STATE OF NEW MEXICO
WATER QUALITY CONTROL COMMISSION

In the Matter of:	)	
PROPOSED AMENDMENT	)	**No. WQCC 12-09 (R) and**
TO 20.6.6 NMAC (Dairy Rule)	)	**No. WQCC 13-08 (R)**
	)	

NEW MEXICO ENVIRONMENT DEPARTMENT'S REPLY TO NEW MEXICO ATTORNEY GENERAL'S AND COALITION'S RESPONSES TO ITS MOTION TO STRIKE/LIMIT THE TESTIMONY OF WILLIAM C. OLSON

The New Mexico Environment Department ("Department"), pursuant to Section 106.C of the Procedural Order issued on October 3, 2014, hereby submits its reply to the response filed by the New Mexico Attorney General's Office ("Attorney General") to its Motion to Exclude William C. Olson and Strike/Limit his Testimony ("Motion") and the opposition filed by the Coalition. The Commission should exclude Mr. Olson and strike/limit his testimony in the Proposed Amendment to 20.6.6 NMAC ("Dairy Rule") hearing based on the fact that Mr. Olson was previously employed as the Bureau Chief of the Department's Ground Water Quality Bureau and actively participated in developing the Department's policy and legal strategy related to the Dairy Rule. As a result, Mr. Olson has based his testimony on privileged and confidential information, in violation of the Governmental Conduct Act, which unfairly prejudices the Department and misleads the Water Quality Control Commission ("Commission").

Argument

I. The Governmental Conduct Act

In their responses, the Attorney General and the Coalition argue that exclusion of Mr. Olson on the basis of the Governmental Conduct Act ("GCA"), NMSA 1978, Section 10-16-1 to -18 (1967, as amended through 2011), would be tantamount to enforcement of the GCA by the

Commission. Coalition Opposition, pp. 7-9; AG Response, pp. 5-6. The Coalition further argues that any consideration of the GCA by the Commission would be beyond its jurisdiction. Coalition Opposition, pp. 2, 9. The Commission should reject this argument because the Department does not seek enforcement of the GCA; the Commission has the authority to control its proceedings; and it is proper for an administrative agency to consider the GCA in determining if a former employee's participation is unfairly prejudicial to his former employer.

The Coalition argues that, by deciding a procedural matter before it, the Commission is usurping the authority of the Secretary of State, Attorney General, or the various district attorneys. The Coalition cites to *Marbob Energy Corp. v. New Mexico Oil Conservation Commission* in support of this argument. Coalition Opposition, p. 9. However, *Marbob* is distinguishable from the present matter in that the agency in *Marbob* sought to give itself the authority to assess civil penalties in newly promulgated regulations. *Marbob*, 2009-NMSC-013, ¶ 3, 146 N.M. 24, 27. The Court found that this violated the express provisions of the law in question. *Id.* 2009-NMSC-013, ¶ 23, 146 N.M. at 32. Unlike the agency in *Marbob*, the Department seeks no enforcement of the provisions of the GCA contained in NMSA 1978, Sections 10-16-14 and -16, including sanctions, censure, or penalties against Mr. Olson. Furthermore, neither the Coalition nor the Attorney General cite to any authority suggesting that an administrative body exercising its authority over its proceedings through the exclusion of witnesses is equivalent to sanctioning, censuring, or assessing civil penalties. Indeed, by the reasoning contained in the responses, the Commission would likewise be unable to exclude even an attorney from its proceedings despite blatant violations of the Rules of Professional Conduct simply because there is an existing disciplinary procedure. *See* Rule 17-301 to -316 NMRA. As such, *Marbob* is inapplicable to this situation.

Here, the Commission has the authority and jurisdiction to control its proceedings, including the power to "take all measures necessary for the maintenance of order and for the efficient, fair and impartial consideration of issues arising in proceedings governed by these guidelines." WQCC Rulemaking Guidelines, Section 104.B. While the Attorney General was not a party to these proceedings at the time the procedural order adopted portions of these guidelines, the Coalition was and did not object to this provision.

Admittedly, in reviewing the GCA there is a limited amount of case law regarding its application. In *Ortiz*, an administrative hearing officer concluded that a former agency employee could not represent a paying client in an agency hearing because of the possibility of improper influence at the hearing. *Ortiz v. Taxation and Revenue Dep't, Motor Vehicle Div.*, 1998-NMCA-027, ¶¶ 2-3, 124 N.M. 677, 679. While the Coalition is correct that the Court in *Ortiz* addressed the constitutionality of the GCA, Coalition Opposition, p. 10, it is incorrect to assert that this case has no application in the present matter. While the former employee in *Ortiz* was an attorney, the Court stated that the GCA applies to all former employees. *Ortiz*, 1998-NMCA-0027 at ¶ 14. Importantly, the Court gave no indication that it was improper for an agency, in its own hearing proceedings, to consider violations of state law as a basis for excluding the former public employee from participation. *See Ortiz*, 1998-NMCA-027, ¶ 19. In citing the GCA, the Department seeks to support a demonstration of a conflict of interest, and, in turn, that a conflict of interest is grounds for a finding of unfair prejudice pursuant to Rule 11-403 NMRA. By excluding the former employee, the Commission is not enforcing the GCA. Rather the Commission would be preserving the integrity of the proceedings.

II. Separate Matters

The Attorney General and the Coalition argue that the present Dairy Rule hearing is not the same matter, and therefore, NMSA 1978, Section 10-16-8(B) should not apply to Mr. Olson. Coalition Opposition, p. 2; AG Response, pp. 6-7.

