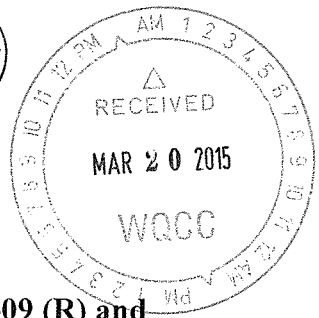


COPY



STATE OF NEW MEXICO
WATER QUALITY CONTROL COMMISSION

In the Matter of:)
PROPOSED AMENDMENT)
TO 20.6.6 NMAC (Dairy Rule))
)

No. WQCC 12-09 (R) and
No. WQCC 13-08 (R)

NEW MEXICO ENVIRONMENT DEPARTMENT’S RESPONSE TO ATTORNEY
GENERAL’S MOTION TO DISQUALIFY HEARING OFFICER

The New Mexico Environment Department (“NMED” or “Department”) files this Response to the Attorney General’s Motion to Disqualify Hearing Officer (“AG Motion”). The Water Quality Control Commission (“WQCC” or “Commission”) should deny the New Mexico Attorney General’s (“Attorney General”) Motion because New Mexico statutes and case law expressly permit state agencies to employ hearing officers on contract or otherwise, to preside over agency rulemaking and adjudicatory proceedings in which that agency is a party. By statute, funding for Commission hearing officers necessarily comes from NMED, so this financial connection does not warrant disqualification. There is no evidence in the record showing bias by the hearing officer in this proceeding, nor that that Department has exerted any control over the hearing officer. Finally, the Attorney General has proposed no remedy for this alleged appearance of a conflict of interest.

I. NMED may hire a hearing officer that will preside over Department and Commission rulemaking and adjudicatory proceedings.

The Attorney General claims an appearance of a financial conflict of interest exists that warrants the hearing officer’s disqualification in this proceeding since the hearing officer depends upon NMED for future assignments and income. AG Motion, p. 1. New Mexico law does not support disqualification of a hearing officer due to his or her contractual relationship with an agency for which he or she provides hearing officer services, including when that agency

is a party appearing before him or her. New Mexico law expressly permits this type of relationship.

For example, the Department may employ a full-time hearing officer for Department hearings. *See* 20.1.9.7(C) NMAC (hearing officer in Department rulemakings may be an employee of the Department); 20.1.5.100(F)(2) NMAC (hearing officer in Department adjudicatory proceedings may be an independent contractor or a State employee employed as a hearing officer).

Additionally, the WQCC may designate a hearing officer for rulemaking proceedings, NMSA 1978, Section 74-6-6(D) (1993), and for adjudicatory proceedings. *See* NMSA 1978, § 74-6-5(Q) (2009) (for permit reviews before the Commission); 20.1.3.10(B) NMAC (for abatement plan hearings, variance hearings, and compliance order hearings before the Commission). Under the Guidelines for Water Quality Control Commission Regulation Hearings (“WQCC Guidelines”), the hearing officer may be a member of the Commission but need not be. WQCC Guidelines, Part I, Section 104.B. Further, pursuant to 20.1.3.10(B)(1) NMAC, the hearing officer appointed by the Commission in adjudicatory proceedings may be a commissioner or his or her designee, an independent contractor, or a *hearing officer employed by the Department*. The Commission is specifically allowed by rule to utilize the hearing officer services of the Department’s hearing officer even though that hearing officer receives income from the Department and is assigned Department cases at the discretion of the Department. *See generally* NMSA 1978, § 9-7A-6(D) (1991); 20.1.4.100(E)(2) NMAC; 20.1.5.100(F)(2) NMAC; 20.1.9.8 NMAC (supporting the fact that the Secretary decides whether to appoint a hearing officer, deemed to be independent despite being employed by the Department).

This arrangement is not unique to NMED. Throughout New Mexico, hearing officers presiding over agency rulemaking proceedings are often employed by that agency to perform hearing officer services. *See, e.g.*, NMSA 1978, § 9-11-6.2(D) (1995) (Taxation and Revenue Department rulemaking proceedings are before the Secretary of Taxation and Revenue or a hearing officer designated by the agency’s Secretary); NMSA 1978, § 9-7-6(E) (2001) (Department of Health rulemaking proceedings are before the Secretary of Health or a hearing officer designated by the agency’s Secretary). So, the Attorney General’s argument would result in the disqualification of all agency hearing officers hired by agencies to provide hearing officer services, upending the longstanding practice of administrative law across New Mexico.

