

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 RESPONSE TO NMED'S MOTION TO EXCLUDE
WILLIAM C. OLSON AND STRIKE/LIMIT HIS TESTIMONY**

Preliminary Statement

The New Mexico Environment Department ("NMED") moves to exclude William C. Olson from testifying as an expert in this rulemaking. NMED claims that Mr. Olson's participation violates the Governmental Conduct Act ("GCA") and that he should be excluded as a sanction for the violation. The Commission, however, does not have authority to enforce the GCA or to impose sanctions for its violation. That authority lies with the Secretary of State, Attorney General, and district attorneys. *See* NMSA 1978, § 10-16-18.

NMED specifically claims that Mr. Olson's participation violates Section 10-16-8(B) of the GCA because he represents a person on a "matter" in which he participated personally and substantially while employed by NMED, that is, the original Dairy Rule proceeding, WQCC No. 09-13 (R). However, NMED's original 2009 petition to promulgate the Dairy Rule is the not same "matter" as the Dairy Industry Group for a Clean Environment's ("DIGCE") 2012 and 2013 petitions to amend the Dairy Rule, WQCC Nos. 12-09 (R) and 13-08 (R), now before the Commission.

NMED claims further that Mr. Olson used confidential information in his testimony in violation of Section 10-16-6 of the GCA. NMED Mot. to Exclude, pp. 3-4. NMED, however, does not identify any specific confidential information disclosed by Mr. Olson.

Finally, NMED claims that Mr. Olson's testimony will "mislead" and "confuse" the Commission into believing that "Mr. Olson maintains some authority when it comes to implementing [NMED] policy and enforcement, when in reality he does not." NMED Mot. to Exclude, p. 6. This is a far-fetched contention. The Commission will understand that Mr. Olson is not employed by NMED and does not speak for NMED.

This is the third time that NMED has moved to exclude Mr. Olson as an expert in a legal proceeding when he has taken a position NMED management does not like. NMED's baseless assertions that he violates the GCA "have no substantial purpose other than to embarrass, delay or burden" him. *See* Rule 16-404(A) NMRA. The Commission should admonish NMED in its tactics.

NMED's frivolous Motion to Exclude Mr. Olson from testifying in this proceeding should be summarily denied.

Background

I. MR. OLSON'S BACKGROUND

Mr. Olson has a Bachelor of Science in Geology and a Master of Science in Hydrology from the New Mexico Institute of Mining and Technology. He worked for the State of New Mexico protecting ground water for 25 years. He was employed by the Oil Conservation Division of New Mexico Energy, Minerals and Natural Resources Department for 14 years working on abatement and reclamation under the New Mexico Water Quality Act ("WQA") and Commission Regulations, 20.6.2 NMAC. He retired from NMED as Chief of the Ground Water Quality Bureau where he administered and enforced all aspects of the WQA, including permitting, compliance, abatement, and rulemaking. Mr. Olson sat as a member of the Commission for 13 years and as a member of the Oil Conservation Commission for 5 years.

Olson Resume [Coalition Ex WCO-2]. Mr. Olson is one of the foremost authorities in New Mexico on interpretation, administration and enforcement of the WQA and Commission Regulations. He retired from the State of New Mexico with an impeccable reputation.

II. NMED'S BASELESS ACCUSATIONS AGAINST MR. OLSON DURING THE COPPER MINE RULE PROCEEDING

After Mr. Olson retired from NMED in 2011, NMED contracted with him to assist with facilitating stakeholder meetings and developing the Copper Mine Rule. Olson Test., pp. 1-2 [Coalition Ex. WCO-1]. In the fall of 2012, NMED informed Mr. Olson that his services on the Copper Mine Rule were no longer needed, and their contract terminated amicably December 1, 2012. Olson Resp. to NMED Not. of Objection, ¶ 2 [Ex. C].

On February 22, 2013, Mr. Olson filed a Notice of Intent to Present Technical Testimony ("NOI") in the Copper Mine Rule proceeding objecting to certain provisions in NMED's proposed rule. Olson NOI [<http://www.nmenv.state.nm.us/wqcc/documents/WCO-NOI.pdf>].

On February 25, 2013, then-NMED General Counsel, now-Secretary Ryan Flynn telephoned Mr. Olson, and accused him of violating the confidentiality provision in his contract with NMED. Mar. 1, 2013 ltr. to D. Martin, NMED, from W. Olson, pp. 1-2 [Ex. A]. Mr. Flynn said he would send a letter to Mr. Olson seeking reimbursement of monies paid to Mr. Olson under contract. *Id.* Mr. Olson responded that he had not disclosed confidential information in the NOI, and Mr. Flynn did not inform Mr. Olson of any specific confidential information disclosed. *Id.* at 2. Mr. Flynn reminded Mr. Olson that he had previously advised Mr. Olson that he should remain "neutral" in the Copper Mine Rule matter. *Id.* Mr. Olson was disturbed by what he perceived as Mr. Flynn's attempt to influence his testimony in a legal proceeding by threat of seeking funds earned under contract. *Id.*

Mr. Flynn never sent his letter or pursued any contract claim. Instead, Mr. Flynn's lawyers at NMED filed a pleading with the Commission styled "Notice of Objection to William C. Olson's Notice of Intent to Present Technical Testimony." [Ex. B]. In its Notice of Objection, NMED claimed that, by filing the NOI, Mr. Olson violated his contract with NMED. NMED Not. of Objection, p. 1. NMED did not cite a specific provision of the contract violated. *Id.* NMED claimed that Mr. Olson had gained access to confidential information, although again NMED did not cite any specific confidential information disclosed in his NOI. *Id.*; *see also* NMED Resp. to Mots. to Strike, p. 2 [Ex. D].

Mr. Flynn's and NMED's unsubstantiated claim in the Copper Mine Rule Proceeding that Mr. Olson misused confidential information is the same tactic now used in NMED's present Motion to Exclude.

The Commission's experienced Hearing Officer struck NMED's Notice of Objection because there was no basis for its assertions of a contract violation or disclosure of confidential information. Order on Several Motions and Procedural Matters, ¶ 4 [Ex. E].

III. NMED'S BASELESS ACCUSATIONS AGAINST MR. OLSON DURING THE HORSE SLAUGHTER PERMIT PROCEEDING

NMED's next groundless attack on Mr. Olson was in a 2013 NMED hearing on an application for a discharge permit to conduct horse slaughter operations. *See In the Matter of the Application of Valley Meat Company, LLC for Renewal of a Ground Water Discharge Permit DP-236*, No. GWB 13-05(P). Mr. Olson proposed to testify against the permit recommended by NMED. NMED moved to strike Mr. Olson's testimony on that ground that he had been personally and substantially involved in issuing a 2010 notice of violation to the applicant for his cattle slaughter operations. NMED Mot. to Strike/Limit Test. of William Olson, p. 3 [Ex. F].

