



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 STRIKE ENTRY OF
APPEARANCE OF ATTORNEY GENERAL**

Preliminary Statement

The New Mexico Environment Department (“NMED”) moves to exclude the New Mexico Attorney General from participating in this public rulemaking. The New Mexico Water Quality Act (“WQA”), however, allows “all interested persons” to participate in rulemakings before the Water Quality Control Commission (“Commission”). NMSA 1978, § 74-6-6(D). Under the WQA, state agencies such as the Office of the Attorney General are “persons” entitled to participate in Commission rulemakings. *Id.* § 74-6-2(I). The Attorney General has a right under the WQA to participate.

Furthermore, the Attorney General has statutory authority, “except as otherwise provided by law,” “to appear before local, state and federal courts and *regulatory officers, agencies and bodies*, to represent and to be heard on behalf of the state *when, in his judgment, the public interest of the state requires such action public . . .*” *Id.* § 8-5-2(J) (emphasis added); *see also id.* § 8-5-2(B). NMED argues that its general authority to administer and enforce environmental laws is law that, by implication, otherwise precludes the Attorney General from participating in this rulemaking. NMED Mot. to Strike, pp. 4-6. NMED, however, does not disclose to the Commission that the New Mexico courts have held that a limitation on the Attorney General’s authority “provided by law” must be *express*. *State v. Block*, 2011-NMCA-101, ¶¶ 19, 23, 150

N.M. 598, 604-05. There is no express limitation in law on the Attorney General's authority to participate in this rulemaking.

The Attorney General has a right under the WQA, *id.* § 74-6-6(D), and the authority under his statutory powers, *id.* § 8-5-2(B), (J), to participate in this rulemaking. NMED's motion has no basis in law or fact, and should be summarily denied.

Legal Framework and Background

I. ANY "INTERESTED PERSON," INCLUDING A STATE AGENCY SUCH AS THE ATTORNEY GENERAL'S OFFICE, HAS THE RIGHT TO PARTICIPATE IN A COMMISSION RULEMAKING

The WQA authorizes the Commission to promulgate regulations and water quality standards through rulemaking after a "public hearing." *Id.* §§ 74-6-4(D), (E), (K); -6(A). The Commission must give notice to the public of the hearing and "the manner in which *interested persons* may present their views." *Id.* § 74-6-6(C) (emphasis added).

At the hearing, the commission shall allow *all interested persons* reasonable opportunity to submit data, views or arguments orally or in writing and to examine witnesses testifying at the hearing.

Id. § 74-6-6(D) (emphasis added). Under the WQA, "person" includes "the state or a political subdivision of the state." *Id.* § 74-6-2(I).¹ Thus, rulemakings under the WQA – like virtually all rulemakings under state and federal laws – allow broad participation by individuals, businesses, and government agencies. All of these "interested persons" – including state entities like the Attorney General -- have the right to present witnesses, exhibits and argument, and to cross-examine witnesses at the rulemaking. *Id.*

The Commission has established guidelines for conducting its rulemakings. *See Guidelines for Water Control Commission Regulation Hearings* (1993) ("*Commission*

¹ Under the WQA, "person" is broadly defined as "an individual or any other entity, including partnerships, corporations, associations, responsible business or association agents or officers, the state or a political subdivision of the state or any agency, department or instrumentality of the United States and any of its officers, agents or employees . . ." *Id.* § 74-6-2(I).

Guidelines”) [<http://www.nmenv.state.nm.us/wqcc/WQCC1993Guidelines.pdf>]. According to the *Commission Guidelines*, their purpose is to:

A. to *encourage participation* in the hearings conducted by the, Commission for the promulgation of regulations;

B. to make possible the effective presentation of the evidence and *points of view of parties and members of the general public*;

C. to *allow all interested participants* a reasonable opportunity to submit data, views, arguments orally or in writing;

Commission Guidelines, § 102(A), (B), (C). “Person” means “an individual or any entity, including federal, *state*, and local *government entities, however organized*;” *Id.* § 103(J) (emphasis added). At rulemaking hearings, the Hearing Officer “shall conduct the hearing so as to provide a reasonable opportunity for *all persons* to be heard” without unnecessary delay. *Id.* § 401(B) (emphasis added). At the hearing, “any person” may be allowed to give an opening statement or closing argument, “any person” may conduct cross-examination, and “any person” may offer exhibits. *Id.* §§ 401(B)(2), (6); 402(C); 403(A). The Commission’s Guidelines, like the requirements of the WQA, allow without limitation broad participation in Commission rulemakings by individuals, businesses and government entities, including the Attorney General and other state government entities.

