

**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

March 9, 2010

9:00 a.m.

NM Energy, Minerals and Natural Resources Dept., Porter Hall

Chino Building

1220 St. Francis Drive

Santa Fe New Mexico 87505

MEMBERS PRESENT:

Carlos Romero	Acting Chair
Cheryl Bada	State Parks Division
Larry Dominguez	Department of Agriculture
Howard Hutchinson	Soil and Water Conservation Commission
Steve Glass	County of Bernalillo, Municipal/County Representative
Doug Bland	Bureau of Geology and Mineral Resources
Brad Jones	Oil Conservation Division
Greg Lewis	Office of the State Engineer
Heidi Krapfl	Department of Health
Tod Stephenson	in lieu of Mike Sloane, Department of Game & Fish
Maxine Goad	Member-at-Large
Edward Vigil	Member-at-Large
Joseph Chavarria	Member-at-Large
Harold W. Tso	Member-at-Large

MEMBERS ABSENT:

None.

OTHERS PRESENT:

Mary P. Carlson, US Bur. of Reclam.	Kathy Martin
Adolfo Mendez, II, NMED/OGC	Susan Rich, NMED
Jerry Nivens, CCCG	Gerald L. Chacon
Frances T. Chacon	Dan Lorimor, Sierra Club
Tyler Bean	Bill Olson, NMED/GWQB
Pam Homer	Glenn Saums, NMED
Ralph Vigil	Cecilia Abeyta, NM Farm Bureau
Dan Dolan, Esq.	Jose Varela Lopez
Carlos Salazar	Rida Salazar
Pete Domenici, Domenici Law Firm	Alberto Baros
Steve Hansen	Michael Norvison
Caren Cowan, NM Cattle Growers	Michelle L. Frist, NM WGID
Biz Ladner	Ernest R. Torrez
Joe Culbertson	Josh Smith, Esq., EBID
Chris Rich, US BOR	Ken McCallum
Tracy Hughes, NMED/OGC	Joe Lanctot
Zachary Shandler, Commission Counsel	Joyce Medina, NMED

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

Item 1. Roll Call:

Roll was taken and it was noted that a quorum was present.

Item 2. Approval of Agenda

Action: Mr. Glass moved Commission adoption of the Agenda. Mr. Lewis seconded. Mr. Romero asked for a roll call vote.

Roll Call Vote:

Mr. Romero	yes
Mr. Lewis	yes
Mr. Jones	yes
Ms. Bada	yes
Mr. Glass	yes
Mr. Dominguez	yes
Mr. Stephenson	yes
Mr. Hutchinson	yes
Mr. Bland	yes
Ms. Krapfl	yes
Ms. Goad	yes
Mr. Vigil	yes
Mr. Chavarria	yes

The motion passed unanimously.

Item 3. Approval of the meeting minutes of December 8-11, 2009.

Mr. Glass noted a date error in the minutes.

Action: Mr. Dominguez moved Commission approval of the December 8-11, 2009 meeting minutes as corrected. Mr. Lewis seconded. The motion passed unanimously.

Item 4. Approval of the WQCC 2010 Open Meetings Act Resolution

Mr. Glass noted that the section of the Resolution pertaining to determination of a quorum of the Commission and the minimum number of votes needed to pass a motion are not pertinent to Open Meetings Act requirements.

Action: Ms. Bada moved that the Commission approve the Commission's 2010 Open Meetings Act Resolution.

Action: Roll Call Vote:

Mr. Hutchinson	yes
Mr. Vigil	yes
Mr. Glass	yes
Ms. Goad	yes
Mr. Lewis	yes
Mr. Jones	yes
Mr. Lewis	yes
Mr. Dominguez	yes
Ms. Bada	yes
Mr. Chavarria	yes
Mr. Stephenson	yes
Mr. Tso	yes
Ms. Krapfl	yes
Mr. Romero	yes

The motion passed unanimously.

Item 5. Request for hearing in re: WQCC 10-01 (R) Petition to Nominate Surface Waters in Forest Service Wilderness as Outstanding National Resource Waters, NM Environment Dept., NM Dept. of Game and Fish and NM Energy Minerals and Natural Resources Dept., Petitioners; Petition to Amend Antidegradation Policy, 20.4.6.8 A(3) NMAC, NM Environment Dept., Petitioner; and Request to Amend Antidegradation Policy Implementation Procedures and to Issue Guidance for Non-Point Source Discharges in Areas Designated as ONRWs. Tracy Hughes, NMED General Counsel.

