

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

1190 St. Francis Drive, Room N2150

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Santa Fe, New Mexico 87502

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Constituent Agencies

Environment Department
Office of State Engineer
Game and Fish Department
Oil Conservation Division
Department of Agriculture
Department of Health
State Parks Division
Soil and Water Conservation Commission
Bureau of Geology and Mineral Resources
Municipal/County Representative
Members-at Large

New Mexico Water Quality Control Commission Meeting

January 13, 2009

9:00 a.m.

New Mexico Department of Energy, Minerals and Natural Resources

Chino Building, Porter Hall

1220 S. St. Francis Drive

Santa Fe, New Mexico 87505

MEMBERS PRESENT:

| | |
|----------------------|---|
| Jon Goldstein | NMED/Deputy Secretary |
| Greg Lewis | Office of the State Engineer |
| Cheryl Bada | State Parks Division |
| Larry Dominguez | Department of Agriculture |
| Howard Hutchinson | Soil and Water Conservation Commission |
| Glenn Von Gonten | Oil Conservation Division |
| Peggy Johnson | Bureau of Geology and Mineral Resources |
| Mike Sloane | Department of Game & Fish |
| Len Flowers | Health Department |
| Maxine Goad | Member-at-Large |
| Edward Vigil | Member-at-Large |
| Joseph Chavarria | Member-at-Large |
| Jim Norton, NMED/EPD | Representing NMED in re: Agenda Item 7 |

MEMBERS ABSENT:

Steve Glass City of Albuquerque – Municipal/County Representative

OTHERS PRESENT:

Glenn Saums, NMED/SWQB

Dale Doremus, NMED/SWQB

James Hogan, NMED/SWQB
Adolfo Mendez, NMED/OGC
George Schuman, NMED/GWQB
Eric Schlenker-Goodrich, WELC
John Kelly, Phelps Dodge
Bruce Frederick, NMELC
Charlie Nylander, WaterMatters, LLC
Sally Malave, Asst. NM Atty General
Joyce Medina, NMED

Kathie Deal, NMED/GWQB
Rachel Conn, Amigos Bravos
Bill Olson, NMED/GWQB
Stuart Butzier, Phelps Dodge
Louis Rose, Montgomery-Andrews Law Firm
John Fogarty, NEE
Marcy Leavitt, NMED
Zachary Shandler, Asst. Atty. General

The meeting was called to order by Mr. Goldstein at 9:00 a.m.

Item 1. Roll Call:

The Commission administrator took roll and noted a quorum was present.

Item 2. Approval of Agenda

The Commission agreed that Agenda Item 7 would be heard in place of Agenda Item 5 and that Items 5 and 6 would be heard after Item 7.

Action: Mr. Sloane moved approval of the agenda as revised. Mr. Hutchinson seconded. The motion passed unanimously.

Item 3. Approval of meeting minutes of December 16, 2008.

Action: Mr. Dominguez moved to approve the minutes as presented. Mr. Sloane seconded. The motion passed unanimously.

Item 4. Commission approval of the Open Meetings Act Resolution of 2009.

Action: Mr. Lewis moved to approve the Open Meetings Act Resolution of 2009. Mr. Hutchinson seconded. The motion passed unanimously.

Item 7. Announcement of Commission decision in re: WQCC 03-12 (A) and WQCC 03-13 (A) (Consolidated), In the Matter of the Appeal of Supplemental Discharge Permit for Closure, DP 1341, for Phelps Dodge Tyrone, Inc., Petitioner. Jim Norton, Acting Chair and Sally Malave, Asst. Atty. General, Commission Counsel.

Commissioners Chavarria and Flowers were not participants in Item 7 because they did not attend the hearing in this case.

The Acting Chair introduced Commissioner Johnson who set out the Commission's decision in in this consolidated case.

Action: Ms. Johnson moved that the Commission come out of executive

session and that the meeting minutes reflect that the only matter discussed in executive session was the record in this remand proceeding. Mr. Von Gonten seconded.

