330, 338.

Merits

The Attorney General Has Clear Statutory Authority to Participate in the Rulemaking, and the Commission Has a Mandatory, Nondiscretionary Duty to Allow the Attorney General to Participate

38. The Attorney General has authority under statute:

to appear before local, state and federal courts and *regulatory officers, agencies and bodies*, to represent and to be heard on behalf of the state *when, in his judgment, the public interest of the state requires such action*

NMSA 1978, § 8-5-2(J) (emphasis added); *see also id.* § 8-5-2(B) (Attorney General has authority to “prosecute and defend in any other court or *tribunal all actions and proceedings*, civil or criminal, in which the state may be a party or interested *when, in his judgment, the interest of the state requires such action*”) (emphasis added).

39. This Court has held that, “[t]he language of [Section 8-5-2(B) and (J)] grants the attorney general discretion when the public interest requires him to bring a civil action on behalf of the state.” *State ex rel. Bingaman v. Valley Sav. & Loan, Ass’n*, 1981-NMSC-108, ¶ 6, 97 N.M. 8, 10.

40. This holding applies with equal force to the Attorney General’s authority to participate in administrative proceedings, “when, in his judgment, the state is in need of protection.” *Id.*

41. In entering his appearance as a party in the Rulemaking, the Attorney General exercised his judgment under Section 8-5-2, and determined that

protection of the State's ground water resources requires his entry as a party in the Rulemaking.

42. The Hearing Officer concluded that "the legislature has designated [NMED] to be heard on behalf of the State" in rulemakings before the Commission under the WQA. Comm'n Order, ¶ 6. In support of this conclusion, the Hearing Officer cited to NMSA 1978, §§ 9-7A-1 to -15. *Id.*

43. Sections 9-7A-1 to -15, the Department of Environment Act, however, do not designate NMED to be heard on behalf of the State of New Mexico in rulemakings under the WQA.

44. The Department of Environment Act establishes the department, and gives the Secretary general authorities. NMSA 1978, §§ 9-7A-4, -6.

45. The Department of Environment Act does not grant NMED authority with respect to protection of ground water let alone designate NMED as the sole and exclusive state actor authorized to participate in a rulemaking under the WQA. *See* NMSA 1978, §§ 9-7A-1 to -15

46. While the WQA grants NMED authority to participate in rulemakings, it expressly provides that NMED holds no special status viz a viz any other party in such rulemakings. Under the WQA, the "constituent agencies" of the Commission, which includes NMED,¹² are authorized:

¹² The other constituent agencies of the Commission are:

on the same basis as any other person, [to] present data, views or arguments and examine witnesses and otherwise participate at all hearings conducted by the commission or any other administrative agency with responsibility in the areas of environmental management, public health or consumer protection, but shall not be given any special status over any other party.

NMSA 1978, § 74-6-9(G) (emphasis added); *see also id.* § 74-6-9(F) (constituent agencies of Commission may “*on the same basis as any other person, recommend and propose regulations for promulgation by the commission . . .*”) (emphasis added).

47. Under the WQA, NMED has no special status let alone exclusive statutory authority or responsibility on behalf of the State with respect to participation in rulemakings. NMED stands in the same position as any other “person” in a rulemaking.¹³

-
- (1) the State Engineer and the Interstate Stream Commission,
 - (2) the Department of Game and Fish,
 - (3) the Oil Conservation Commission,
 - (4) the State Parks Division of the Energy, Minerals and Natural Resources Department,
 - (5) the New Mexico Department of Agriculture,
 - (6) the Soil and Water Conservation Commission, and
 - (7) the Bureau of Geology and Mineral resources at the New Mexico Institute of Mining and Technology.

NMSA 1978, § 74-6-2(K).

¹³ With respect to *initial* promulgation of the Dairy Rule, NMED was charged with forming a stakeholder group and filing the petition for rulemaking with the Commission. NMSA 1978, § 74-6-4(K). This responsibility was not to the

48. The Attorney General is a “person” under the WQA, NMSA 1978, § 74-6-2(I), and is entitled like any other “person” to participate in the Rulemaking.