The Commission issued a Notice to the Public of this rulemaking published in the State Register. *See* Notice to Public [http://www.nmenv.state.nm.us/wqcc/Matters/13-08R/Item008_NewspaperPublications-NMRegister.pdf]. The notice restated, without limitation, the WQA’s requirement that “all interested persons” are allowed to participate in the rulemaking. Notice to the Public, p. 1.

The Commission’s Hearing Officer issued a Procedural Order governing this rulemaking. The Procedural Order restates the WQA’s statutory requirements and the *Commission Guidelines*

authorizing without limitation participation by any person in the rulemaking. *E.g.*, Procedural Order, §§ 303; 401(B); 402(C); 403(A).

There are no limitations in the WQA, *Commission Guidelines* or Procedural Order on participation of individuals, businesses or governments. In particular, there is no limitation on the right of the Attorney General to participate. To the contrary, the WQA, *Commission Guidelines* and Procedural Order authorize the broad participation by individuals, businesses, and governments in Commission rulemakings under the WQA.

II. THE ATTORNEY GENERAL HAS STATUTORY AUTHORITY TO PARTICIPATE IN RULEMAKINGS

The Attorney General's statutory authority to represent the state and to appear in legal proceedings is broad. *See* NMSA 1978, § 8-5-2. In particular, the Attorney General has authority to:

appear before local, state and federal courts and *regulatory officers, agencies and bodies*, to represent and to be heard on behalf of the state *when, in his judgment, the public interest of the state requires such action*

Id. § 8-5-2(J) (emphasis added); *see also id.* § 8-5-2(B) (Attorney General has authority to “prosecute and defend in any other court or *tribunal all actions and proceedings*, civil or criminal, in which the state may be a party or interested *when, in his judgment, the interest of the state requires such action*”) (emphasis added). Section 8-5-2(J) expressly allows the Attorney General to participate in proceedings before “regulatory officers, agencies and bodies” when he determines the “public interest of the state” requires participation. Such proceedings include rulemakings before the Commission.

The New Mexico Supreme Court has held, in the context of the Attorney General bringing a civil action, that, “[t]he language of [Section 8-5-2(B) and (J)] grants the attorney general discretion in determining when the public interest requires him to bring a civil action on

behalf of the state.” *State ex rel. Bingaman v. Valley Sav. & Loan, Ass’n*, 1981-NMSC-108, ¶ 6, 97 N.M. 8, 10. That holding applies with equal force to the Attorney General’s authority under those provisions to participate in an administrative action, “when, in his judgment, the state is in need of protection.” *Id.* The Attorney General’s participation in this rulemaking represents the exercise of his authority under Section 8-5-2(B) and (J) and his judgment that the public interest in protecting the State’s ground water warrants his entry as a party in this proceeding.

Argument

I. THE ATTORNEY GENERAL HAS CLEAR AUTHORITY TO PARTICIPATE IN THIS RULEMAKING

NMED acknowledges the Attorney General’s authority in Section 8-5-2, but argues his authority is limited and he cannot participate in this rulemaking by virtue of NMED’s general authority to administer and enforce environmental laws. NMED Mot. to Strike, pp. 4-6. NMED argues that its general authority is law that otherwise precludes the Attorney General from exercising his statutory authority under Section 8-5-2. *Id.*

This argument reaches the absurd. First, NMED’s general authority to administer and enforce certain environmental laws has nothing to do with whether the Attorney General -- or any other “person” under the WQA -- can participate in rulemakings before the Commission. NMED’s authority to administer and enforce the WQA and other environmental acts does not preclude -- expressly or impliedly -- the Attorney General or any other “interested person” from participating in Commission rulemakings. NMED has cited no specific statutory provision or any case law in support of this nonsensical argument.