NMED claimed the 2010 notice of violation under for cattle slaughter operations was the same “matter” as the 2013 discharge permit application for horse slaughter operations, and Mr. Olson’s involvement in the same matter violated Section 10-16-8(B) of the GCA. *Id.*

NMED’s claim in the horse slaughter case -- that Mr. Olson violated the GCA based on his involvement with a prior, separate enforcement matter -- is the same tactic now used in NMED’s present Motion to Exclude.

NMED’s experienced Hearing Officer found there were “some real challenges to the Department’s interpretation in that language of the statute, particularly as to what it means to represent someone and what the words ‘this matter’ means.” 10-22-13 Tr. 17:22-25 [Ex G]. She concluded that “the language of 10-16-8(B) does not form a basis to exclude Mr. Olson,” and denied NMED’s motion. *Id.* 20:23-24; Hearing Officer’s Report, ¶¶45-46 [Ex. I].

IV. NMED’S CONTINUATION OF UNFOUNDED ACCUSATIONS

In its third pass, in its current Motion to Exclude, NMED again claims Mr. Olson used confidential information in his NOI in violation of the GCA, and again fails to identify any confidential information disclosed. In its current Motion to Exclude, NMED again claims that Mr. Olson violates Section 10-16-8(B) of the GCA by participating in the same “matter,” and again argues that two matters are the same when they plainly are not.

Argument

I. THE COMMISSION DOES NOT HAVE AUTHORITY TO ENFORCE THE GOVERNMENTAL CONDUCT ACT

NMED accuses Mr. Olson of violating the Governmental Conduct Act and seeks sanctions for the violation by excluding his testimony from this rulemaking. Through its Motion to Exclude, NMED requests the Commission to – in effect -- administer and enforce the GCA.

The GCA has its own enforcement provisions. Under Section 10-16-18, allegations of violations of the GCA may be filed with the Secretary of State. If the Secretary of State reasonably believes a violation will occur or has occurred, she must refer the matter to the Attorney General or a district attorney for enforcement. NMSA 1978, § 10-16-18(A). The Attorney General or district attorney may file civil suit, and relief may include a permanent or temporary injunction, a restraining order or any other appropriate order, and a civil penalty of \$250 for each violation up to \$5,000. *Id.* § 10-16-18(B).

Administrative bodies like the Commission are creatures of statute and can act only on those matters which are within the scope of authority delegated to them. *Matter of Proposed Revocation of Purveyors of Food and Drink for Permit of House of Pancakes*, 1984-NMCA-109, ¶ 13, 102 N.M. 63, 66. The Commission has no authority under the GCA to administer or enforce the act. NMED's request to exclude Mr. Olson's testimony would require the Commission to interpret, administer and enforce through sanctions the Governmental Conduct Act. The Commission has no authority to impose sanctions for violation of the GCA, and should deny NMED's Motion to Exclude on this basis alone.

If NMED genuinely is of the opinion that Mr. Olson's testimony violates the GCA, NMED's remedy is to file a complaint with the Secretary of State. If the Secretary of State reasonably believes there is a violation, she must refer the matter to the Attorney General or district attorney for enforcement. NMED may not circumvent the enforcement mechanism under the GCA by complaining to the Commission.

II. THE RULEMAKING ON THE ORIGINAL DAIRY RULE IS NOT THE SAME MATTER AS THIS RULEMAKING TO AMEND THE DAIRY RULE

The GCA prohibits a former public employee from "represent[ing] a person in the person's dealings with the government on a matter in which the former public officer or

employee participated personally and substantially while a public officer or employee.” NMSA 1978, § 10-16-8(B). NMED claims NMED’s 2009 petition to promulgate the Dairy Rule is the same “matter” as DICGE’s 2012 and 2103 petitions to amend the Dairy Rule and, therefore, because Mr. Olson personally and substantially participated on behalf of NMED in the original rulemaking, he cannot participate in amending the Dairy Rule.

The GCA does not define “matter.” “Matter” therefore should be interpreted using its plain meaning. *State v. Boise*, 2013-NMSC-024, ¶ 9. “Matter” referred to in “law” means “something which is to be tried or proved in court; a case.” *Concise Oxford English Dictionary* (2008, 11th ed.). On their face, the original Dairy Rule proceeding, docketed as WQCC No. 09-13 (R), and this proceeding, docketed as WQCC Nos. 12-09 (R) and 13-09 (R), are separate docketed matters, separate “cases.” The 2009 petition in the original Dairy Rule proceeding was filed by NMED and proposed to promulgate an entirely new rule. The final rule was comprehensive in scope, and became effective January 31, 2011. The 2012 and 2013 petitions now before the Commission were filed by DIGCE and propose to amend certain, limited sections of the Dairy Rule. These matters – filed years apart -- are separate. There is no violation of the GCA.

III. MR. OLSON DID NOT DISCLOSE CONFIDENTIAL INFORMATION

NMED claims that Mr. Olson uses confidential information in violation of the GCA “as the basis of his testimony on behalf of the Coalition in the present proceeding.” NMED Mot. to Exclude, p. 3. NMED, again, fails to identify any specific confidential information disclosed by Mr. Olson in his testimony, which relies in large measure on public information. NMED cannot expect to be taken seriously in this claim without identifying confidential information improperly used.

IV. MR. OLSON'S TESTIMONY WILL NOT CONFUSE THE COMMISSION

NMED's next baseless (and rambling) objection is that Mr. Olson's testimony will "mislead" and "confuse" the Commission because the Commission will be fooled into thinking that Mr. Olson speaks for NMED, not for the Coalition. NMED Mot. to Exclude, pp. 4-6. It is difficult to conceive of a more preposterous proposition. The Commission will be able to keep straight that Mr. Olson is no longer employed by NMED, does not speak on behalf of NMED, and serves as an expert for the Coalition.

V. THE COMMISSION SHOULD ADMONISH NMED

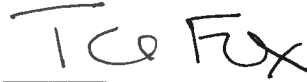
NMED's Motion to Exclude has no "good ground to support it." *See* Rule 1-011(A) NMRA. NMED is on notice that its instant Motion to Exclude the testimony of Mr. Olson has no basis in law or fact, based on rulings on its previous motions to exclude him in the Copper Mine Rule proceeding and the horse slaughter permit proceeding. NMED's continued unsubstantiated assertions that he misuses confidential information, violates his contract, violates the GCA "have no substantial purpose other than to embarrass, delay or burden" him. Rule 16-404(A) NMRA. NMED's tactics are simply base retaliation against a professional with impeccable credentials, unparalleled expertise, and unquestioned integrity for taking positions contrary to NMED management. While the Commission does not have authority to sanction NMED for filing a frivolous motion, the Commission can and should admonish NMED for wasting the resources of the Commission, the Coalition, the Attorney General, and NMED by filing its frivolous and harassing motion.

Conclusion

For the reasons set forth herein, the Attorney General respectfully requests the Commission to deny NMED's Motion to Exclude the testimony of William C. Olson.