The Department agrees that the 2010 Dairy Rule hearing and the present hearing are separate proceedings. However, unlike the Valley Meat hearing, excerpts of which the Attorney General includes in support of its argument, *see* AG Response, Exhibits F and G, this matter involves virtually identical circumstances as the 2010 Dairy Rule hearing, including the type of hearing-- a rulemaking. In Valley Meat, the proceedings at issue were a notice of violation and a discharge permit hearing. Here, both hearings are rulemakings before the Commission that involve the same parties, the same subject matter, the same arguments, and, in the case of Mr. Olson, even some of the same testimony. Thus, while they are different proceedings, they should be considered the same matter for purposes of the GCA. Additionally, if the Commission finds that they are the same matter, neither the Coalition nor the AG refute that Mr. Olson substantially and personally participated in the Dairy Rule proceedings in 2010 when he had substantial, personal, direct, and immediate participation and authority over this matter for the Department. *See* Coalition Opposition; AG Response.

III. Confidential Information

The Attorney General and the Coalition assert that the Department has failed to identify any confidential information that was improperly used by Mr. Olson in his testimony. Coalition Opposition, pp. 3-4; AG Response, p. 1. Further, the Coalition claims that Mr. Olson's testimony is based on publically available information. Coalition Opposition, p. 4. This argument ignores

the process and information that went into the creation of the previous testimony upon which Mr. Olson now relies.

In its Motion, the Department did not allege that Mr. Olson submitted confidential documents to the Commission. Rather, the Department argued that Mr. Olson had based his testimony on confidential and privileged information. Motion, p. 5. A review of the Coalition's Notice of Intent to Provide Technical Testimony filed on October 17, 2014, reveals that exhibits WCO-4, WCO-5, WCO-6, WCO-7, WCO-8, and WCO-17 are documents prepared under the supervision of Mr. Olson during his employment as Bureau Chief at the Department. Mr. Olson received the advice of Department counsel in developing his positions as Bureau Chief, positions upon which he now relies. It is disingenuous to state that even though Mr. Olson and his former staff used the Department's privileged and confidential information (including legal advice, internal policy discussions, and revisions to his original testimony), he now relies on these documents solely as public record without any benefit of the thought process or advice that went into their creation. It is a strain to claim that Mr. Olson has divorced his thought process completely from the environment in which he helped create these documents, while relying precisely on that environment to qualify him as an expert. This creates a conflict of interest, and if the information Mr. Olson provides to Commission is publically available, then the probative value of such information should not outweigh the possibility of prejudice towards the Department.

IV. Misleading the Finder of Fact

In their Responses, the Attorney General and the Coalition assert that the Commission will have no trouble understanding that Mr. Olson does not speak for NMED and is not employed by NMED. Coalition Opposition, pp. 5-7; AG Response, p. 8. However, given the

voluminous materials provided for the present hearing, there is a genuine possibility of confusion as to which testimony being offered actually speaks for the Department and establishes its position in this hearing. Mr. Olson will cite to Department testimony throughout his own testimony. Will he clarify each time that he is not citing to the most recent Department testimony, but that he is citing to the previous Department testimony that he helped to draft?

V. Copper Rule and Valley Meat

In its Response, the Attorney General argues that the Department's concerns regarding Mr. Olson's participation are a continuation of the concerns raised in the Copper Rule hearing and the recent Valley Meat discharge permit hearing. *See* AG Response pp. 3-4. However, those proceedings are distinct from one another and this one. In the Copper Rule hearing (WQCC 12-01(R)), Mr. Olson contracted to provide advice to the Department, but he was not in a position of authority within the Department at the time of his contract. He had no ability to direct staff, nor did he have the final say over Department policy or testimony. *See* AG Response, Exhibit C. Conversely, in the Dairy Rule hearing in 2010, he did have supervisory and decision making authority for the Department. Testimony of William Olson, Section III, pp. 6-7. In the Valley Meat hearing (GWB 13-05 (P)), the matter at issue was a permitting matter and its relation to a Notice of Violation. *See* AG Response, Exhibit F. That hearing is also distinct from the present one because a discharge permit does not involve high level policy decisions, the kind made by Mr. Olson in the 2010 Dairy Rule hearing.

VI. Admonishment

The Coalition requests that the Hearing Officer deny and strike the Department's motion from this proceeding pursuant to Rule 1-011.A NMRA. Coalition Opposition, pp. 11-12. The Attorney General requests that the Commission admonish the Department for filing its Motion.

AG Response, p. 8. The Commission should deny these requests because the Department has established that it has solid ground to support its Motion both in law and fact. The Department has established that there is a conflict of interest in a former employee basing testimony on information he had access to while employed by the Department. Such a conflict unfairly prejudices the Department in this proceeding. Neither the Attorney General nor the Coalition has supplied information that supports denying or striking the Department's Motion or admonishment.

Conclusion

For the reasons provided above and in its Motion to Exclude William Olson and Strike/Limit his Testimony filed on October 27, 2014, the Department respectfully requests that the Hearing Officer exclude Williams C. Olson from this proceeding and strike in full all testimony and related exhibits of William C. Olson. In the alternative, the Department requests that the Hearing Officer strike or limit Mr. Olson's testimony to the extent that it is based on confidential information obtained during former employment with the Department.

Respectfully submitted,

GROUND WATER QUALITY BUREAU
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CERTIFICATE OF SERVICE

I hereby certify that on November 17, 2014, a copy of the Department's Reply to New Mexico Attorney General's Office and Coalition's Responses to its Motion to Strike/ Limit the Testimony of William C. Olson was served on the following parties of record via e-mail and/or regular first-class mail:

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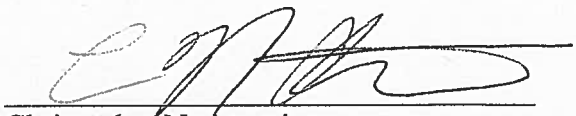

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