Second, any restriction in law on the Attorney General’s authority under Section 8-5-2 must be *express*. *Bingaman*, 1981-NMSC-108, ¶ 6, 97 N.M. at 10. The Attorney General’s statutory authority under Section 8-5-2 cannot be restricted by implication. *Id.* There is no

express provision in the WQA or any other law restricting the Attorney General's authority to participate in rulemakings before the Commission. As the New Mexico courts have observed in the context of the Attorney General's criminal authority, "[t]he attorney general is the State's highest ranking law enforcement officer, elected by the people of New Mexico. For a court to forbid the attorney general from engaging in a prosecution within the jurisdiction of the office is a serious encroachment on the executive branch." *State v. Armijo*, 1994-NMCA-136, ¶ 48, 118 N.M. 802, 815 (citation omitted). An administrative agency – with less authority to review the actions of the Attorney General than the courts – excluding the Attorney General from engaging in a rulemaking within his jurisdiction would similarly represent a serious encroachment on the authority of the Attorney General.

Third, while NMED has authority to administer and enforce certain environmental laws, *NMED stands in no different position than the Attorney General in terms of a right to participate in rulemakings under the WQA*. According to the WQA, NMED is authorized:

on the same basis as any other person, [to] present data, views or arguments and examine witnesses and otherwise participate at all hearings conducted by the commission or any other administrative agency with responsibility in the areas of environmental management, public health or consumer protection, but shall not be given any special status over any other party;

NMSA 1978, § 74-6-9(G) (emphasis added); *see also id.* § 74-6-9(F) (NMED may “*on the same basis as any other person, recommend and propose regulations and standards for promulgation by the commission . . .*”) (emphasis added). NMED has no special statutory authority or responsibility in rulemakings before the Commission. NMED is not even obligated to participate in rulemakings before the Commission.² NMED's claim that because it is participating in this rulemaking, the Attorney General cannot, has no basis in law, and is in fact contrary to the WQA

² With respect to the *initial* rules for the dairy and copper industries, NMED was charged with forming a stakeholder group and filing the petition for rulemaking with the Commission. NMSA 1978, 74-6-4(K). NMED has no such statutory role with respect to amendments to the rules for the dairy and copper industries. *See id.*

giving NMED the same status as any other party in this rulemaking and no “special status” over any other party .

NMED makes various other meritless arguments why the Commission should exclude the Attorney General. NMED argues that the environmental groups represent the public and therefore the Attorney General has no place representing the public interest. NMED Mot. to Strike, pp. 5-6. Private environmental groups, of course, do not represent the State of Mexico, as does the Attorney General. The Attorney General, as the State’s chief elected legal officer, has a different role to play protecting the State’s interests than private actors.

NMED argues that because the Attorney General did not file a notice of intent to present technical testimony, his participation will be “confusing.” NMED Mot. to Strike, p. 6. This is a preposterous assertion. There is no confusion: as a party, the Attorney General would be entitled to service of all pleadings, to give an opening statement and closing argument if those are permitted, to cross-examine witnesses, to use exhibits for cross-examination, to present rebuttal witnesses and exhibits, to file motions, and to file proposed findings of fact and conclusions of law if those are permitted. Other entities have participated in Commission rulemakings as “parties” without filing notices of intent and without confusing the proceedings. For example, in the Copper Mine Rule proceeding before the Commission, the New Mexico Mining Association entered its appearance as a party, but did not file a notice of intent. *See* Entry of Appearance for the New Mexico Mining Association, *In the Matter of Proposed Amendments to 20.6.2 NMAC, the Copper Rule*, WQCC No. 12-01(R) [<http://www.nmenv.state.nm.us/wqcc/documents/Entryofappearance12-01RoseIndall.pdf>]. NMED did not object to the Mining Association’s entry as a party without filing a notice of intent. The Commission can take notice that nobody was confused by the Mining Association’s

participation as a party in that proceeding.

II. NMED SHOULD BE ADMONISHED

NMED appears to be developing a pattern of filing meritless motions to exclude the participation of the Attorney General from legal proceedings with which it is involved. NMED filed a motion similar to the instant motion in an NMED permit proceeding to conduct horse slaughter operations, *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). See NMED Mot. to Strike [Ex. A]. The Attorney General objected to the motion. AGO Memo. in Opp. [Ex. B]. Under the WQA, in a hearing on a permit application, just as in a rulemaking hearing, “all interested persons shall be given a reasonable chance to submit evidence, data, views or arguments orally or in writing and to examine witnesses testifying at the hearing.” NMSA 1978, 74-6-5(G). The experienced and respected NMED Hearing Officer denied NMED’s motion based on the “breadth of public participation” authorized in the Commission’s regulations and past practice where other constitutional officers within the executive branch had appeared and participated in NMED hearings.³ 10-22-13 Tr. 17:9-15 [Ex. C]; HO Report, pp. 12-13 [Ex. D].