Respectfully submitted,

GARY KING
NEW MEXICO ATTORNEY GENERAL



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Certified Mail - Return Receipt Requested

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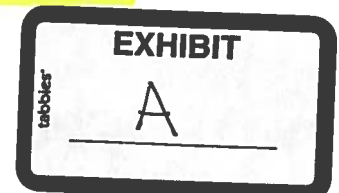
RE: Copper Mine Rule - William C. Olson Testimony

Dear Secretary Martin:

During 2012, I worked under a professional services contract to assist the New Mexico Environment Department (NMED) in the development of a Copper Mine Rule that would achieve the goals of the New Mexico Water Quality Act (WQA) for prevention of pollution of New Mexico ground water and surface water resources. In the fall of 2012, NMED informed me that my services would not be required for attending and providing expert witness testimony at the New Mexico Water Quality Control Commission (WQCC) rule-making hearings pursuant to the contract. At that point, I had completed all other scope of work tasks and my contract was terminated effective December 1, 2012. NMED Resource Protection Division Director James H. Davis thanked me for my work in his November 5, 2012 correspondence to me on the termination of the contract. I also received positive input on my services from you, NMED staff and the various stakeholder members on my role in the rule development activities.

I have found it rewarding to work with you and NMED and therefore find it regrettable that I need to inform you of an incident that occurred this week regarding a New Mexico Environment Department employee under your supervision. As you may be aware, on February 22, 2013, I filed a Notice of Intent (NOI) to Present Technical Testimony in The Matter of Proposed Amendments to 20.6.2 NMAC, The Copper Mine Rule, WQCC 12-01(R). I am presenting independent testimony solely on my own behalf as a public citizen, and not for any other party. In my testimony, I present factual documentary evidence and expert opinion on the application of the WQA and WQCC rules in the prevention of ground water pollution in New Mexico. I also offer some proposed amendments to improve the rule and provide consistency with statutory and regulatory requirements. My purpose is to provide objective facts and information to the WQCC to assist in their consideration of adoption of a Copper Mine Rule.

After the filing of my Notice of Intent to Provide Technical Testimony with the WQCC, on February 25, 2013, NMED General Counsel Ryan Flynn called me and told me that he would be sending me a letter in a day or two seeking reimbursement for monies I was paid under my prior contract with NMED. Mr. Flynn told me that I had violated the confidentiality clause of



F. David Martin
March 1, 2013
Page 2 of 2

the contract. I explained to him that I neither relied upon nor disclosed confidential information in my prepared testimony. I also told him that I had not violated the confidentiality clause, and had no intention of doing so in the future. Mr. Flynn did not indicate to me what confidential information he believed that I have disclosed. Mr. Flynn also informed me that he had told me before that I should remain "neutral" in this matter.

Mr. Flynn's phone call to me is very disturbing. It appears that he is attempting to influence my testimony for a public hearing of the WQCC by threatening to seek recovery of payments under my prior contract. It is my understanding that such an action would have to be in the form of litigation on behalf of the State of New Mexico as approved by New Mexico Attorney General. I have been advised that Mr. Flynn's actions could be considered intimidation of a witness under §30-24-3(A)(2), which is a very serious criminal matter. I have also been advised that it appears he may be attempting to prevent my right to free speech, which would be a violation of my civil rights actionable under 42 USC §1983.

As a member of the public, I have a right to file a Notice of Intent to Provide Technical Testimony at the WQCC public hearing on the Copper Mine Rule, and provide facts and expert and personal opinion. I also have a right to testify at the WQCC hearing, subject to rulings of admissibility.

Again, I regret having to inform you of this, however, the seriousness of the issue warranted that I bring it to your attention. If you wish to discuss this with me personally, I welcome you to contact me.

Sincerely,



William C. Olson

cc: Ryan Flynn, General Counsel
Anthony J. Forte, NM Risk Management Division Director
Albert Lama, NM Chief Deputy Attorney General

STATE OF NEW MEXICO
WATER QUALITY CONTROL COMMISSION



IN THE MATTER OF PROPOSED AMENDMENTS
TO 20.6.2 NMAC, THE COPPER RULE

WQCC 12-01 (R)

New Mexico Environment Department,
Petitioner.

NEW MEXICO ENVIRONMENT DEPARTMENT'S
NOTICE OF OBJECTION
TO WILLIAM C. OLSON'S
NOTICE OF INTENT TO PRESENT TECHNICAL TESTIMONY

The New Mexico Environment Department ("NMED" or "Department") hereby submits this Notice of Objection to William C. Olson's Notice of Intent to Present Technical Testimony at the public hearing set to begin April 9, 2013. The basis for the Department's objection is Mr. Olson's violation of his professional services contract with the Department.

Mr. Olson was retained by the Department for the express purpose of developing rules applicable to all copper mine facilities, including to "[a]ssist NMED in preparing for public hearing to be held in front of the WQCC." By virtue of his status as an expert consultant assisting the Department in the development of proposed copper rules, Mr. Olson gained access to confidential information, including information protected by the attorney-client privilege and work product doctrine. Notwithstanding the duties and obligations of his professional services contract with the Department, Mr. Olson filed a Notice of Intent to Present Technical Testimony ("NOI") on February 22, 2013, as a member of the public.

While the Department does not seek to strike Mr. Olson's NOI or otherwise prevent Mr. Olson from fully participating in the upcoming hearing, the Department wishes to be on record as objecting to his violation of the professional services contract. Furthermore, the Department



does not waive its right to object to or move to strike specific testimony or exhibits during the hearing, and reserves all other rights of recourse outside of these administrative proceedings.

Respectfully submitted,

NEW MEXICO ENVIRONMENT DEPARTMENT



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served by email on the following on this 17th day of March, 2013:

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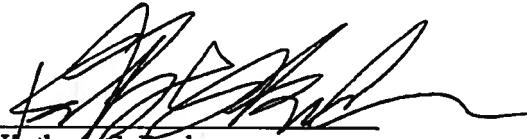
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**STATE OF NEW MEXICO
WATER QUALITY CONTROL COMMISSION**

**IN THE MATTER OF PROPOSED
AMENDMENTS TO 20.6.2 NMAC,
THE COPPER MINE RULE,**

**New Mexico Environment Department,
Petitioner.**

No. WQCC 12-01(R)



**WILLIAM C. OLSON
RESPONSE
TO
NEW MEXICO ENVIRONMENT DEPARTMENT
NOTICE OF OBJECTION**

I, William C. Olson hereby submit this response to the New Mexico Environment Department (Department) Notice of Objection to William C. Olson's Notice of Intent to Present Technical Testimony filed with the New Mexico Water Quality Control Commission (Commission) on March 12, 2013. The Department maintains that, by filing a Notice of Intent to Present Technical Testimony as a member of the public, I have violated a professional services contract between myself and the Department. The Department does not provide any factual information in support of its position. For clarity of the hearing record, I would like to provide the Commission with the following information:

1. During 2012, I worked under a professional services contract to assist the Department in the development of a Copper Mine Rule that would achieve the goals of the New Mexico Water Quality Act for prevention of pollution of New Mexico ground water and surface water resources.