The Attorney General’s statement that the hearing officer’s contract represents a “type of financial conflict of interest for which courts *uniformly* [emphasis added] disqualify hearing officers” is false. *See* AG Motion, p. 5. At the outset, the Department notes that this argument rests on cases arising in California and Puerto Rico, ignoring well-established precedent in New Mexico. The Attorney General’s argument fails to mention New Mexico precedent stating that mere employment of a hearing officer by an agency that is a party to the case, without more, is insufficient to prove bias. *Kmart Properties, Inc. v. N.M. Taxation & Revenue Dep’t*, 2006-NMCA-026, ¶ 57, 139 N.M. 177, *rev’d on other grounds*, *Kmart Corp. v. Taxation & Revenue Dep’t*, 2006-NMSC-006, 139 N.M. 172. *Kmart Properties, Incorporated* (“KPI”) brought a lawsuit regarding New Mexico’s assessment of State income taxes and gross receipts taxes, basing one of its challenges on its belief that the hearing officer was not independent and impartial. *Id.* ¶ 1. *KPI* challenged the department hearing officer and the administrative hearing process, claiming that hearing officers are “captives” of the department. *Id.* ¶ 56. The New Mexico Court of Appeals held, “it is well-established that due process is not violated by having

hearing officers who are employed by an agency adjudicating cases in which that agency is a party.” *Id.* ¶ 57. The Attorney General provides no argument as to why this precedent should be discarded or the law extended to follow case law from other jurisdictions.

II. The Legislature permits agencies to combine functions of investigator, prosecutor, and judge, while instituting appropriate safeguards.

The Attorney General fails to consider the unique structure of administrative agencies in his argument. The Attorney General states that because a business relationship would be prohibited if the Commission hearing officer were a judge, the business contract between SaucedoChavez, P.C. and the Department *should* be prohibited as an unacceptable conflict of interest. AG Motion, p. 7. This rationale wholly distorts the structure of administrative agencies. Regulatory agencies often combine functions of investigator, prosecutor, and judge; courts have uniformly held that this is the nature of the law, and it does not violate due process. *See Kennecott Copper Corp. v. FTC*, 467 F.2d 67, 79 (10th Cir. 1972), *cert. denied*, 416 U.S. 909 (1974) (stating that the FTC’s combination of functions of investigator, prosecutor and judge is allowable since Congress designated it to be this way).

For example, regulations allowing employment of a hearing officer by an administrative agency do not violate due process because the hearing officer’s role does not come with unfettered authority. Anyone who has performed prosecutorial or investigative functions in connection with the matter at issue in the proceeding cannot serve as hearing officer. *See* 20.1.3.10(B)(1)(c) NMAC (for Commission adjudicatory proceedings); 20.1.5.100(F)(2)(a) NMAC (for Department adjudicatory proceedings). The hearing officer is prohibited from discussing *ex parte* the merits of the proceeding. *See* 20.1.3.11 NMAC (for Commission adjudicatory proceedings); 20.1.5.100(H) NMAC (for Department adjudicatory proceedings); 20.1.9.11 NMAC (for Department rulemaking proceedings). The hearing officer shall be

disqualified if he or she has a personal bias or prejudice concerning a party or personal knowledge of the facts of the case; has a financial interest in the proceeding; is related to a party; or is an officer, director, or trustee of a party in the proceeding. *See* 20.1.3.10(B)(1)(b) NMAC (for Commission adjudicatory proceedings); 20.1.5.100(F)(3) NMAC (for Department adjudicatory proceedings).

That a hearing officer is employed by the Department or engaged in a financial services contract with the Department, does not by itself establish the appearance of a financial conflict of interest that merits disqualification, since the Legislature has structured administrative proceedings in this manner, and there are regulations in place to ensure impartiality. The Legislature allows for this alleged “appearance of a financial conflict of interest” because it is not unrestrained. Section 9-7A-13 (1991) of the Department of Environment Act states that the powers, duties, and responsibilities of the WQCC are explicitly exempted from the authority of the Department Secretary. Thus, the Department cannot exert control over the Commission.