Ms. Hughes requested time to telephone Marcy Leavitt, Water and Waste Management Division Director at NMED, who was out of state. The phone connection was made and Ms. Leavitt was available to participate in this matter. Ms. Hughes then introduced Jim Karp, General Counsel, NM Dept. of Game and Fish and Sonny Suazo, Asst. General Counsel, NM Energy, Minerals and Natural Resources. Dept.

Ms. Hughes set out, in general terms, the Petitioners' proposals with respect to the nomination of the waters in Forest Service wilderness areas as ONRWs as well as those proposals related to the antidegradation policies. She described in detail the procedures followed prior to the filing of the petition in WQCC 10-01 (R), including the extensive outreach programs that were implemented in impacted areas.

On behalf of the Petitioners, Ms. Hughes asked that the Commission set a three day hearing in this case on its May 11, 2010 meeting agenda. She requested that the Commission appoint a hearing officer and noted that she had spoken with Felicia Orth who indicated that she would be available during the relevant time period. She also requested that the Commission allow whomever it designates as hearing officer to rule on any preliminary motions that arise prior to the proposed hearing date and further that the Commission designate a specific date upon which all notices of intent to present technical testimony would be due.

A lengthy discussion relating to issues pertinent to an ONRW designation took place among Commission members and various parties, including persons representing interested entities and members of the general public.

Action: Mr. Hutchinson moved that the Commission reject the Petition in WQCC 10-01 (R) and return it to the NM Environment Department to be revised to comply with ONRW nomination requirements in the WQCC regulations. Mr. Dominguez seconded.

Roll Call Vote:

Mr. Chavarria	yes
Mr. Vigil	yes
Ms. Goad	no
Mr. Tso	yes

After a partial roll-call vote, Ms. Krapfl asked Mr. Hutchinson for clarification with respect to his definition of a "proper petition complying with WQCC regulations." Mr. Hutchinson explained his position.

The Chair then noted that he had made a mistake in not asking if the Commission had comments regarding the motion. There was a discussion of Commission action with respect to prior ONRW petitions and the stringency of petition requirements. Commission counsel discussed the content of Mr. Hutchinson's motion with several members and answered questions relating to that motion. The roll-call vote on Mr. Hutchinson's motion was reinitiated.

Ms. Krapfl	no
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Mr. Bland	no
Mr. Hutchinson	yes
Mr. Stephenson	recused himself
Mr. Dominguez	yes
Mr. Glass	no
Ms. Bada	pass
Mr. Tso	yes
Mr. Chavarria	yes
Ms. Goad	no
Mr. Vigil	yes
Mr. Jones	no
Mr. Lewis	no
Mr. Romero	no

The motion failed, seven negative; five affirmative; one recusal; one pass.

Mr. Romero then asked how the Commission wished to proceed.

Action: Mr. Glass moved that the Commission accept the Petition in WQCC 10-01 (R), set the hearing on the May 11, 2010 and designate Felicia Orth as Hearing Officer. Mr. Jones seconded.

Mr. Romero asked if the Commission wished to discuss the motion.

Mr. Hutchinson suggested that the hearing be moved from the Commission's May agenda to a date in the future. He asked that the motion be reconsidered and that the hearing take place later in the summer.

Ms. Leavitt noted that Petitioners' witnesses would not be available in July or August. Mr. Glass mentioned that it was not necessary to hold the hearing on a regular Commission meeting day. There was discussion regarding a possible meeting date.

Mr. Glass amended his motion setting the hearing date in WQCC 10-01 (R) on September 14, 2010. Mr. Bland seconded the amended motion.

Roll Call Vote:

Mr. Lewis	yes
Mr. Jones	yes
Ms. Bada	abstain
Mr. Glass	yes
Mr. Dominguez	no
Mr. Stephenson	abstain
Mr. Hutchinson	no
Mr. Bland	yes
Ms. Krapfl	yes
Mr. Tso	yes

Ms. Goad	yes
Mr. Vigil	no
Mr. Chavarria	no
Mr. Romero	yes

The motion passed, eight affirmative; four negative; two abstentions.

Ms. Hughes asked the Commission for clarification regarding its intent to appoint a hearing officer at this time, and if so, that such appointee be empowered to rule on any preliminary motions that arise prior to the proposed hearing date and further that the Commission designate August 31, 2010 as the due date for submission of notices of intent to present technical testimony.