2. In the fall of 2012, the Department informed me that my services would not be required for attending and providing expert witness testimony at the Commission rule-making hearings pursuant to the contract. At that point, I had completed all other scope of work tasks and my contract was amicably terminated effective December 1, 2012.

3. The prior professional services contract between the Department and myself contained a provision that stated, "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."

4. The prior professional services contract between the Department and myself does not contain any provision preventing my participation in a public hearing of this Commission.

5. My February 22, 2013 Notice of Intent to Provide Technical testimony was prepared by myself as a public citizen of the State of New Mexico interested in the protection of New Mexico water resources. I do not represent any other party.

6. My testimony was submitted for the purpose of providing information to assist the Commission in its decision making process in the adoption of a Copper Mine Rule.

7. My February 22, 2013 Notice of Intent to Provide Technical Testimony supports the need for adoption of rules for copper mines and contains my independent analysis and expert opinion of the proposed Copper Mine Rule in regards to:

- a. The statutory requirements of the Water Quality Act;
- b. The requirements of various Commission rules;
- c. Historical ground water protection in New Mexico since adoption of the Water Quality Act and Commission rules in 1977;

d. Previous Commission litigation over statutory requirements for protecting ground water at a place of withdrawal of water for present or reasonably foreseeable future use;

e. Inconsistencies between portions of the proposed Copper Mine Rule and the Water Quality Act, other Commission rules, historical ground water protection in New Mexico and prior Commission litigation over the issue of place of withdrawal;

f. Technical feasibility and water rights issues;

g. Potential for harm regarding specific portions of the proposed rule; and

h. Proposed modifications to problematic sections of the rule necessary to make it consistent with the Water Quality Act, other Commission rules, previous Commission litigation and historical precedent.

8. A review of my February 22, 2013 Notice of Intent to Provide Technical Testimony shows that my testimony is based upon my knowledge obtained during 25 years of public service for the State of New Mexico in the implementation of the Water Quality Act and Commission rules and does not rely on or disclose any confidential information.

For the above reasons, the Department's March 12, 2013 Notice of Objection is without merit.

Respectfully submitted,

WILLIAM C. OLSON



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William C. Olson

STATE OF NEW MEXICO
WATER QUALITY CONTROL COMMISSION



IN THE MATTER OF PROPOSED AMENDMENTS
TO 20.6.2 NMAC, THE COPPER MINE RULE

WQCC 12-01 (R)

New Mexico Environment Department,
Petitioner.

NEW MEXICO ENVIRONMENT DEPARTMENT'S
RESPONSE TO MOTIONS TO STRIKE NOTICE OF OBJECTION
TO WILLIAM C. OLSON'S
NOTICE OF INTENT TO PRESENT TECHNICAL TESTIMONY

The New Mexico Environment Department ("NMED" or "Department") hereby submits this Response to both the Attorney General's and Amigos Bravos' Motions to Strike the Department's Notice of Objection to William C. Olson's Intent to Present Technical Testimony. The Department opposes the motions, and requests that they be denied.

The Department intentionally refrained from presenting specific arguments or evidence regarding a breach of contract in the Objection because the Copper Rule proceeding is not the proper forum in which to decide this issue. The purpose of the Department's notice was twofold, to inform the Commission of the Department's perceived violation of a professional services agreement by Mr. Olson, so that the Commission may weigh his testimony in this regard, and to preserve its objections on the record. The notice provided to the Commission of a prior relationship and the conflict it gives rise to is entirely appropriate.

The Attorney General cites no legal authority for the proposition that a pleading such as the Objection is not a proper pleading. See AG's Motion to Strike, ¶ 7 ("A notice stating such dissatisfaction is not a proper pleading"). The Objection is not frivolous as it provides important information to the Commission regarding the prior contractual relationship between Mr. Olson



and the Department. Mr. Olson served as the Department's contractor from June 1 of 2012 through November 30, 2012. Mr. Olson accepted payment from the Department for services rendered under the contract. The Department was surprised by the filing of Mr. Olson's NOI. Mr. Olson's individual interest conflicts with the interests of the Department as presented in the proposed Copper Rule. Further, Mr. Olson participated in preparing the Department's expert witness who was retained in lieu of Mr. Olson.

The fact that Mr. Olson was retained as an expert consultant by the Department, and had access to confidential information while serving in that capacity, is undisputed. On this basis alone, the Objection is proper. The AG's citation to Rule 1-007.1.C in paragraph 8 is inapposite because the Objection is not a motion, and does not seek any form of relief. The AG's citation to the Commission's *Guidelines* in paragraph 9 is likewise inapplicable because the Objection is not evidence, as the AG acknowledges in footnote 1 on page 4 of the Motion to Strike. It is adequate and appropriate that the Department notify the Commission of the perceived conflict of interest of Mr. Olson and preserve its objection for the record. The notification should stand.

Respectfully submitted,

NEW MEXICO ENVIRONMENT DEPARTMENT



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served by email on the following on this 28th day of March, 2013:

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Andrew P. Knight

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



IN THE MATTER OF PROPOSED AMENDMENTS
TO 20.6.2 NMAC, THE COPPER RULE

WQCC 12-01 (R)

New Mexico Environment Department,
Petitioner.

**ORDER ON SEVERAL MOTIONS AND
ADDITIONAL PROCEDURAL MATTERS**

The Hearing Officer and Counsel for all Parties participated in a teleconference on March 29, 2013, conducted for argument on several recently filed motions and the discussion of additional procedural matters shortly prior to hearing. The following paragraphs reflect the decisions made during the teleconference, by order or agreement.

1. The Attorney General's Motion to Strike Brack Exhibit 4--a Video offered by Freeport-McMoRan (FMI), filed March 25, 2013, was withdrawn following consideration of the Response to the Motion from FMI filed March 28, 2013.
2. FMI's Motion to Withdraw Testimony and File Substitute, Condensed Testimony, filed in two parts on March 15 (the Motion) and March 22 (the substitute testimony), is denied for the reasons set out in the Attorney General's Response, the Supplement to that Response and argument from other Counsel during the teleconference. The revisions to the testimony originally filed are not insubstantial; and are filed a month after the deadline set for every Party, precluding an opportunity for rebuttal or sufficient time to prepare cross-examination.




3. The two Motions filed March 25, 2013 by the New Mexico Environment Department (NMED) to Exclude Exhibits of Written Testimony and Transcripts from Prior Permit Appeal Proceedings submitted by both the Attorney General and by William Olson are denied for the reasons set out in the Responses filed by the Attorney General and Mr. Olson. The Attorney General's witness and Mr. Olson are relying on these excerpts of relevant testimony for their own opinions, and will stand for cross-examination during this rulemaking. Although the transcripts offered are excerpts, NMED declined an invitation to compel the addition of related cross-examination to the excerpts.
4. NMED filed a "Notice of Objection to William Olson's Notice of Intent to Present Technical Testimony" on March 12, 2013. The Attorney General's Motion to Strike NMED's Notice of Objection, filed March 15, and Amigos Bravos' Motion to Strike NMED's Notice of Objection, filed March 19, 2013, are granted for the reasons set out in the Motions and argument from Counsel and Mr. Olson during the teleconference. The Commission's Pleading File in a rulemaking is not the appropriate place for the airing of a potential contract dispute. The Hearing Officer will set up an additional time to discuss with Counsel the question of whether the topic may be properly raised during Olson's cross-examination.