NMED’s Motion to Strike has no “good ground to support it.” See Rule 1-011(A) NMRA. NMED is on notice that its instant motion to exclude the participation of the Attorney General has no basis in law or fact, based on the ruling on its previous motion to exclude the Attorney General from the NMED permit proceeding. Both motions are based on the same statutory frameworks and same legal analysis. While the Commission does not have authority to sanction NMED for filing a frivolous motion, the Commission can and should admonish NMED

³ The Attorney General appeared without objection as a party in the Copper Mine Rule proceeding before the Commission, No. WQCC 12-01(R), and in a Triennial Review proceeding before the Commission, *In the Matter of Proposed Amendments to 20 NMAC 6.1, Standards for Interstate and Intrastate Streams*, WQCC [1998-99].

for wasting the public resources of the Commission, the Attorney General, and NMED by filing its motion.

Conclusion

For the reasons set forth above, the Attorney General respectfully requests the Commission to deny NMED's motion to exclude the Attorney General from participating in this rulemaking.

Respectfully submitted,

GARY KING
NEW MEXICO ATTORNEY GENERAL



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**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)

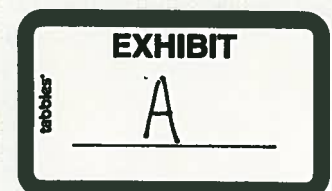
**MOTION TO STRIKE ENTRY OF APPEARANCE OF
NEW MEXICO ATTORNEY GENERAL'S OFFICE**

The New Mexico Environment Department ("Department") hereby moves the Hearing Officer to strike the entry of appearance of the New Mexico Attorney General ("Attorney General"), entered on October 9, 2013 in its Notice of Intent to Present Technical Testimony, which serves as an entry of appearance per 20.1.4.300.A(1) NMAC. The Attorney General has improperly entered into the current permitting action now before the Secretary of the Environment Department which is contrary to the laws of the State of New Mexico.

I. BACKGROUND

The Department of Environment Act ("Act"), NMSA 1978, Section 9-7A-1 to -15 (2005), creates the New Mexico Department of Environment. The Act's purpose is to "*establish a single department to administer the laws and exercise the functions relating to the environment formerly administered and exercised by the health and environment department.*" NMSA 1978, § 9-7A-3 (emphasis added).

As set forth by the New Mexico Legislature, the Secretary of the Environment ("Secretary") is the sole official responsible for the management and operation of the Department and has the responsibility "to administer and enforce the laws with which he or the



department is charged.” NMSA 1978, § 9-7A-6(A). The Secretary has every power expressly enumerated in the law(s), whether granted to the Secretary, the Department or any division of the Department. § 9-7A-3(B). The Secretary may delegate specific duties, obligations, and responsibilities; however, the Secretary at all times retains full authority of the Department. § 9-7A-3(B)(1)-(2).

The Secretary’s expressed duties include the legislative directive to “take administrative action by issuing orders and instructions . . . to assure implementation of and compliance with the provisions of law for which administration or execution he is responsible and to enforce those orders and instructions by appropriate administrative action or actions in the courts.” § 9-7A-3(B)(5).

New Mexico Environment Department Jurisdiction

The Legislature also enacted the Environmental Improvement Act (“EIA”). Its purpose “is to create a *department that will be responsible for environmental management . . . in order to ensure an environment that in the greatest possible measure will confer optimum health, safety, comfort and economic and social well-being on its inhabitants; will protect this generation as well as those yet unborn from health threats posed by the environment; and will maximize the economic and cultural benefits of a healthy people.*” NMSA 1978, § 74-1-1 to -17 (2013). The Environment Department was given broad and extensive powers by the Legislature including, but not limited to, the right to sue and be sued, to make contracts, to “enforce the rules, regulations and orders promulgated by the board and environmental management and consumer protection laws for which the department is responsible by appropriate action in courts of competent jurisdiction,” and to maintain “such other powers as may be necessary and appropriate for the exercise of the powers and duties delegated to the department.” NMSA 1978, § 74-1-6;

see also State ex rel. Norvell v. Arizona Pub. Serv. Co., 85 N.M. 165, 510 P.2d 98 (1973) (state district court action brought by Attorney General for injunctive relief and abatement of public nuisance caused by a power plant was improper since the environmental improvement agency, now the Environment Department, had primary jurisdiction over pollution control).