Mr. Romero noted that the previous motion had passed and that Felicia Orth had been designated as hearing officer in WQCC 10-01 (R).

There was discussion relating to the anticipated length of the September hearing. It was agreed that the hearing would commence on September 14th and continue on consecutive days until a recess at which time, additional days, if necessary, would be designated.

The Chair stated, with respect to Ms. Hughes requested August 31, 2010 due date for filing notices of intent in this case, that Ms. Orth as Hearing Officer was empowered to make that decision. There was a brief discussion relating to delegation of authority to the Hearing Officer.

Mr. Hutchinson moved that the Commission delegate the authority to act on motions in WQCC 10-01 (R) to Ms. Orth as Hearing Officer. Mr. Glass seconded.

Mr. Dominguez asked for clarification of the motion. There was a brief discussion.

The motion passed unanimously.

There was a brief period of additional public comment relating to the case.

The Chair announced a fifteen minute break.

The meeting reconvened.

Item 6. Request for Record Review in re: WQCC 08-05 (A) Appeal by ParaSol Dairy – Discharge Permit DP 1641. Pete Domenici, Jr., Esq., ParaSol Dairy; Joshua L. Smith, Esq., EBID; Jerry Nivens, Caballo Concerned Citizens; Chris Rich, Esq. and Steve Hansen, USDI/BOR and Tracy Hughes, NMED General Counsel

Mr. Domenici, representing ParaSol Dairy, set out the lengthy background of the case and his client's position in filing this appeal. He also discussed at length the procedural issues involved in this case and what documentation, in his view, the Commission should review in making its decision in setting the requested record review. Mr. Domenici asserted that Secretary Curry's

Second Final Order denying the discharge permit included new justification arguments that were inappropriate for consideration by the Commission during the current record review, and noted that the Hearing Officer's Second Report did not include a recommendation with regard to the discharge permit.

Ms. Hughes, representing the Environment Department and Secretary Curry, reviewed for the Commission the chronological procedural background of the case. Additionally, Ms. Hughes explained the position of the Department and Secretary Curry, as well as pointing out inadequacies in ParaSol's ability to deal with precipitation events of any magnitude because of the location of the proposed facility adjacent to Percha Creek. She also discussed WQCC regulations relating to discharge permits and the issue of undue risk to property posed by the Dairy because of anticipated subsurface migration of contaminants (including *E. coli*) away from the Dairy toward Percha Creek and Caballo Reservoir.

The Chair announced that there would be a recess for lunch and that the meeting would reconvene at 1:30 p.m.

The meeting reconvened at 1:45 p.m. The Chair noted that Mr. Stephenson was not able to be present for the afternoon portion of the meeting and Mr. Chavarria needed to leave the meeting at 2:30 p.m.

The Chair announced that the Commission would proceed with discussion of the Request for Record Review in WQCC 08-05 (A), ParaSol Dairy.

Christopher Rich, Esq., on behalf of the United States Bureau of Reclamation, explained the Bureau's reluctance at being involved in this case since the Bureau ordinarily considers matters such as this more reasonably dealt with at the state level. He went on to explain however, that in this particular case, the Bureau has an enormous interest. Mr. Rich set out the Bureau's view that a dairy in the geographical location proposed by the Petitioner would be a disastrous mistake. He went on to describe the reasons for the Bureau's assessment of the issues relating to that opinion, with specific references to Reclamation's responsibility to provide uncontaminated water to irrigators downstream of Caballo Reservoir.

Following Mr. Rich's presentation, the Commission requested that he clarify several of the points that he had made during his presentation. A brief discussion ensued.

Joshua L. Smith, Esq., representing the Elephant Butte Irrigation District (EBID), explained EBID's function in supplying irrigation water to approximately 90,000 acres of farm land in southern New Mexico. Mr. Smith stated that from the outset in this matter, EBID has been frustrated with the lack of acceptable engineering planning and data in the ParaSol Dairy permit application. He went on to express EBID's numerous objections to the placement of a dairy in this geographical location.

The Chair stated that the Commission would take a five minute recess.

The meeting reconvened.