5. Order of presentation: As Petitioner, NMED would generally present its witnesses first, but neither of its witnesses are available on April 9. FMI offered to present Mr. Brack on April 9, and if Mr. Brack is not testifying, the Hearing Officer has asked FMI to consider presenting another witness or witnesses. FMI will notify the other Parties and the Hearing Officer as to its plans for April 9 by close of business April 3. FMI will follow the Department and will present three of its witnesses (Eastep, Shelley, Lande) as a panel for cross-examination. The Mining Association will follow FMI. The Attorney General, Amigos Bravos, the Gila Resources Information Project and Turner Ranch Properties, and William Olson will generally present in that order following the Mining Association, except that witness availability, especially for those traveling from out of state, may result in adjustments.
6. The Hearing Officer declined NMED's invitation to impose time limits on cross-examination, but will limit cross-examination that is repetitive or otherwise improper.
7. The Hearing Officer still plans to allow sur-rebuttal within her discretion, on a case-by-case basis, consistent with the original Procedural Order.
8. Amigos Bravos requests leave to present one rebuttal witness by telephone. Although this remains a possibility, if necessary, the Hearing Officer and other Counsel are agreed that a personal

appearance is preferable, even if that personal appearance must be scheduled in advance and might result in an out-of-order presentation.

9. Oral argument on the early filed motions and briefs relating to the Commission's authority and requests to remand or dismiss the Petition will be accepted from each Party on April 9 prior to the beginning of the evidentiary hearing. The order of argument will follow the order of presentation set out above. Each Party will be strictly limited to argument of 10 minutes, followed by an opportunity for Commissioners to ask questions.
10. Opening statements may be made at the beginning of the hearing or at the beginning of a Party's presentation, and may not exceed fifteen minutes.
11. Public comment: The Hearing Officer has scheduled three times to accept non-technical public comment: the evenings of April 10 and 11 in Apodaca Hall of the Old PERA Building in Santa Fe and the late afternoon/early evening of May 3 in the Auditorium of Western New Mexico University in Silver City. Public comment will also be accepted during the day in the weeks of April 16, April 23 and April 30 as necessary and at times intended to minimize the interruptions in the testimony of the technical witnesses (first thing in the morning, late in the day or immediately before or after lunch). The Hearing Officer invites those interested to make contact if they desire a specific time, and will share each day's known plans with the Parties.

12. In the event the hearing pace appears too slow to finish by May 3, the Hearing Officer may lengthen the hearing day or impose time limits on commenters. This would occur only following discussion with the Parties and the Commissioners.
13. The hearing will be webcast from Room 307 of the Capitol; a link will be posted on the Commission's webpage shortly before the hearing begins.



Felicia L. Orth, Hearing Officer

**STATE OF NEW MEXICO
BEFORE THE SECRETARY OF ENVIRONMENT**



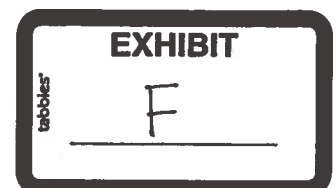
**IN THE MATTER OF THE APPLICATION
OF VALLEY MEAT COMPANY, LLC FOR
RENEWAL OF A GROUND WATER DISCHARGE PERMIT DP-236**

No. GWB 13-05 (P)

**MOTION TO STRIKE/LIMIT TESTIMONY OF
WILLIAM OLSON**

The New Mexico Environment Department, Environmental Improvement Division (“Department”) hereby moves the Hearing Officer to strike in full or limit in part the testimony of William (“Bill”) C. Olson as presented in the Notice of Intent to Present Technical Testimony (“FRER NOI”) filed by “the State of New Mexico, the New Mexico Attorney General’s Office, Front Range Equine Rescue, and six residents of Roswell, New Mexico: Ramona Cardova, Cassie Gross, Tanya Littlewolf, Sandy Schaefer, Krystle Smith and Deborah Trahan” on October 9, 2013. The testimony must be excluded in full because Mr. Olson was previously the Bureau Chief of the Ground Water Quality Division and, as discussed below, actively participated in regulatory and enforcement actions against Valley Meat Company, LLC (“Valley Meat”), formerly known as “Pecos Valley Meat.” In the alternative, the Department moves the Hearing Officer to strike or limit portions of Mr. Olson’s testimony due to lack of knowledge, skill, experience, training, or education as an expert in certain scientific fields and to which he offers his expert and technical opinions and conclusions.

It is unclear from the FRER NOI which party Mr. Olson specifically represents. Mr. Olson states that he is presenting technical testimony on behalf of the various FRER NOI listed



parties. *Written Testimony of William C. Olson*, page 1. The Department is a “state agency” as defined by the Governmental Conduct Act, NMSA 1978, Section 10-16-2 (K) (2013).

I. Argument

- A. The testimony of Mr. Olsen must be excluded because his participation creates a conflict of interest that violates the public trust and compromises the public’s confidence in the NMED to maintain the integrity, and discharge ethically, the high responsibilities of public service.**

As provided in the testimony and resume of Mr. Olson, Exhibit 1 of the FRER NOI, Mr. Olson states that he was employed with the Department from March, 1988 to February, 1990, and then again as Bureau Chief for the Ground Water Quality Bureau (“GWQB”) from October, 2004 to November, 2011. *Olson*, Section I, page 1.¹ As Bureau Chief of the GWQB, Mr. Olson was responsible for supervising and managing staff in the Pollution Prevention Section (“PPS”). PPS develops, issues and enforces ground water discharge permits including those issued to Valley Meat. *See Direct Testimony of Kimberly Kirby, NOI for the New Mexico Department’s Statement of Intent to Present Technical Testimony*, Exhibit 8, dated October 9, 2013. Mr. Olson, as Bureau Chief, was directly responsible for the permitting and “enforcement of discharge permits and abatement of ground water pollution pursuant to the New Mexico Water Quality Act (“WQA”) and WQCC rules.” *Olson*, Section I, page 2.

