

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

1190 St. Francis Drive, Room N2150

Post Office Box 26110

Santa Fe, New Mexico 87502

Telephone (505) 827-2425 Fax (505) 827-0310



Constituent Agencies

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

**Minutes of the
New Mexico Water Quality Control Commission Meeting
August 8, 2006
9:00 a.m.**

**New Mexico State Capitol, Rm 321
Santa Fe, New Mexico 87501**

MEMBERS PRESENT:

Cindy Padilla	Acting Chair, New Mexico Environment Department
Cheryl Bada	State Parks Division
Maxine Goad	Member-at-Large
Edward Vigil	Member-at-Large
Howard Hutchinson	Soil and Water Conservation Commission
Greg Lewis	Office of the State Engineer
Mike Sloane	Department of Game & Fish
Wayne Price	Oil Conservation Division
Julie Maitland	Department of Agriculture
Fred Lujan	Member-at-Large
Steve Glass	City of Albuquerque – Municipal/County Representative

MEMBER ABSENT:

Peggy Johnson	Bureau of Geology and Mineral Resources
---------------	---

OTHERS PRESENT:

Zach Shandler, WQCC Counsel	Heidi Henderson NMED/SWQB
Bill Olson, NMED/GWB	Violette Valerio-Hirschfeld, NMED
Nina Wells, NEMD/SWQB	William Schudlich
Jane DeRose Bamman, NMED/SWQB	Frank Weissbarth, Asst. NM Atty. General
Robert Parmeter	Elias Vigil

Ann McCampbell
Kathryn S. Becker
Arnold R. Atkins, MD
Felicia Orth, NMED/OOTS
Mike Coffman, NMED/SWQB
Ken Mosley

Sam Hitt
Staci Matlock
Kirk Patten, NMG&F
Kit Rousch
Rebecca (“Gert”) Perry-Piper
Joyce Medina, NMED

Cindy Padilla, Acting Chair, called the meeting of the WQCC to order at 9:05 a.m. Ms. Padilla then noted that since Ms. Watchman-Moore had returned to the Department, following a leave of absence, and resumed her position as Deputy Secretary, she is no longer Interim Deputy Secretary of NMED. She further stated that Secretary Curry had requested that she continue to act as Chair of the WQCC.

Ms. Padilla then introduced Commissioner Julie Maitland who is replacing Tim Darden as the representative from the New Mexico Department of Agriculture. She also mentioned that Ms. Maitland had previously served on the Commission.

Item 1. Roll Call:

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

Item 2. Approval of Agenda

Action: Mr. Sloane moved to approve the agenda. Ms. Goad seconded. The motion passed unanimously.

Item 3. Approval of the June 13, 2006 meeting minutes; approval of the June 29, 2006 Special Meeting minutes.

Ms. Goad noted amendments to be made in the June 13, 2006 meeting minutes.

Action: Mr. Sloane moved to approve the June 13, 2006 meeting minutes as amended. Ms. Goad seconded. The motion passed unanimously.

Ms. Goad noted amendments to be made in the June 29, 2006 Special Meeting minutes.

Action: Mr. Sloane moved to approve the June 29, 2006 Special Meeting minutes as amended. Mr. Lewis seconded. The motion passed unanimously.

Item 4. Approval of Final Draft for the Jemez River Watershed (Valles Caldera National Preserve to Headwaters) TMDL. Heidi Henderson, NMED/SWQB.

Ms. Henderson requested that the Commission approve the adoption of the final draft of this TMDL for incorporation into the State’s Water Quality Management Plan. She noted that under the federal Clean Water Act TMDLs must be incorporated into the Water Quality Management Plan to have official standing. She stated that the public notification for this TMDL included a public comment period that began May 15th and ended June 13th and that federal public participation requirements had been met. She went on to state that the TMDL was made available to the public on the Surface Water Quality

Bureau web site, at the public meeting in Jemez Springs as well as upon request. Public meeting notices were mailed, emailed, published and posted on the bureau's web site and there was a public meeting held on May 25, 2006 in Jemez Springs, NM at which nine individuals were present. She further noted that the bureau received various comments from the public and responded to those comments. Some of the requested revisions contained in those comments were incorporated into the Final Draft TMDL. Ms. Henderson discussed why other suggested revisions had not been made. In conclusion, she stated that the final draft version was made available to the Commission and to the public ten days prior to today's hearing.