49. Furthermore, all of the Commission’s seven other constituent agencies may participate in rulemakings under the WQA. The other seven constituent agencies are state actors. NMED is not the only state entity authorized to participate in rulemakings under the WQA. Moreover, each of those agencies also has general statutory duties and responsibilities with respect to the environment. NMED is not “specifically designated to represent the State’s interests with respect to environmental matters,” as claimed by the Hearing Officer, Comm’n Order, ¶ 8, and is certainly not designated as the only state agency that may appear in rulemakings under the WQA.

50. Indeed, the Attorney General’s interests, representing the State and the public under Section 8-5-2, are broader and more comprehensive than NMED’s environmental interests under statute. The Commission cannot claim the interests of the Attorney General, as representative of the general public interest, and NMED are the same or coterminous.

51. Finally, it should be noted that NMED is not obligated to participate in any rulemaking under the WQA. The Hearing Officer cannot contend, based on any statutory provision, that if NMED participates in a rulemaking, the Attorney

exclusion of participation by the Attorney General or any other “person.” NMED has no such statutory role with respect to *amendments* to the Dairy Rue. *See id.*

General – and all other state agencies, for example, the State Land Office – cannot participate, but that if NMED does *not* participate in a rulemaking, the Attorney General *can* participate.

52. The only case law the Hearing Officer cited in support for his decision to exclude the Attorney General from participation in the Rulemaking is the *Reese* decision, cited above. Comm'n Order, ¶ 7.

53. That case has no application to this circumstance. There, a district attorney brought an action in state court seeking reimbursement of salary allegedly illegally paid to the Chair of the State Highway Commission. *Reese*, 1967-NMSC-172, 78 N.M. 241. Although the district attorney had statutory authority to bring the action, the Attorney General attempted not only to intervene in the action, but to oust the district attorney from participating. The Court found that the Attorney General had no statutory authority to supplant the district attorney's authority. *Id.*

54. Here the Attorney General does not seek to oust NMED from participation in the Rulemaking, and the *Reese* case does not support the Hearing Officer's decision.

55. If anything, *Reese* supports the Attorney General's position. NMED seeks to oust the Attorney General from the Rulemaking, but NMED has no authority to supplant the Attorney General's authority.

56. The Hearing Officer cited no New Mexico, other state or federal case

law in which any entity, let alone an attorney general with statutory authority to appear in rulemakings, has been excluded from participating in a rulemaking.

57. As the New Mexico courts have observed in the context of the Attorney General's criminal authority, "[t]he attorney general is the State's highest ranking law enforcement officer, elected by the people of New Mexico. For a court to forbid the attorney general from engaging in a prosecution within the jurisdiction of the office is a serious encroachment on the executive branch." *State v. Armijo*, 1994-NMCA-136, ¶ 48, 118 N.M. 802, 815 (citation omitted).

58. The Commission is an administrative agency with less authority to review the actions of the Attorney General than the courts. The Commission's refusal to allow the Attorney General from engaging in an administrative proceeding within the jurisdiction of his office is a serious encroachment on that statutory authority.

59. The Attorney General has clear and unequivocal statutory authority under Section 8-5-2 to participate in the Rulemaking. The Commission has no statutory authority to strike his participation. The Commission is under a clear and mandatory duty to allow his participation. The Court should issue to a writ of mandamus ordering the Commission to allow the Attorney General's participation.

The Commission Has a Mandatory, Nondiscretionary Duty under the WQA to Allow the Attorney General to Participate

60. The WQA authorizes the Commission to promulgate regulations and water quality standards through rulemaking after a “public hearing.” NMSA 1978, §§ 74-6-4(D), (E), (K); -6(A).

61. The Commission must give notice to the public of the hearing and “the manner in which *interested persons* may present their views.” *Id.* § 74-6-6(C) (emphasis added).

62. Under the WQA:

At the hearing, the *commission shall allow all interested persons* reasonable opportunity to submit data, views or arguments orally or in writing and to examine witnesses testifying at the hearing.

Id. § 74-6-6(D) (emphasis added).

63. Under the WQA, therefore, the Commission “shall” allow all interested persons to participate in its rulemakings. The duty is mandatory. The Commission has no discretion to pick and choose which “person” may participate; it *must* allow any “person” to participate in its rulemakings.

64. The WQA broadly defines “person” as “an individual or any other entity, including partnerships, corporations, associations, responsible or association agents or officers, *the state or a political subdivision of the state* or any agency, department or instrumentality of the United States and any of its officers, agencies or employees” *Id.* § 74-6-2(I) (emphasis added).