Issuance, issuance with conditions, or denial of a ground water discharge permit is generally a delegated duty by the Secretary of the Environment to the GWQB Bureau Chief. *See generally* NMSA 1978, §9-7A-1, *et. seq.* The decision to issue, issue with condition, or deny a ground water discharge permit is a discretionary and “official act” pursuant to NMSA 1978, Section 10-16-2 (H). The purpose of the Governmental Conduct Act is to ensure that all public officers, officials, and elected or appointed public employees act in a manner that “justifies the

¹ The testimony of Mr. Olson was not dated, signed under penalty of perjury, or notarized.

confidence placed in them” by the citizens of New Mexico. NMSA 1978, § 10-16-3 B. Only by avoiding either real or perceived conflicts of interest can the citizens of New Mexico continue their confidence in the institution of state governance. Real or potential conflicts of interest shall be fully disclosed and shall be a “guiding principle for determining appropriate conduct.” NMSA 1978, § 10-16-3 C.

Mr. Olson, during his six (6) years as the GWQB Bureau Chief, was substantially involved in the permitting and enforcement actions against facilities, including Valley Meat. On May 7, 2010, the GWQB mailed Valley Meat a Notice of Violation of its Discharge Permit, DP-236. This letter was signed by George Schuman on behalf of William C. Olson, GWQB Bureau Chief. *See* Admin. Record 236C-109.

Using this knowledge and information gained while in the position of GWQB Bureau Chief, Mr. Olson now continues his opposition to issuance and/or renewal of the discharge permit for Valley Meat. Although Mr. Olson has not been employed by the Department for over one (1) year, he is nonetheless engaged in a business and been hired, contracted, or engaged to provide technical testimony against a facility he had direct and immediate regulatory authority over. Such an impropriety and conflict of interest could reasonably be interpreted by the public and the regulated community as a potential violation of the Governmental Conduct Act, ethical standards and due process rights under state and federal laws. As the New Mexico Court of Appeals has noted, “[t]he purpose of ‘revolving door’ legislation is to enhance public trust and confidence in our governmental agencies by prohibiting conduct which may permit or appear to permit undue influence or a conflict of interest.” *Ortiz v. Taxation & Revenue Dep’t, Motor Vehicle Div.*, 1998-NMCA-027, ¶9, 124 N.M. 677, 680, 954 P.2d 109, 112.

Although rules of evidence do not directly control these proceedings, pursuant to 20.1.4.100.A NMAC, New Mexico Rules of Evidence Rule 11-403 NMRA provides additional support and guidance on why the testimony of Mr. Olson must be excluded. Rule 11-403 NMRA generally allows a court or tribunal to exclude relevant evidence *where* the prejudice to the opposing party outweighs its useful purpose. Here, there is clear indication that Mr. Olson's testimony, which reflects his continued opposition to operations at Valley Meat, is or could be viewed as tainted by his prior role at the Department. Such vehement opposition both then, and now, indicates a gross conflict of interest and is clearly within the realm of prejudice.

The Department respectfully requests that the Hearing Officer find that the testimony of Mr. Olson is objectionable, as Mr. Olsen's participation creates a conflict of interest that jeopardizes the public trust placed in the NMED and its public officers. Mr. Olsen's participation endangers NMED's duty and commitment to maintain the integrity, and discharge ethically, the responsibilities of the public trust. For these reasons, the testimony of Mr. Olsen should be excluded.

B. Mr. Olson's testimony must be stricken and limited because he propounds expert opinions on scientific and technical matters that he is not qualified to testify on.

In the alternative, the Department asks that the Hearing Officer strike or limit the testimony of Mr. Olson because Mr. Olson seeks to offer expert opinions on scientific and technical fields he is not trained in, educated in, or otherwise qualified to assert.

In this matter, no person may testify as an expert unless identified as a technical witness in a timely filed NOI. 20.1.4.400.B(1)(c) NMAC. "Technical testimony" is "scientific, engineering, economic or other specialized testimony, whether oral or written, but does not include legal argument, general comments, or statements of policy or position concerning

matters at issue in the hearing.” 20.1.4.7.A(22) NMAC. Further, under the New Mexico Rules of Evidence 11-702 NMRA, if scientific or technical evidence is to be presented, it must first assist the trier of fact in understanding the issues. (11-702 NMRA based on Fed. R. Evid. 702). The evidence must be from a witness qualified as an expert *based on that witness’s specific knowledge, skill, experience, training, or education*. See 11-702 NMRA; Fed. R. Evid. 702; see also *Ram v. New Mexico Dep’t of Env’t*, CIV 05-1083 JB/WPL, 2006 WL 4079623 (D.N.M. Dec. 15, 2006) (a witness must first qualify under Rule 702 but then the court must determine whether the opinion is reliable from an evidentiary standpoint and fit the facts of the case). The Hearing Officer is this agency’s “gatekeeper” for ensuring that experts are qualified in providing proper expert and technical opinions. *See generally Ram*.

Mr. Olson states in his testimony that he holds a Bachelor of Science in Geology as well as a Master’s of Science in Hydrology. *Resume of William C. Olson*, FRER NOI Exhibit 1. Mr. Olson does not include in his testimony that he has been or is currently considered an expert or qualified technical witness either before this Department or state or federal judicial courts, nor has he indicated qualifications that support him being an expert worthy to opine as a technical witness on certain subjects of his testimony. His testimony lacks citation to any studies or data that indicate the statements to be true and accurate expert opinions. He lacks the education, training, experience, and knowledge to support the following portions of his proposed testimony, and the Hearing Officer should strike those portions of Mr. Olsen’s written testimony, and limit any live testimony that relates to those portions.

Section II

Section II of Mr. Olson’s testimony begins with an introductory statement that “it is well-known that most horses in the United States have been treated with antibiotics, anti-

inflammatory drugs, growth hormones, steroids and other substances that are typically not used on food animals such as cattle.” *Olson*, Section II, page 3-4. Mr. Olson continues, there are “unique and significant considerations and potential problems in discharging wastewater and biosolids from a horse slaughter facility and from potential human ingestion of such drug residues or metabolites: to the best of my knowledge, considerations which have not been adequately evaluated to determine potential effects on ground water and public health.” *Olson*, Section II, page 4.

The Department requests that the Hearing Officer strike the above statements of the witness and limit any in-hearing testimony related to these statements, specifically that: (1) it is well known that most horses in the U.S. have been treated with certain chemicals; and (2) that such unspecified chemicals are or can be potential problems in wastewater and biosolids from such a facility. As related to statement (1) above, Mr. Olson has not cited to any specific studies, reports, or statistical data that indicates that this is a true and accurate expert statement and opinion. As related to statement (2) above, Mr. Olson has failed to list, cite, or provide data related to this position and shows he has no specific expertise, knowledge, training or education in this field. The Department requests that Mr. Olson’s testimony in this section related to the potential harm from the residuals or metabolites of the drugs on human health be stricken because Mr. Olson has no education, training, experience, expertise, or knowledge of the interaction of veterinary pharmaceuticals with and on human health as would be expected from either a toxicologist or certified medical doctor trained in this field.

Section IV

The Department requests that the Hearing Officer completely exclude and strike Section IV. D of Mr. Olson’s testimony. *See Olson*, Section IV. D., page 9. In this portion of Mr.