Roll Call Vote:

| | |
|-----------------------|------------|
| Mr. Lewis | yes |
| Mr. Von Gonten | yes |
| Ms. Bada | yes |
| Mr. Dominguez | yes |
| Mr. Sloane | yes |
| Mr. Hutchinson | yes |
| Ms. Johnson | yes |
| Ms. Goad | yes |
| Mr. Vigil | yes |
| Mr. Norton | yes |

Ms. Johnson noted that the initial issues to be addressed were pending motions, the first from the Department requesting a ruling from the Commission that the Water Quality Act protect all groundwater in the State except private, isolated groundwater and that §74-6-5 (E) (3) of the Act does not apply to the issuance of DP-1341.

Action: Ms. Johnson moved that the Department’s motion be denied. Mr. Sloane seconded.

Roll Call Vote:

| | |
|-----------------------|------------|
| Ms. Bada | yes |
| Mr. Lewis | yes |
| Mr. Von Gonten | yes |
| Mr. Dominguez | yes |
| Mr. Hutchinson | yes |
| Mr. Sloane | yes |
| Ms. Johnson | yes |
| Ms. Goad | yes |
| Mr. Vigil | yes |
| Mr. Norton | yes |

The motion passed unanimously.

Ms. Johnson then moved on to the second motion, which was filed by Gila Resources Information Project (GRIP), requesting that the Commission adopt three general policies to help guide the Commission’s determination of whether the Tyrone mine site is a place of withdrawal of water for present or reasonably foreseeable future use.

The Commission finds that GRIP’s motion does not resolve the central question in this proceeding of where the effects of Tyrone’s discharges will be measured and ignores the Court of Appeals’ rejection of “such a broad and impractical interpretation of the Act.”

Action: Ms. Johnson moved that GRIP’s motion be denied. Mr. Sloane seconded.

Roll Call Vote:

| | |
|----------------|-----|
| Mr. Dominguez | yes |
| Mr. Lewis | yes |
| Mr. Von Gonten | yes |
| Ms. Bada | yes |
| Mr. Sloane | yes |
| Mr. Hutchinson | yes |
| Ms. Johnson | yes |
| Ms. Goad | yes |
| Mr. Vigil | yes |
| Mr. Norton | yes |

The motion passed unanimously.

Ms. Johnson then mentioned the applicability of the Water Quality Act (Act) and Water Quality Control Commission regulations, she went on to note that the purpose of the Act is to abate and prevent pollution in “all water, including water situated wholly or partly within or bordering upon the State, whether surface or subsurface, public or private, except private waters that do not combine with other surface or subsurface waters.” (quoting §74-6-2 (H) of the Act).

Ms. Johnson then noted a number of additional issues relating to the Act and its provisions as well as findings by the Commission.

Action: Ms. Johnson moved, based on the Commission’s findings and conclusions, that the Commission order (1) that NMED shall identify places of withdrawal of water for present or reasonably foreseeable future use and identify appropriate locations at which the effect on groundwater discharges covered by DP-1341 shall be measured; (2) that the Department and Tyrone shall negotiate on the appropriate systems model and modeling parameters to determine the effectiveness of DP-1341 conditions four and seventeen; (3) the Department shall determine the effectiveness of DP-1341 conditions four and seventeen to prevent and reduce groundwater contamination at the identified places of withdrawal of water for present or reasonably foreseeable future use; and (4) that the parties shall comply with these terms within eighteen months of the issuance of the Commission’s written order. Mr. Sloane seconded.

Roll Call Vote:

| | |
|----------------|-----|
| Mr. Hutchinson | yes |
| Ms. Johnson | yes |
| Mr. Sloane | yes |
| Mr. Dominguez | yes |
| Mr. Von Gonten | yes |
| Mr. Lewis | yes |

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|-------------------|------------|
| Ms. Bada | yes |
| Ms. Goad | yes |
| Mr. Vigil | yes |
| Mr. Norton | yes |

The motion passed unanimously.

Action: Ms. Johnson moved, in accordance with §21-3600 (D) of the regulations, that the Commission direct its counsel in this proceeding to prepare a final order memorializing the Commission’s decision and order. Ms. Johnson further moved that the Commission direct the Commission Chair to sign the final order. Mr. Sloane seconded.