Ms. Goad asked Ms. Henderson if the Valles Caldera National Preserve had applied for a Section 319 grant to repair the area. Ms. Henderson deferred to Bob Parmeter, who represents the Valles Calderas National Preserve, to answer Ms. Goad's question. Mr. Parmeter noted that the Preserve concurs with the finding of impairment of the streams and went on to note that the Preserve has a preliminary grant proposal application for submission to the State Water Trust Fund to establish a monitoring program. He went on to note that it is the intention of the Preserve to apply for Section 319 funding to begin rehabilitation of a number of areas along the streams. Mr. Parmeter mentioned that extensive logging in the area had contributed substantially to erosion and turbidity issues and that the heavy grazing that has occurred over the past 200 years has created serious problems with many stream banks.

The Chair then opened the public comment period.

Ms. Rebecca Perry-Piper stated that she had comments she wished to make and also that she had written materials she wished to distribute to the Commission. She then discussed those distributed materials with the Commission as well as expressing her views with respect to the proposed TMDL.

Following a lengthy Commission discussion with NMED staff and Ms. Perry-Piper it was agreed that certain revisions would be made to the Final Draft TMDL.

Action: Mr. Glass moved substitution of the following language for sentence 4 in the current TMDL at §7.1, "Stakeholders currently involved in the JWG include members of the general public, representatives of acequia associations, water users, private landowners, local government, environmental groups, state and federal agencies, and some of the Pueblos." Mr. Price seconded.

Ms. Bada stated that she thought the text referred to in the motion should be inserted in addition to the current language §7.1 not substituted for that language.

At the request of the Chair, Mr. Glass restated his motion and moved the insertion of the following language as the fifth sentence at §7.1, page 53 of the current TMDL, and at page 4 of the Watershed Restoration Action Strategy: "Stakeholders currently involved in the JWG include members of the general public, representatives of acequia associations, water users, private landowners, local government, environmental groups, state and federal agencies, and some of the Pueblos." Mr. Price seconded. The motion carried unanimously.

The Chair mentioned earlier discussion regarding Mr. Lewis's suggestion that the cover page of the TMDL be revised to include the map currently appearing at page 7 of the document. The Commission then discussed with Ms. Perry-Piper what might be the most helpful manner in which to revise the cover page of the TMDL. There was discussion with NMED staff regarding what additional language they considered appropriate on the cover page. There was additional discussion with NMED staff relating to the inclusion of language in the TMDL Executive Summary indicating that the stream segments that are the subject of this TMDL are part of the larger watershed that eventually drains to the Rio Grande.

Action: Mr. Glass moved that the following language be added, parenthetically, to the cover page of the TMDL "East Fork Jemez River and Jaramillo Creek VCNP Boundary to Headwaters" and that a second sentence be added to the TMDL Executive Summary stating that the Jemez River Watershed is tributary to the Rio Grande. Ms. Bada seconded. The motion carried unanimously.

Commission discussion with Ms. Perry-Piper followed regarding the use of personal address information obtained by the Department. Mr. Sloane suggested that the Department send letters to those property owners whose names and addresses are used making clear that the information would be utilized only in the context of notify them of pending official Department matters. There was also discussion with Department staff requesting the development of a standardized list of definitions of terms which would be used in all future TMDLs.

Action: Mr. Glass moved that the Commission adopt the Final Draft of the Jemez River Watershed, Valles Caldera National Preserve TMDL, as amended, into the Water Quality Management Plan. Ms. Bada seconded. The motion carried unanimously.

Item 5. Deliberation and possible decision in WQCC 05-14(R), In the Matter of the Petition by the Dept. of Game & Fish for the Use of Piscicides to Restore the Native Fish Community in the Rio Costilla Watershed, Taos County, heard February 22, 2006, by Felicia Orth, NMED Hearing Officer.

The Chair introduced Felicia Orth, NMED Hearing Officer and requested that she present her comments relating to this case. Ms. Orth discussed her Hearing Officer's Report at some length. She specifically referred to written public comments, copies of which were distributed to the Commission, that she had received regarding the use of piscicides in the Rio Costilla Watershed. She noted that all notice protocols to downstream users had been performed. Additionally, she mentioned that she would recommend conditioning any Commission approval on the issues set out by the Surface Water Quality Bureau in its document dated December 6, 2005.

Discussion on this matter was initiated by Ms. Goad who stated that she wanted to make very sure that specific language was included in any motion before the Commission that would prohibit aerial application. Mr. Sloane, as the representative on the Commission from the Game & Fish Department, answered member questions relating to the scope and focus of the proposed project. Ms. Goad and Mr. Sloane discussed the need for appropriate procedures in mixing and applying the piscicides.