Olson's testimony, he restates his earlier findings that certain drugs in horses bound for slaughter will pose a human health risk from ingestion. Based only on his review of certain documents, including FRER NOI Exhibits 7 through 20² and 21 through 25, he concludes that any discharge may potentially cause "serious public health and environmental hazards." *Olson*, Section IV. D, page 9. Again, Mr. Olson does not have expertise in toxicology or agricultural sciences to be able to draw such a conclusion or to opine on exhibits. He has not provided testimony or information in his resume and thus the Hearing Officer must exclude this testimony.

In Section IV. E., Mr. Olson reviews and compares the volumetric discharges of Valley Meat to other facilities listed in FRER NOI, Exhibit 30. Mr. Olson then states that after review of the permit application and of the administrative record, he found that Valley Meat is "knowingly misrepresenting facts related to the Discharge Permit and therefore pursuant to 74-6-5.E (4)(a) NMSA 1978, NMED is required to deny" the permit. *Olson*, Section IV. E, page 11-12. The Department requests that the Hearing Officer strike this testimony as being a legal conclusion, *e.g.*, "knowingly..." which is the prerogative and purview of the Hearing Officer and ultimately the Secretary of the Environment Department, hereafter "Secretary." Similarly on page 16 of Section V., the witness concludes that Valley Meat "has exhibited a history of willful disregard...". Again, the Department asks that this statement be stricken because it is a legal and factual determination of the Hearing Officer and the Secretary. The Department further requests that the Hearing Officer caution the witness from making legal or factual determinations outside his field of expertise – here hydrology.

Section V

² Mr. Olson cites several exhibits as information guiding his opinion, specifically one affidavit from Terry Miner (Exhibit 21), however the affidavit from Mr. Miner then includes references to over eleven (11) other exhibits that are not included or attached.

In Section V., Mr. Olson states NMED should include a condition that requires immediate termination of the permit where water quality monitoring requirements are not met. *Olson*, Section V., page 15. Mr. Olson then states that this authority is given pursuant to the WQA, NMSA 1978, §74-6-4 (M)(1). However, this subsection of the statute appears to generally not require a permit for the use of water in irrigated agriculture. The Department requests that the Hearing Officer strike the last paragraph of Section V because: (1) this is again a legal determination that the Department can include his suggested condition; and (2) that the legal authority cited by Mr. Olson is factually and legally incorrect.

Section VI

In Section VI. A., Mr. Olson makes the statement that “[c]learly there is a high potential for animal wastewater impoundments, similar to the impoundments at Valley Meat Company, to cause ground water pollution.” *Olson*, Section VI. A., page 17. The Department requests that this factual conclusion be stricken as Mr. Olson is not a licensed or certified professional engineer or statistician capable of making such a significant factual determination.

Section VIII

In Section VIII, Mr. Olson again reiterates and restates conclusions discussed above. The Department requests that the Hearing Officer strike any portion that is duplicative. *Olson*, Section VIII., page 22.

Exhibit 45

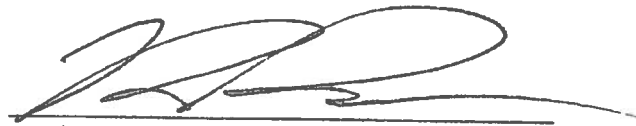
The Department would request that the Hearing Officer also strike Exhibit 45 as it is not supported by any direct testimony or witness. As such, it remains unclear how such evidence would be introduced at the hearing by Mr. Olsen.

II. CONCLUSION

For these reasons, the Department respectfully requests that the Hearing Officer strike in full all testimony of William C. Olson, or in the alternative, strike or limit his testimony based on Mr. Olson's lack of expertise and technical knowledge of the above stated matters. In light of the nature of this motion, concurrence from the other parties was not sought.

Respectfully submitted,

NEW MEXICO ENVIRONMENT DEPARTMENT

A handwritten signature in black ink, appearing to read 'K. Powers', written over a horizontal line.

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I hereby certify that on October __, 2013 a copy of the Department's Motion to Strike/Limit Testimony of William Olson was delivered to:


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Kevin J. Powers

Re: *GWB 13-05 (P)*

STATE OF NEW MEXICO
BEFORE THE SECRETARY OF ENVIRONMENT

No. GWB 13-05

IN THE MATTER OF THE APPLICATION
OF VALLEY MEAT COMPANY FOR RENEWAL
OF GROUND WATER DISCHARGE PERMIT DP-236,
ROSWELL, NEW MEXICO.

TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED that on the 22nd day of October,
2013, this matter came on for hearing before FELICIA
ORTH, Hearing Officer, at the Chaves County Courthouse,
400 N. Virginia, Roswell, New Mexico, at the hour of
9:00 AM.

Volume 1

EXHIBIT

tabbies

G

KATHY TOWNSEND COURT REPORTERS

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KATHY TOWNSEND COURT REPORTERS

110 Twelfth Street, Northwest, Albuquerque, New Mexico 87102

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1 one of these parties.

2 On Friday, the counsel and Mr. Holland and I
3 participated in a long teleconference concerning a
4 couple of motions.

5 Correct me if I'm wrong, Mr. Powers or
6 Mr. Kendall, I believe that the motion to determine
7 party status and representation was adequately addressed
8 in that teleconference.

9 Next was a motion to strike the entry of
10 appearance of the New Mexico Attorney General's Office.
11 I have given, as I said, more thought to it since Friday
12 afternoon, and also considered the memorandum that was
13 issued to that motion sent by Mr. Biernoff over the
14 weekend, and it has not changed my conclusion that the
15 motion should be denied.

16 Finally, as to the motion to strike or limit
17 the testimony of Mr. Olson, I considered again
18 everything we spoke about on Friday afternoon and also
19 paid special attention to the statute at 10-16-8(B), as
20 the Department had asked me to do, and didn't change my
21 mind there, either.

22 I think there is some real challenges to the
23 Department's interpretation in that language of the
24 statute, particularly as to what it means to represent
25 someone and what the words "this matter" means.

KATHY TOWNSEND COURT REPORTERS

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1 Mr. Dunn?

2 MR. DUNN: Yes, Madam Chair.

3 If it's appropriate, I'd like to renew our
4 objections from the hearing the other day to --

5 MS. ORTH: All right.

6 MR. DUNN: I'd like to put those on the
7 record, if that's acceptable.

8 MS. ORTH: All right.

9 Please.

10 MR. DUNN: With the matter of striking the
11 presence of the Attorney General to provide technical
12 testimony, I'd like to renew that the Attorney General
13 is the top legal officer for this state, he is not the
14 top environmental officer for this state, that is not
15 his area of expertise, and providing technical testimony
16 in contravention of the actual technical experts of this
17 state presents a conflict of interest that is I believe
18 is unwaivable at this point.

19 Regarding Mr. Olson, a similar objection, he
20 is representing the state, he's a former officer of the
21 State of New Mexico, a former employee of the State of
22 New Mexico, that actually ruled on these matters
23 previously in his official capacity. To now show up and
24 to speak against his own previous actions, we find also
25 to be a conflict that pretty much destroys his

1 credibility.