III. The Attorney General’s attempt to show the appearance of a financial conflict of interest is novel because by statute, any payments to a Commission hearing officer will necessarily come from NMED.

The foundation for the Attorney General’s argument is the appearance of a financial conflict of interest between the hearing officer and the Department; this assertion is invalid because it attacks the legislatively mandated relationship between the WQCC and the Department. The WQCC is administratively attached to NMED. NMSA 1978, § 74-6-3(F) (2007). All funding for the Commission, other than mileage and per diem reimbursements for Commissioners, comes from NMED, as allowed by NMSA 1978, Section 9-1-7(B) (1977). Thus, payments to any hearing officer for services provided in relation to WQCC rulemakings necessarily comes from NMED, including situations wherein the Commission elects to retain an

independent contractor. Although the Commission is administratively attached to NMED, it is specifically empowered to exercise its functions independently of NMED and without approval or control of the Department. NMSA 1978, § 9-1-7(A)(1) (1977). The Department had no control over the Commission when it selected a hearing officer for the Dairy Rule hearing. The hearing officer, in providing hearing officer services to the Commission in the Dairy Rule hearing, is empowered to make decisions independently of NMED.

IV. The Attorney General has shown no form of bias or the appearance of bias by the Dairy Rule hearing officer that would support disqualification.

The Attorney General cites to *Esso Standard Oil v. Lopez-Freytes*, a First Circuit Court of Appeals case involving the Puerto Rico Environmental Quality Board (“Board”), for the notion that a hearing officer on contract with an agency cannot preside over a hearing in which the agency is presenting the case. AG Motion, p. 5. In *Esso Standard Oil*, a gas station owner sued officials of the Puerto Rico Environmental Quality Board alleging due process violations during hearings. *Esso Standard Oil Co. v. Lopez-Freytes*, 522 F.3d 136, 141 (1st Cir. 2008). While the Court determined that the contractual relationship between the Board and the hearing officer exhibited structural bias due to the Board’s discretionary assignment of cases to the hearing officer, this case is readily distinguishable from the Dairy Rule hearing. *Id.* at 145. Note, the court relied on a set of facts that demonstrated clear structural bias: two prior hearing officers were dismissed after various disagreements with the Board regarding proceedings. *Id.* n.5. Moreover, the funding structure that created structural bias was such that funds paying the hearing officer were supplied by fines issued by the Board, expressly linking the hearing officer’s salary to the funds in contention during hearings. *Id.* at 147. Furthermore, the hearing officer’s contract stated that she “acknowledges that in the performance of her professional function she has a complete duty of loyalty towards the agency, which includes not having

adverse interest to said governmental entity.” *Esso Standard Oil Co. v. Cotto*, 389 F.3d 212, 215 (1st Cir. 2004).

The Attorney General has shown no form of bias or the appearance of bias by the hearing officer in the Dairy Rule hearing that remotely resembles the situation in *Esso Standard Oil*. The Attorney General’s three-paragraph footnote claiming prejudice by the hearing officer due to his decision to grant one of NMED’s motions, omits reference to the hearing officer’s other decision in that order, to deny another one of NMED’s motions. *See* Order on NMED’s Mot. to Exclude/Strike William C. Olson and Mot. to Strike Attorney General’s Appearance, ¶¶ 1-4 (Nov. 26, 2014); *See also TPL, Inc. v. N.M. Taxation & Revenue Dep’t*, 2000-NMCA-083, ¶ 21, 129 N.M. 539 (where the court rejected the argument that the hearing officer was biased; court stated that such a claim was “undermined by the fact that the hearing officer ruled against the department on a number of issues presented for her review at the hearing...”). Additionally, NMED does not pay for hearing officer services through fines issued by NMED. The contract is funded through a special appropriation from the Legislature that transfers funds from the Attorney General’s Office. *See* 2014 N.M. Laws, ch. 63, § 5. The contract contains no loyalty clauses or any similar inferences. Contrary to *Esso Standard Oil*, it contains language requiring the hearing officer to ensure hearings are conducted fairly, in accordance with the law, and to assure due process for all parties. Environment Department Professional Services Contract 15-667-1800-003, ¶ 1 (Aug. 8, 2014) [AG Ex. A].