The Chair noted that the Findings of Fact and Conclusions of Law, Closing Arguments, the Hearing Officer's Report and recommendations for the Commission that have been filed in this case provide in-depth case information as well as setting out options for Commission action.

Action: Mr. Price moved to approve the request made by the Game & Fish Department for the Use of Piscicides to Restore the Native Fish Community in the Rio Costilla Watershed, Taos County. Ms. Bada seconded.

Mr. Hutchinson asked Mr. Price if the motion included the Hearing Officer's suggestion regarding the inclusion of the recommendations from NMED. Additionally, Ms. Goad asked if the motion included her recommendation prohibiting aerial application. Mr. Price answered both questions in the affirmative.

After a short discussion, Ms. Orth stated that if the Commission considered the Findings of Fact and Conclusions of Law submitted by Mr. Weissbarth and the Game & Fish Department, which she had recommended for Commission adoption, the final order in this case would state that the Commission accepted her report, her recommendation to adopt the Findings and Conclusions submitted by Game & Fish and its counsel and, that the petition be approved with the two conditions mentioned by Mr. Hutchinson and Ms. Goad.

Mr. Shandler pointed out to the Commission that in approving this petition it is not required to state why it did not accept the criticism of a party but he felt it was appropriate to build a public record. He mentioned the 99% genetic purity standard statement referenced in Dr. McCampbell and Mr. Hitt's Findings and Conclusions, at paragraph 9. He noted that there was no reference to this issue in the Petitioner's findings and conclusions and asked if anyone wished to comment on the purity standard matter. Mr. Sloane stated that the 99% purity standard was adopted in the Long Range Management Plan for Rio Grande Cutthroat Trout and was used in the status review that was conducted by the U. S. Fish and Wildlife Service as the standard against which it judges whether populations would count toward listing as an endangered species. He noted also that there is a letter referenced in the case documentation from the Fish and Wildlife Service stating that 99% standard is what it would use to determine whether population counts toward listing.

Mr. Shandler mentioned the need for Commission discussion relating to piscicides and the Valle Vidal as set out in Petitioner's Findings of Facts numbered 57 and 58. He went on to state that Commission members should review those findings and make sure that they concur.

There was Commission discussion regarding the referenced findings, the Valle Vidal status as an ONRW and the perceived impact of piscicides.

Mr. Shandler noted that the next point for additional discussion was the fact that Game & Fish was in the process of writing an environmental analysis and mention had been made of an Environmental Impact Statement. Mr. Sloane stated that he did not believe that the Commission needed to rely on any environmental assessment or any federal process to make a decision and move forward. He went on to say that those are separate matters. He noted that NEPA is a entirely separate from the Commission's decision making process. Ms. Orth added that documents provided relating to NPDES and NEPA were solely for member information and not to be used as a basis for member decision making.

Mr. Shandler brought up for Commission consideration those issues contained in the McCampbell/Hitt Findings and Conclusions at paragraph 4 relating to the efficacy of requiring a small area pilot program to determine impact. Ms. Orth stated that at the hearing on this matter, she did not hear or take into the record substantial evidence which would support the distinction between what was proposed by the Petitioner and what is described in the referenced paragraph 4. Mr. Hutchinson and Ms. Orth discussed the fact that this matter is not a rulemaking issue but falls under the designation of Part 16, Special Approval. A lengthy discussion was conducted with Mr. Hutchinson relating to knowledge within the membership that bears on this issue but is not necessarily in the administrative record. Mr. Shandler stated that members were allowed to bring their specialized knowledge to a deliberation but cautioned against bringing in anything that was not in the record. Ms. Orth added comments relating to the concept of what constitutes administrative notice. Discussion continued regarding the types of piscicides that would be used by Game & Fish and the need for caution in applying them.

Additionally, Mr. Shandler mentioned paragraph 5 of the McCampbell-Hitt Findings and Conclusions requesting Mr. Sloane recuse himself from voting on this petition. Mr. Shandler noted that under statute Mr. Sloane was not required to recuse himself from voting.

Mr. Glass asked that the motion be amended to include McCampbell-Hitt Findings and Conclusions paragraph 4, subparagraphs a. and b. in their entirety and in the case of subparagraph h. as follows: specifically analyzing downstream for acetone, diethyl phthalate (in the case of Fintrol use), rotenone and rotenolone (in the case of rotenone use) as well as diethylene glycol ethyl ether and 1-methyl-2 pyrrolidone (in the case of CFT Legumine use), analysis of the water for the indicated chemicals during the treatment period would be adequate and once the chemicals are no longer detected downstream there would be no further need to analyze and, finally, the samples should be taken at a point downstream where the pulse would be and if, for instance, 30 minutes after the treatment is applied and perhaps two hours after treatment is applied if traces cannot be found where the pulse would be, then testing would be done.