2 So we'd like those on the record.

3 MS. ORTH: All right.

4 Does the Department join in this renewed
5 motion?

6 MR. POWERS: Yes, Madam Hearing Officer, we
7 do. We renew our objections.

8 And if it pleases the Court, we can make an
9 offer of proof of certain witnesses, and we can do that
10 at a different time or later time during this
11 proceeding, but we do renew our objections against
12 Mr. Olson's testimony under 10-16 -- 10-16-8(B) because
13 of substantial public interest or the substantial
14 involvement that Mr. Olson had during the proceedings
15 below or in prior proceedings.

16 Those were enforcement actions against the
17 same permittee here today, so we do believe that there
18 is a conflict that is apparent, and for the sake of
19 justice, we believe that Mr. Olson's testimony should be
20 stricken.

21 As to the Attorney General's appearance, we do
22 renew our objection and believe that there is a conflict
23 between who represents the State of New Mexico, in what
24 capacity, and in what capacity any witnesses that are
25 going to be presented represent the views and opinions

1 of the state.

2 MS. ORTH: All right. Thank you, Mr. Powers.

3 Any change in the opposition to the motions?

4 MR. BIERNOFF: No change, Madam Hearing
5 Officer. I won't rehash our positions. I just want to
6 indicate our continuing opposition to both of these
7 motions.

8 MS. ORTH: All right. Thank you.

9 Mr. Wagman, you join in that position, I
10 assume?

11 MR. WAGMAN: Yes, Madam Hearing Officer.

12 MS. ORTH: All right. Thank you.

13 As I said on Friday, I think there is no
14 question about the identity of the person who makes the
15 decision in this matter, that's Secretary Flynn,
16 absolutely, that's -- primary jurisdiction is in
17 Secretary Flynn's hands.

18 Having said that, we have among the broadest
19 permitting procedures in the country when it comes to
20 public participation and the variety of ways in which
21 they can participate in permitting proceedings, and I
22 don't see an exclusion there for the Attorney General or
23 -- and again, as I said, I think the language of
24 10-16-8(B) does not form a basis to exclude Mr. Olson.

25 So are there any other issues that we need

**STATE OF NEW MEXICO
BEFORE THE SECRETARY OF ENVIRONMENT**

**IN THE MATTER OF THE APPLICATION OF
VALLEY MEAT COMPANY FOR GROUND WATER
DISCHARGE PERMIT RENEWAL, DP-236**

No. GWB 13-05 (P)



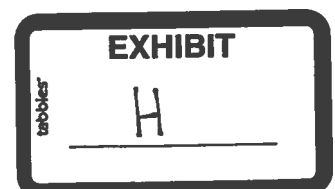
**HEARING OFFICER'S REPORT, PROPOSED FINDINGS
AND CONCLUSIONS AND DRAFT FINAL ORDER**

Valley Meat Company ("VMC" or "Applicant") seeks a ground water discharge permit for planned discharges associated with equine slaughter and processing at a facility located seven and one-half miles east of Roswell in Chaves County, New Mexico. The permit would cover discharges up to 8,000 gallons per day of wastewater flowing by gravity to two underground concrete holding tanks used for solids settling and from there to two synthetically-lined surface impoundments to evaporate.

Depth to ground water is approximately 10 feet with a total dissolved solids (TDS) concentration of 2,300 milligrams per liter (mg/l).

The New Mexico Environment Department (NMED) Ground Water Bureau ("Bureau" or "GWQB") supports the issuance of the permit with conditions necessary to protect public health and welfare and the environment.

This matter was heard on October 21-22, 2013, in Roswell, New Mexico. NMED was represented by Kevin Powers and Jeff Kendall of NMED's Office of General Counsel, and the Bureau's position was presented by Ground Water Quality Bureau Chief Gerard Schoeppner and Kimberly Kirby, a Bureau permit manager. Those present on behalf of the Applicant included attorney A. Blair Dunn, VMC owner Ricardo De Los



43. The only other party providing written testimony in a NOI was John Holland, President of Equine Welfare Alliance. Mr. Holland provided several exhibits primarily related to compliance issues and concerns at horse slaughter facilities outside the State of New Mexico.

PRE-TRIAL MOTIONS

44. During the October 18, 2013 telephone conference, the Bureau filed three pre-trial motions. The first motion was to determine the various interests of the parties in FRER's and the Attorney General's NOI. The second motion was to strike the entry of the New Mexico Attorney General's Office into the proceedings. The last motion was to exclude and/or to limit the testimony of Mr. William C. Olson. FRER and the Attorney General's office stated verbally that Bruce Wagman represented only FRER and the six residents of Roswell, New Mexico. The Assistant Attorney General, Ari Biernoff, stated that he represented the interest of the State of New Mexico. Both Mr. Wagman and Mr. Biernoff stated they had jointly hired William Olson and that his testimony was on behalf of both parties.

45. The Hearing Officer found that the verbal response of FRER and the AG's office as to the identity of parties and respective counsel was sufficient and denied the GWQB's first motion. The GWQB's other two motions, supported by VMC, but opposed by FRER and the Attorney General, were denied based on the breadth of public participation contemplated in the Ground Water Regulations and the Department's Permitting Procedures, and past matters in which other constitutional officers within the executive branch had appeared and participated in the Department's hearings.

46. At the start of the hearing, VMC and the Bureau renewed their objections to participation by the Attorney General's Office and by Mr. Olson, who is a former Ground Water Quality Bureau Chief. The rulings remained the same. Tr. pp. 17-21.

EVIDENCE ON BEHALF OF THE APPLICANT VMC

47. Applicant VMC presented four witnesses: owner/operator Ricardo De Los Santos, agricultural consultant Lonnie Ashcraft, permitting consultant Chet Wyant and large-animal veterinarian Dr. Leonard Blach, DVM. VMC's NOI is at No. 11 in the Hearing Clerk's Pleading File.

48. Mr. De Los Santos' pre-filed testimony is appended to VMC's NOI as Exhibit A.

49. Mr. De Los Santos believes the facility was built sometime in 1982. He initially leased the business, and later purchased the operation. The facility previously processed livestock, primarily cattle, also goats, sheep and hogs. The facility has employed, at times, fifty (50) to fifty-five (55) employees. He made the decision to switch to equine slaughter for economic reasons. Neither Valley Meat nor Mr. De Los Santos has any experience slaughtering horses. Tr. pp. 62-66, 103.

50. Mr. De Los Santos first spoke with the United States Department of Agriculture (USDA) about equine slaughter in November 2011. VMC's cattle processing operations ceased in April 2012 to switch from cattle processing to equine processing, because the USDA will not issue a grant of inspection for both species. Tr. pp. 95-96.

51. VMC has a contract to slaughter 120 head per day and plans to send the offal to a company in Dallas until they can build their own rendering plant, for which they already have all the components. Tr. pp. 72-73. Although Mr. De Los Santos approached the