New Mexico law recognizes the common law doctrine of “primary jurisdiction.” *Id.* at 171. As the New Mexico Supreme Court reasoned, “the legislature has created the agency in order to afford a systematic method of factfinding . . . and the agency’s jurisdiction should be given priority.” *Id.*

Water Quality Control Commission

As part of its overall goal to protect the environment of the State, the Legislature also enacted the Water Quality Act (“WQA”), NMSA 1978, § 74-6-1 to -17 (2013). The WQA in turn authorized the creation of the Water Quality Control Commission (“WQCC”). It is this commission’s duty and power to, among other things: (1) adopt a comprehensive water quality management program; and (2) adopt water quality standards for surface and ground waters that protect, at minimum, the public’s health and welfare, enhance the quality of water and serve the purposes of the WQA. NMSA 1978, § 74-6-4. The WQCC has the authority to adopt regulations, Section 74-6-6, issue ground water discharge permits, Section 74-6-5, and issue civil and criminal orders and penalties, Sections 74-6-10, -10.1, and -10.2. Appeals of such constituent agency determinations are often to the WQCC and then to the NM Court of Appeals. *See generally* §§74-6-6 and -7.

Section 74-6-5 of the WQA governs the procedures for issuance of permits authorizing discharge of pollutants to surface and ground waters as well as the procedures governing appeals to the WQCC. As part of the issuance of any permit, the “constituent agency” may issue a

permit in accordance with rules adopted by the WQCC or deny the permit in accord with the statute or applicable rule. NMSA 1978, § 74-6-5. According to the WQA, a constituent agency includes the Department of Environment, Section 74-6-2(J), but does not include the New Mexico Attorney General or his office.

II. ARGUMENT

The Department requests that the Hearing Officer exclude the New Mexico Attorney General from participating in this matter, as the Department has Primary Jurisdiction in effecting the laws of the State in this instance. As such, entry of the New Mexico Attorney General is contrary and ultra vires to his statutory authority and jurisdiction as found in NMSA 1978, Section 8-5-2 (1975) (giving Attorney General authority to prosecute and defend civil or criminal actions in courts or tribunals in certain instances).¹ This is an administrative matter before the Secretary of the Environment related to issues specifically within the expertise and legislative authority of the Department, as outlined in the statutory authority provided *supra*.

It is inappropriate, where the Secretary and Hearing Officer are actively engaged in the administrative adjudication of an agency action for the Attorney General to supersede legislative directive and the primary jurisdiction of the Department and enter into an active permit adjudication. *See e.g., State ex rel. Attorney Gen. v. Reese*, 78 N.M. 241, 430 P.2d 399 (Court found that entry of Attorney General to displace District Attorney who was actively pursuing the case was improper). Further, permit hearings where an applicant faces representation on behalf of the State of New Mexico by both the Department and the Attorney General's Office creates an

¹ The New Mexico Attorney General's Office, as authorized by law, should only enter the primary jurisdiction of the Department in this permitting matter to defend or represent the WQCC, pursuant to NMSA 1978, § 74-6-3.1. This matter is currently not before the WQCC and therefore the Attorney General does not have statutory authority to represent the interest of the WQCC at this point in the proceeding.

impropriety that must be avoided for the state and the Department to execute its statutory and regulatory requirements.

III. CONCLUSION

For these reasons, the Department respectfully requests that the Hearing Officer exclude the Attorney General's Office from the current proceedings.