Following the introduction of these proposed amendments, a discussion regarding the difficulties inherent in testing in the manner described by Mr. Glass was held. It was suggested by Mr. Sloane that since the tests are actually performed in Albuquerque, testing could more reasonably be done at three intervals when the piscicides are applied, during application, 24 hours after initial application and 48 hours after initial application. He added that testing is ordinarily done below the detoxification center or at some specific place downstream that is meaningful. Mr. Sloane explained that Game & Fish has performed similar procedures in the past based upon orders issued by the Commission.

Mr. Glass continued his request for amendment of the motion asking to include additional McCampbell-Hitt Findings contained in paragraph 4, subparagraph i. relating to the testing of lake sediment for rotenone and rotenolone. Mr. Sloane pointed out that testing stream sediment would probably not provide any meaningful data. Mr. Glass also suggested that subparagraphs m. and n. be included in its entirety.

Mr. Glass moved for a friendly amendment to Mr. Price's original motion to include the sampling described above with the limitation on in-stream sampling

to during treatment, 24 hours after treatment and 48 hours after treatment. With respect to lakes, sample both water column and sediment before any water is released from a reservoir. Said samples should be taken at one foot below the surface, mid-column, and one foot above the sediment. Mr. Price accepted the inclusion of Mr. Glass's friendly amendments into his original motion.

Mr. Shandler mentioned a reference in the Hearing Officer's Report at page 75 regarding Ramon Pacheco, who is part of the Sangre de Cristo Growers. Mr. Pacheco grows organic wheat. He is concerned that the piscicides will have a negative impact upon livestock and agriculture. Additionally, he was concerned about the possible loss of organic certification for produced crops. Mr. Sloane noted that the evidence in the record from the Organic Commodities Commission indicates that antimycin has no affect on organic certification. Mr. Sloane stated he believed that if antimycin/fintrol were acceptable then rotenone products would be acceptable but it is not 100% clear from the record. He also noted that the organic farms are quite distant from the water.

A roll call vote was taken and the motion, with all accepted amendments, carried, 8 votes in the affirmative; 1 vote in the negative and 2 votes abstaining.

Commission vote

Cindy Padilla	yes
Greg Lewis	yes
Wayne Price	yes
Cheryl Bada	yes
Steve Glass	yes
Julie Maitland	abstained
Mike Sloane	yes
Howard Hutchinson	no
Maxine Goad	abstained
Edward Vigil	yes
Fred Lujan	yes

Item 6. Deliberation and possible decision re: Amendments to 20.7.4 NMAC Pursuant to 2005 statutory changes to NMSA 1978, §§61-33-1, 66-33-10 (HB153), WQCC 06-01 (R); Utility Operators Certification Regulations.

Kit Rousch and William Schudlich were seated as members of the Commission in this matter.

The Chair noted after consulting with Mr. Shandler that the Commission deliberations would be based solely upon the record since no Hearing Officer's Statement has been prepared relating to this matter.

Ms. Goad stated that she had reviewed Attachment 2 to the Statement of Reasons and compared those documents with what was proposed at the June hearing and thought that each Commission requested revision had been made.

The Chair expressed appreciation for the Department's work relating to handling the concerns that were set out by Commissioners.

There was lengthy discussion regarding levels of laboratory technician certification as they relate to the difficulty of tests performed at a facility. There was also discussion about the concept of population based laboratory qualification requirements as well as what would be workable alternatives to that concept which would reflect the complexity of the tests.

Mr. Glass proposed that additional language be added to NMED's Proposed Statement of Reasons under Section 20.7.4.29, Utility Operators Certification Advisory Board, creating a new paragraph at G.(1)(d), proposing criteria for the classification of wastewater laboratory technicians based on the complexity of analytical work performed.

Discussion continued regarding whether an operator of a small facility should be required to obtain laboratory technician certification. After discussion, Mr. Glass suggested that new paragraph G.(1)(d) also include a reference to text from line 3 at page 108 through line 11 at page 109 of the Transcript of Proceedings in this case. Mr. Rousch pointed out that it seemed unnecessary to him that someone would be required to acquire separate lab technician certification for a number of tests that an operator would not be running just so that operator could do process control testing.

The Chair pointed out to the Commission that the role of Utility Operators Advisory Board is to answer questions or provide clarification to the Commission at any juncture in a proceeding regarding matters which would require the Board's expertise.