65. Rulemakings under the WQA, like rulemakings under virtually all state and federal laws, allow broad participation by individuals, businesses and government agencies.

66. The Attorney General, representing the State of New Mexico pursuant to Section 8-5-2(B) and (J), is a “person” under the WQA.

67. As such, the Attorney General has a right to participate in the Rulemaking, and the Commission is under a mandatory, nondiscretionary duty to allow the Attorney General to participate. NMSA 1978, § 74-6-6(D).

68. The Commission has established guidelines for conducting its rulemakings. *See Guidelines for Water Quality Control Commission Hearings* (1993) (“*Commission Guidelines*”).¹⁴

69. The *Commission Guidelines* encourage the broadest public participation, and allow “all persons” to be heard. *Commission Guidelines*, §§ 102 (A), (B), (C); 401(B). “Person” includes state government entities, however organized. *Id.* § 103(J); *see also id.* §§ 401(B)(2), -(6); 402(C); 403(A) (giving rights to participate to “any person”).

70. Similarly, the Hearing Officer’s Procedural Order governing the Rulemaking authorizes without limitation the right of any person to participate in the proceeding. Procedural Order, §§ 303; 401(B); 402(C); 403(A).

¹⁴ <http://nmenv.state.nm.us/wqcc/WQCC1993Guidelines.pdf>.

71. The Commission is under a clear and mandatory duty under Section 74-6-6(D) of the WQA to allow the Attorney General's participation. The Commission's own *Guidelines* and Procedural Order stand for the same proposition. The Attorney General has a clear and unequivocal right under the WQA to participate in the Rulemaking. The Commission has no statutory authority to strike his participation. The Court should issue to a writ of mandamus ordering the Commission to allow the Attorney General's participation.

The Commission's Denial Justifies the Supreme Court's Exercise of Original Jurisdiction

72. The Commission's denial of party status to the Attorney General encroaches upon the State's chief law enforcement officer's fundamental statutory authority to protect the public interest.

73. The issue raised is of statewide importance and, therefore, is more appropriately heard by the Supreme Court than a district court.

74. The issue raised in this Petition is purely legal, and there are no disputed facts.

There Is No Plain, Speedy and Adequate Remedy at Law

75. Having been excluded from the Rulemaking six working days prior to its beginning, the Attorney General has no plain, speedy and adequate remedy at law. Therefore, mandamus is appropriate.

76. The Attorney General's legal remedy is through appeal to the Court of

Appeals. NMSA 1978, § 76-6-7(A).

77. If the Attorney General were to participate in the Rulemaking, he would be allowed to cross-examine witnesses, introduce exhibits for cross-examination, raise objections, file motions, and file a post-hearing brief.

78. If the Attorney General is not allowed to participate in the Rulemaking, appeal is not a plain remedy because it is not clear how the Attorney General would be able to exercise his rights as a party absent re-doing the public hearing, which would represent a poor use of the parties' and the Commission's resources.

79. Appeal is not a speedy remedy because it can take one to three years, according to the Court of Appeals' statistics¹⁵, and the hearing scheduled to being in one week's time would have already long passed.

80. Appeal is not an adequate remedy because the Attorney General would not have been allowed to participate in the hearing, and any "re-doing" the hearing is not a practical or sound remedy.

81. Indeed, even if the Court of Appeals were to find that the Attorney General should have been allowed to participate, it is not clear the court would order the remedy of re-doing the hearing because of how burdensome re-doing a hearing would be.

¹⁵ <https://coa.nmcourts.gov/statistics/Averagedays%202011-2012.pdf>.

82. Moreover, it is not clear that the Attorney General would have standing to bring an appeal to the Court of Appeals on the merits if he does not have party status in the Rulemaking itself. *See New Energy Economy, Inc. v. Vanzi*, 2012-NMSC-005.

83. Mandamus is the appropriate remedy for the Commission's clear violation of duty.

Relief Requested

84. The Attorney General respectfully requests the Court to:

- a. Issue a writ of mandamus ordering the Commission to allow the Attorney General to participate as a party in the Rulemaking, and to allow the Attorney to exercise all rights accorded to parties in rulemakings under the WQA, the Commission's Guidelines, and the Procedural Order governing the Rulemaking.
- b. Expedite consideration of this Petition and decide this matter on or before Friday, *December 5, 2014* because the public hearing is scheduled to begin on Tuesday, December 9, 2014 at 9:00 a.m. in Roswell, New Mexico.
- c. Alternatively, stay the Rulemaking until the Court decides this matter.
- d. Order any other relief the Court deems just.