Jerry Nivens, representing Caballo Concerned Citizens (CCC), introduced Kathy Martin, Registered Engineer, State of Oklahoma, appearing for CCC, and Dan Lorimor, Rio Grande Chapter of the Sierra Club. Ms. Martin discussed the dangers inherent in allowing toxic elements to penetrate the waters down stream from the proposed dairy location. She also noted what she perceived as serious flaws in the engineering proposals set out by the Petitioner.

Dan Lorimor, representing the Rio Grande Chapter of the Sierra Club, stated that the Sierra Club had strenuously objected to the location of the Dairy from the inception of this matter and that its position had not altered, it continues to strenuously object to any decision that would allow construction of the Dairy at this precarious location.

Jerry Nivens of CCC, spoke as a resident of the Percha Creek area. He expressed his deep concern that approving the placement of the Dairy in the proposed location would have ever been considered.

Commission discussion followed.

Mr. Domenici then requested the opportunity to provide rebuttal testimony. His request was denied. He then objected, for the record, to the denial of his rebuttal opportunity request.

Mr. Shandler noted that the Commission had the option of deliberating in executive session.

The Chair recessed the meeting for seven minutes.

The meeting was reconvened.

Mr. Domenici stated that, since his request for rebuttal had been denied, he wished to make a motion relating to Bureau of Reclamation testimony. He set forth his reasons why the Commission should not consider said testimony since it was accepted by the Hearing Officer simply as an "offer of proof" only. He then stated that his motion was that the Bureau of Reclamation testimony be stricken and could not be considered as evidence by the Commission.

Mr. Shandler noted that this was an issue that could be taken under advisement by the Commission during its deliberations in this matter.

Action: Mr. Glass moved that the Commission enter into an executive session to discuss this matter. Mr. Bland seconded.

Mr. Tso asked if Mr. Glass would be more specific in stating his motion.

Mr. Glass stated that his motion referred specifically to the Commission entering executive session for the purpose of discussing ParaSol Dairy's Request for Record Review in WQCC 08-05 (A).

Roll Call Vote:

Mr. Lewis **yes**

Mr. Jones	yes
Ms. Bada	abstained
Mr. Glass	yes
Mr. Dominguez	yes
Mr. Hutchinson	no
Mr. Bland	yes
Mr. Tso	yes
Ms. Krapfl	yes
Ms. Goad	yes
Mr. Vigil	yes
Mr. Romero	yes

The motion passed, ten affirmative; one negative; one abstention.

Mr. Hutchinson noted that he had voted against the Commission going into executive session because he feels that all deliberations should be open to the public.

At 4:45 p.m. the Commission returned to open meeting.

Mr. Shandler stated that the Commission's executive session was over and the meeting had returned to open status.

**Action: Mr. Hutchinson moved that the Commission return to open session.
Mr. Bland seconded.**

Roll Call Vote:

Mr. Lewis	yes
Mr. Jones	yes
Mr. Glass	yes
Mr. Dominguez	yes
Ms. Hutchinson	yes
Mr. Bland	yes
Ms. Krapfl	yes
Ms. Goad	yes
Mr. Vigil	yes
Mr. Tso	yes
Mr. Romero	yes

The motion passed unanimously.

Mr. Shandler asked the Chair to state that the only matter discussed by the Commission in executive session was the ParaSol Dairy Request for Record Review, WQCC 08-05 (A). Mr. Romero affirmed that the Dairy's request for review was the only matter discussed by the Commission.

Action: Mr. Vigil moved that this matter be tabled until the Commission's

**May 11, 2010 meeting. Mr. Hutchinson seconded.
Roll Call Vote:**

Mr. Vigil	yes
Ms. Goad	yes
Mr. Tso	yes
Ms. Krapfl	yes
Mr. Bland	yes
Mr. Hutchinson	yes
Mr. Dominguez	yes
Mr. Glass	yes
Mr. Jones	yes
Mr. Lewis	yes
Mr. Romero	yes

The motion passed unanimously.

Item 7 Other business

Ms. Goad asked for a Commission scheduling status report with respect to future meetings and hearings. There was a discussion regarding meeting dates, scheduled hearings and scheduling deliberations relating to hearings previously held.

**Item 8. Next meeting: April 13-16, 2010, 9:00 a.m., Location: State Capitol
Room 307, 490 Old Santa Fe Trail, Santa Fe, NM 87501.**

Item 9. Adjournment

Action: The meeting was adjourned by the Chair.

Signature on File

Carlos Romero, Acting Chair