Mr. Glass moved to amend the text in Section 20.7.4.29, Utility Operators Certification Advisory Board, by creating a new paragraph at G.(1)(d), assigning responsibility to the Advisory Board for developing criteria for the classification of wastewater laboratory technicians based on the complexity of analytical work performed, as well as adding appropriate explanatory language referencing text from line 3 at page 108 through line 11 at page 109 of the Transcript of Proceedings in this case, into NMED's Statement of Reasons and the Amendments to 20.7.4 NMAC Pursuant to 2005 statutory changes to NMSA 1978, §§61-33-1, 66-33-10 (HB153), WQCC 06-01 (R); Utility Operators Certification Regulations. Mr. Price seconded.

Action: The Chair called the question of Mr. Glass's motion for additional text in NMED's Statement of Reasons at Section 20.7.4.29 paragraph G.(1)(d) as stated above. The motion carried unanimously.

Action: Mr. Glass moved to adopt the Regulations and NMED's Statement of Reasons as amended. Ms. Goad seconded. The motion carried unanimously.

Item 7. **Executive session to discuss settlement offer pursuant to 10-15-2-H7; WQCC and NMED v. Richard Garcia, CV2005-1091, First Judicial District Court, Santa Fe County, New Mexico.**

Action: Mr. Sloane moved that the Board go into executive session to discuss the case of WQCC and NMED v. Richard Garcia, CV2005-1091, First Judicial District Court, Santa Fe County, New Mexico. Ms. Bada seconded.

A roll call vote was taken and the motion carried unanimously.

Commission vote

Cindy Padilla	yes
Greg Lewis	yes
Wayne Price	yes
Cheryl Bada	yes
Steve Glass	yes
Julie Maitland	yes
Mike Sloane	yes
Howard Hutchinson	yes
Maxine Goad	yes
Edward Vigil	yes
Fred Lujan	yes

The Chair requested that all persons other than Commission members leave the meeting while the Commission conducted its executive session.

The Commission returned from executive session.

Mr. Glass stated that during the executive session the Commission discussed only issues pertaining to WQCC and NMED v. Richard Garcia, CV2005-1091, First Judicial District Court, Santa Fe County New Mexico and pursuant to 10-14-27 and no other matters.

Action: Ms. Maitland moved that the Board reconvene in open session following The executive session to discuss the case of WQCC and NMED v. Richard Garcia, CV2005-1091, First Judicial District Court, Santa Fe County, New Mexico. Mr. Lewis seconded.

A roll call vote was taken, the motion carried unanimously.

Commission vote

Cindy Padilla	yes
Greg Lewis	yes
Wayne Price	yes
Cheryl Bada	yes
Steve Glass	yes
Julie Maitland	yes
Mike Sloane	yes
Howard Hutchinson	yes
Maxine Goad	yes
Edward Vigil	yes
Fred Lujan	yes

The Chair stated that she would entertain a motion relating to an offer of settlement in this case.

Action: Mr. Vigil moved that the Commission accept the offer of settlement proposed in the matter of WQCC and NMED v. Richard Garcia, CV2005-1091, First Judicial District Court, Santa Fe County, New Mexico, presented by Kathryn Becker of the Office of General Counsel of NMED and Zachary Shandler, Commission. Ms. Goad seconded.

A roll call vote was taken, the motion carried unanimously.

Commission vote

Cindy Padilla	yes
Greg Lewis	yes
Wayne Price	yes
Cheryl Bada	yes
Steve Glass	yes
Julie Maitland	yes
Mike Sloane	yes
Howard Hutchinson	yes
Maxine Goad	yes
Edward Vigil	yes
Fred Lujan	yes

Item 8. Other business:

Bill Olson, Bureau Chief, Ground Water Bureau distributed copies of the new WQCC regulations.

Mr. Glass asked for an update on the Joint Petition for Rehearing in the Court of Appeals relating to the Phelps Dodge Tyrone case. Mr. Shandler noted that since the Court of Appeals denied the motion for rehearing, the next step in the process would be the filing of an Application for Writ of Certiorari with the Supreme Court. It is the intention of NMED to file the application and if the Supreme Court grants it, the case will then be heard by that Court.

The Chair noted that the Commission member packets had included information relating to the Rio Puerco TMDL September 12, 2006 public hearing meeting to be held in Cuba, New Mexico. The hearing will deal with the revised final draft TMDL for the Rio Puerco.

Item 9. Next meeting – September 12, 2006, Cuba, New Mexico

Item 10. Adjournment:

Mr. Sloane moved for adjournment. Mr. Glass seconded the motion. The motion for adjournment passed unanimously. The meeting adjourned at 2:45 p.m.