Respectfully submitted,

NEW MEXICO ENVIRONMENT DEPARTMENT

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

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CERTIFICATE OF SERVICE

I hereby certify that on October 13 2013 a copy of the Department's Motion to Strike Entry of Appearance of New Mexico Attorney General's Office was delivered to:

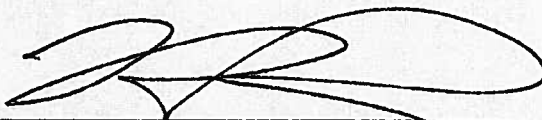
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Kevin J. Powers

Re: *GWB 13-05 (P)*

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

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

No. GWB 13-05 (P)

**MEMORANDUM IN OPPOSITION TO NEW MEXICO ENVIRONMENT
DEPARTMENT'S "MOTION TO STRIKE ENTRY OF APPEARANCE OF NEW
MEXICO ATTORNEY GENERAL'S OFFICE"**

Minutes before the pre-hearing telephonic conference in this matter began on October 18, 2013, the New Mexico Environment Department (the "Department") filed a motion to prevent the Attorney General from appearing in the instant water discharge permit hearing in any fashion. The Department cites no authority for its startling proposition that one instrumentality of state government should be allowed to silence another. Even more strikingly, the Department's motion contravenes its own regulations and the state law underlying those regulations, as well as the fundamental principles animating our state's administrative hearing procedures, and should be denied in its entirety. The Attorney General files this short memorandum to amplify the arguments made by the undersigned counsel during the pre-hearing telephonic conference, and to demonstrate that far from being "ultra vires" or improper, the Attorney General's participation in these proceedings is protected by statute and indeed *mandated* to protect the public interest.

New Mexico law is clear that the Attorney General not only has the right, but the statutory duty, to participate in administrative proceedings regardless of the position taken by separate offices or agencies of state government. "Except as otherwise provided by law, the attorney general *shall*" perform the duties enumerated in the statute, including to

appear before local, state and federal courts *and regulatory officers, agencies and bodies*, to represent and to be heard on behalf of the state when, in his judgment, the public interest of the state requires such action or when requested to do so by the governor...

EXHIBIT

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submitting evidence, data, views or arguments shall be subject to examination at the hearing.” NMSA 1978, § 74-6-5(G) (emphasis added). The Water Quality Act defines “person” as “an individual or any other entity, including partnerships, corporations, associations, responsible business or association agents or officers, the state or a political subdivision of the state or any agency, department or instrumentality of the United States and any of its officers, agents or employees.” NMSA 1978, § 74-6-2(I). It is beyond dispute that the Attorney General meets the Water Quality Act’s expansive definition of “person.” The Department’s own regulations governing permit procedures, 20 NMAC 1.4, echo the Water Quality Act’s intention to facilitate broad public participation by all interested “persons”: “Any person who wishes to be a party shall file, and serve upon all other parties of record, an Entry of Appearance, on or before the deadline set forth in the Notice of Hearing.” 20.1.4.300.A(1) NMAC. Neither the Water Quality Act nor the relevant Department regulations exempt the Attorney General from the universe of “persons” who must be afforded an opportunity to be heard before the Department issues, *inter alia*, a water discharge permit; nor can the Department identify any other authority, or even a general principle of law, that would operate to preclude the Attorney General’s participation.

Instead, the Department embarks on an extended and irrelevant digression defending its sole authority under state law to issue water discharge permits under the Water Quality Act. *See, e.g.*, Department’s Motion to Strike at 3-4 (“a ‘constituent agency’ may issue a [water discharge permit] ... a constituent agency includes the Department of Environment ... but does not include the New Mexico Attorney General or his office.”). The Department either badly misunderstands, or has chosen to misrepresent, the Attorney General’s role in these proceedings. The Attorney General makes no claim of authority to adjudicate the validity of a discharge permit application; that is self-evidently a role reserved in the first instance to the Department. The Attorney General does, however, have a statutorily mandated role to play as an interested party in administrative proceedings once he has determined, as here, that doing so is necessary to protect the public interest.

The Department’s only other argument to the contrary is its flimsy and unsubstantiated assertion that “permit hearings where an applicant faces representation on behalf of the State of New Mexico by both the Department and the Attorney General’s Office creates an impropriety that must be avoided for the state and the Department to execute its [sic] statutory and regulatory requirements.” Department’s Motion to Strike at 4-5. The Department offers nothing more in its

CERTIFICATE OF SERVICE

I certify that I served the foregoing documents on October 19, 2013 via electronic mail, with hard copies to follow by first-class mail.

/s/Ari Biernoff
Ari Biernoff

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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



A P P E A R A N C E S

1
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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.

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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

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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