Respectfully submitted,

GARY KING
ATTORNEY GENERAL OF NEW MEXICO

TCC FOX

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Assistant Attorney General
Water, Environmental and Utilities Division
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Counsel for Petitioner Attorney General on behalf
of the State of New Mexico

Certificate of Service

I certify that the following were served with the foregoing pleading by hand
delivery on December 1, 2014:

Pamela Castaneda
Administrator
New Mexico Water Quality Control Commission
1190 S. St. Francis Drive, N2153
Santa Fe, New Mexico 87502

Wade Jackson
New Mexico Department of Economic Development
1100 S. St. Francis Drive
Santa Fe, New Mexico 87505

TCC FOX

Tannis L. Fox

ATTEST: A TRUE COPY

Joey D. Maya

Chief Clerk of the Supreme Court
of the State of New Mexico

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IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

December 11, 2014

NO. 35,000

**STATE OF NEW MEXICO, ex rel.,
GARY KING, ATTORNEY GENERAL OF
THE STATE OF NEW MEXICO,**

Petitioner,

v.

**NEW MEXICO WATER QUALITY CONTROL
COMMISSION,**

Respondent.

and

NO. 35,001

RIO GRANDE CHAPTER OF THE SIERRA CLUB,

Petitioner,

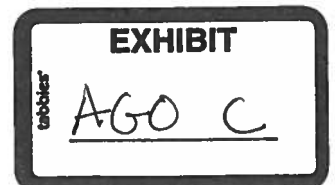
v.

**HON. JENNIFER L. ATTREP,
First Judicial District Court Judge,**

Respondent,

and

**NEW MEXICO WATER QUALITY CONTROL COMMISSION,
DAIRY INDUSTRY FOR A CLEAN ENVIRONMENT,**



ATTEST: A TRUE COPY

Joey D. Maes

Chief Clerk of the Supreme Court
of the State of New Mexico

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and NEW MEXICO ENVIRONMENT DEPARTMENT,

Real Parties in Interest.

ORDER

WHEREAS, this matter came on for consideration by the Court upon the Court's own motion to consolidate the above-entitled proceedings for oral argument on December 15, 2014, and the Court being sufficiently advised, Chief Justice Barbara J. Vigil, Justice Petra Jimenez Maes, Justice Edward L. Chávez, Justice Charles W. Daniels, and Chief Judge Roderick Kennedy, sitting by designation, concurring;

NOW, THEREFORE, IT IS ORDERED that the above-entitled proceedings are CONSOLIDATED for purposes of oral argument on December 15, 2014, at 9:00 a.m.;

IT IS FURTHER ORDERED that the time allotted for the consolidated oral argument shall be limited to a total of sixty (60) minutes;

IT IS FURTHER ORDERED that petitioners shall be collectively allocated thirty (30) minutes for oral argument to be divided between opening and rebuttal in their discretion;

IT IS FURTHER ORDERED that the issues raised by petitioner in cause numbered 35,000 shall be argued first followed by the issues raised by petitioner

ATTEST: A TRUE COPY

Joey D. Moya
Chief Clerk of the Supreme Court
of the State of New Mexico

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in cause numbered 35,001, with the time allocated to each petitioner's opening argument to be divided evenly unless a different division of time is agreed to by counsel for petitioners;

IT IS FURTHER ORDERED that respondent in cause numbered 35,000 and the real parties in interest in cause numbered 35,001 shall be collectively allocated thirty (30) minutes for oral argument, with the time to be divided equally between the New Mexico Water Quality Control Commission, New Mexico Environment Department, and Dairy Industry for a Clean Environment unless a different division of time is agreed to by counsel for the parties; and

IT IS FURTHER ORDERED that this consolidated oral argument shall be the second one argued on the 9:00 a.m. docket call for December 15, 2014.

IT IS SO ORDERED.

WITNESS, Honorable Barbara J. Vigil, Chief Justice
of the Supreme Court of the State of New Mexico, and
the seal of said Court this 11th day of December, 2014.

(SEAL)



Joey D. Moya, Chief Clerk of the Supreme Court
of the State of New Mexico