

STATE OF NEW MEXICO
BEFORE THE WATER QUALITY CONTROL COMMISSION



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

No. WQCC 12-09 (R) and 13-08 (R)

ORDER ON NEW MEXICO ENVIRONMENT DEPARTMENT'S MOTION TO EXCLUDE WILLIAM C. OLSON AND STRIKE/LIMIT HIS TESTIMONY and MOTION TO STRIKE ENTRY OF APPEARANCE OF NEW MEXICO ATTORNEY GENERAL

The New Mexico Environment Department filed a Motion to Exclude William C. Olson and Strike/Limit His Testimony and a Motion to Strike the Entry of Appearance of New Mexico Attorney General on October 27, 2014. On November 5, 2014, three response briefs were filed: the Coalition filed their Opposition to NMED Motions to Exclude and to Strike, the Attorney General filed its Response to NMED's Motion to Exclude William C. Olson and Strike/Limit his Testimony and the Attorney General filed its Response to Strike Entry of Appearance of Attorney General. On November 17, 2014, NMED filed its Reply in Support of its Motion to Exclude William C. Olson and Strike/Limit His Testimony and a Reply in Support of its Motion to Strike the Entry of Appearance of New Mexico Attorney General. The briefs were filed consistent with the Procedural Order issued on October 3, 2014.

On November 18, 2014, the Water Quality Control Commission voted unanimously that undersigned Hearing Officer provide a ruling, based upon the briefs, on NMED's Motion to Exclude William C. Olson and Strike/Limit His Testimony and Motion to Strike the Entry of Appearance of New Mexico Attorney General.

Having reviewed the briefs listed above, and having reviewed the authority cited therein, the undersigned Hearing Officer finds as follows:

1. With regard to the New Mexico Environment Department's Motion to Exclude William C. Olson and Strike/Limit His Testimony, NMED argues that Mr. William C. Olson "was previously employed as the Bureau Chief of the Department's Ground Water Quality Bureau and actively participated in developing the Department's policy and legal strategy related to the Dairy Rules[.]" NMED alleges that Mr. Olson has now based his testimony for the upcoming Dairy Rules hearing on "privileged and confidential information" obtained during his employment with NMED.
2. NMED contends that the WQCC has the authority to control its proceedings, including the exclusion of evidence and witnesses based upon consideration of the Governmental Conduct Act, Section 10-16-1 to -18, NMSA 1978 (2011), and general notions that unfairly prejudicial evidence should be excluded. I find the contentions to be true.
3. The question is whether the WQCC should exercise its authority to exclude Mr. Olson from testifying. NMED does not identify the specific information or documents that it contends to be privileged or confidential. NMED, indeed, admits that Mr. Olson relies upon public information but contends that he benefits from the thought process or advice that went into the creation of the documents. NMED also contends that Mr. Olson's testimony may confuse the WQCC into a belief that he speaks for the NMED. I find that the basis of Mr. Olson's opinions and testimony is appropriate for cross-examination and, at this time, not grounds to exclude Mr. Olson from testifying. I find that issues of confusion, if any, are also proper issues to be raised in cross-examination.

4. Therefore, NMED's request to exclude and strike in full the testimony of William C. Olson is denied. NMED's request to limit Mr. Olson's testimony to the extent that it is based on confidential information obtained during employment with NMED is denied at this time but may be raised again during the hearing if a proper foundation is established that the relied upon evidence is privileged or confidential.
5. With regard to the Motion to Strike the Entry of Appearance of New Mexico Attorney General, NMED seeks to "limit who can appear before the [WQCC] purporting to represent the State's interests in environment protection."
6. NMED contends that the "State's interest in protecting New Mexico's groundwater is adequately represented in this proceeding by the [NMED]" as provided by NMSA 1978, Sections 9-7A-1 to -15 (1991, as amended through 2005). In contrast, the Attorney General contends that NMSA 1978, Section 8-5-2 grants him authority and discretion to represent "the interests of the State" in rulemaking proceedings. The question is 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."
7. "The . . . attorney general [is permitted] to bring an action on 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." *State ex rel. Attorney Gen. v. Reese*, 78 N.M. 241, 245 (1967).
8. 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.

9. For these reasons, the New Mexico Environment Department's Motion to Strike the Entry of Appearance of New Mexico Attorney General is granted.
10. The Coalition's request and the Attorney General's request that NMED be admonished are denied.

Christopher T. Saucedo/cl

Christopher T. Saucedo
Hearing Officer

**BEFORE THE WATER QUALITY CONTROL COMMISSION
FOR THE STATE OF NEW MEXICO**



**In the Matter of:
PROPOSED AMENDMENT
TO 20.6.2 NMAC (Dairy Rule)**

**WQCC 12-09 (R) and
WQCC 13-08 (R)**

CERTIFICATE OF SERVICE LIST

I hereby certify that a copy of the Order On New Mexico Environment Department's Motion To Exclude William C. Olson And Strike/Limit His Testimony and Motion To Strike Entry Of Appearance Of New Mexico Attorney General in the above-referenced matter, by the Hearing Officer on November 26, 2014 was sent via email and regular first-class mail to all parties on November 26, 2014:

SERVICE LIST

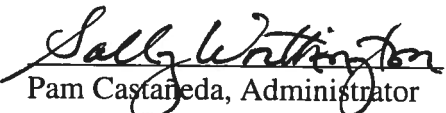
Robert A. Stranahan, IV
Dalva L. Mollenberg, Esq.
Anthony (T.J.) J. Trujillo, Esq.
Gallagher & Kennedy, P.A.
1239 Paseo de Peralta
Santa Fe, New Mexico 87501
DLM@gknet.com
AJT@gknet.com
bob.stranahan@gknet.com
For the Petitioner, Dairy Industry Group for a Clean Environment (DIGCE)

Jeff Kendall, General Counsel
Christopher Atencio, Assistant General Counsel
Kay R. Bonza, Assistant General Counsel
Office of General Counsel
New Mexico Environment Department
P.O. Box 5469
Santa Fe, New Mexico 87502-5469
Jeff.Kendall@state.nm.us
Christopher.Atencio@state.nm.us
Kay.Bonza@state.nm.us
For the Ground Water Quality Bureau

Jon Block
Bruce Frederick
Eric Jantz
Douglas Meiklejohn
New Mexico Environmental Law Center
1405 Luisa Street, Ste. 5
Santa Fe, NM 87505
Jblock@nmelc.org
For the Rio Grande Chapter of the Sierra Club and Amigos Bravos

Tannis L. Fox, Assistant Attorney General
Water, Environmental and Utilities Division
Office of the New Mexico Attorney General
P.O. Box 1508
Santa Fe, New Mexico 87504
tfox@nmag.gov
For the New Mexico Attorney General

Wade Jackson, General Counsel
NM Economic Development Department
Joseph Montoya Building
1100 S. St. Francis Drive
Santa Fe, New Mexico 87505
Wade.Jackson@state.nm.us
Counsel for the Commission

for 
Pam Castañeda, Administrator
Water Quality Control Commission
P.O. Box 5469
Santa Fe, NM 87502
(505) 827-2425 (P)
(505) 827-0310 (F)