Roll Call Vote:

| | |
|-----------------------|------------|
| Ms. Bada | yes |
| Mr. Dominguez | yes |
| Mr. Von Gonten | yes |
| Mr. Lewis | yes |
| Ms. Johnson | yes |
| Mr. Hutchinson | yes |
| Mr. Sloane | yes |
| Ms. Goad | yes |
| Mr. Vigil | yes |
| Mr. Norton | yes |

The motion passed unanimously.

Ms. Malave, Commission counsel, noted that she had a question from one of the parties to this matter regarding Commission members who have participated throughout the deliberations. She stated that Commissioner Glass had participated throughout the deliberations but was unable to attend today’s hearing or yesterday’s deliberations due to commitments in Albuquerque.

Ms. Malave further noted that, with respect to Ms. Johnson’s motion instructing the Commission Chair to sign the order in this case, Mr. Norton would sign on behalf of the Commission due to Mr. Goldstein’s recusal in this matter.

The entire summary statement of the Commission’s decision in these consolidated cases was transcribed by Kathy Townsend Court Reporters, 110 Twelfth Street, NW, Albuquerque, NM 87102. A copy of that transcript is available for review in the office of the Water Quality Control Commission Administrator, New Mexico Environment Department, 1190 St. Francis Drive, Rannels Building Room N2150, Santa Fe, New Mexico 87505.

Item 5. Petition for review in re: WQCC 08-15 (A), Peabody Energy Petition for Review of NMED Surface Water Quality Bureau’s Directive to the NM Energy, Minerals and Natural Resources Department’s Mining and Minerals Division regarding Application of Surface Water Quality Standards to Permanent Impoundments at Coal Mines. Stuart Butzier, Esq., Modrall Law Firm for

Petitioner; Eric Ames, NMED/OGC.

Mr. Butzier briefly discussed the petition for review and stated that, after conferring with Mr. Ames, it was agreed that a workable process with respect to this matter would be for the Commission to appoint a hearing officer for the purpose of setting out scheduling dates in this proceeding and conduct the hearing. Mr. Butzier then requested that the Commission not set a hearing at this time but appoint a hearing officer to set the procedural schedule and preside over the hearing.

There was Commission discussion relating to the ramifications of naming a hearing officer to conduct the hearing, prepare a report for the Commission and then make the transcript of the hearing available to the Commission for review prior to deliberating this matter.

Discussions continued regarding various hearing scheduling alternatives available to the Commission.

Action: Mr. Vigil moved that WQCC 08-15 (A) be tabled until the Commission's next meeting. Mr. Dominguez seconded. The motion passed unanimously.

Item 6. Motion to Stay Permit Conditions Pending Appeal in re: The Matter of the Appeal by Sebastiao Faria (Faria Dairy East) of Permit Conditions in re: DP 923, WQCC 08-09 (A). Pete Domenici, Esq., Domenici Law Firm for Sebastiao Faria; Adolfo Mendez, NMED/OGC.

Mr. Mendez stated that Mr. Domenici had agreed that he, Mr. Mendez, would appear on behalf of both parties to set out the agreements that had been reached in this matter. Mr. Mendez referred the Commission to the NMED and Petitioner Stipulated Scheduling Order for Appeal Petition and Stay of Permit Conditions Pending Appeal document which had been forwarded to all members.

There was discussion regarding options available to the Commission with respect to procedural issues in this case.

Action: Mr. Vigil moved to accept the Stipulated Scheduling Order for Appeal Petition and Stay of Permit Conditions Pending Appeal in WQCC 08-09 (R). Mr. Lewis seconded. The motion passed unanimously.

Item 8. Next public meeting: April 14, 2009, 9:00 a.m. State Capitol Building Room 317, 490 Old Santa Fe Trail, Santa Fe.

Item 9. Other business

Mr. Chavarria brought up the question of the triennial review and the possibility of tribal members meeting with the Department to discuss the review. Marcy Leavitt, Water and Waste Management Division Director for the Department stated that it was her understanding that Pamela Homer, Water Quality Standards Coordinator for the Surface Water Quality Bureau, has scheduled meetings with

tribal representatives. There was a brief discussion relating to the State's jurisdiction over tribal water resources.

10. Adjournment

Action: The Chair adjourned the meeting at 10:10 a.m.

Signature on File

Jon Goldstein, Acting Chair