V. The Attorney General has proposed no remedy for this alleged conflict of interest.

The Attorney General has proposed no remedy for this alleged appearance of a conflict of interest, likely because the conclusion of this argument would require his office to petition the Legislature for complete administrative restructuring and changes to numerous statutes

referenced above. Other remedies may include the Commission electing one of the commissioners to serve as hearing officer in the Dairy Rule hearing. However, if, for example, the NMED WQCC designee was elected, it is likely the Attorney General would challenge that decision on similar grounds to the motion at issue, despite the fact that the Legislature has unequivocally stated that participation by a constituent agency in a hearing shall not require the recusal or disqualification of the commissioner representing that constituent agency. *See* NMSA 1978, § 74-6-9(G) (1993). If the Department was to hire a full-time hearing officer and the WQCC was to select that hearing officer to preside over the rulemaking, the Attorney General might challenge this decision since the hearing officer would be subject to a one-year probationary period during which time the Department may fire him or her without just cause. *See* 1.7.2.8 NMAC; 1.7.11.10 NMAC. The logical outgrowth of the Attorney General's arguments is that no one short of a volunteer or an individual not contracted or hired by the Commission or the Department would ever be qualified to serve as hearing officer in this matter. The end result would be further delay in resolving this issue.

VI. The Attorney General's motion should be denied.

The Attorney General makes a number of false assumptions in his attempt to establish the appearance of a conflict of interest. He bases his claim on the idea that NMED's "willingness" to continue to assign cases to the contracted hearing officer will be influenced by the hearing officer's rulings. AG Motion, p. 5. However, there is no evidence in the record to support this assertion. After a competitive bidding process, in accordance with the New Mexico Procurement Code, NMSA 1978, Sections 13-1-28 to -199 (1984, as amended through 2013), NMED selected the winning bid, a law firm, to handle hearing officer services for the Department. In the rare instance where SaucedoChavez, P.C. is unable to provide hearing officer services on a particular

case due to a conflict of interest or schedule constraints, NMED is forced to contract with a different law firm or hearing officer for that specific case. NMED does not have multiple law firms on contract to pick and choose hearing officers. Moreover, NMED leaves it to SaucedoChavez, P.C. to determine which attorney from the firm will provide hearing officer services. The Attorney General's inference of NMED selectively choosing a hearing officer who may favor the Department's position is unsubstantiated.

It is questionable that the Attorney General would bring a motion to disqualify the hearing officer on grounds of receiving income from the Department, especially since the Attorney General has participated in Commission proceedings in the past and provides legal counsel to various boards and commissions around the State, giving him the knowledge and experience of the framework of administrative agencies and associated boards and commissions.

The Department previously employed a full-time hearing officer who presided over Department hearings as well as WQCC hearings and Environmental Improvement Board ("EIB") hearings. During this time, the same attorney from the Attorney General's Office who filed this motion represented the Attorney General in a previous WQCC rulemaking proceeding wherein NMED was the petitioner, and NMED's full-time hearing officer provided hearing officer services at the request of the Commission. In that proceeding, although the hearing officer's salary came from NMED and NMED was a party in the case, the Attorney General did not raise the issue of hearing officer disqualification based on the appearance of a financial conflict of interest. *See generally*, The Copper Rule: WQCC Matter 12-01(R) Pleading Log, attached as NMED Exhibit A; *see also*, New Mexico Water Quality Control Commission Meeting Minutes, Regular Meeting, Item No. 6 (Nov. 13, 2012), attached as NMED Exhibit B

(appointment of Felicia Orth, former NMED hearing officer, as hearing officer for this WQCC rulemaking).

Finally, counsel for the Attorney General who filed the motion to disqualify the hearing officer previously worked at NMED as Deputy General Counsel, during which time NMED contracted with hearing officers who provided hearing officer services to NMED, the Commission, and the EIB. *See* New Mexico Environment Department Professional Services Contract No. 4076 (Feb. 15, 2007), attached as NMED Exhibit C; New Mexico Environment Department Professional Services Contract No. 06-667-3500-0001 (Oct. 7, 2005), attached as NMED Exhibit D. These contracts spanned four years, during which time there is no record that this attorney ever filed a formal objection or raised concern to such conduct as an alleged conflict of interest. These facts should not be overlooked when ruling on the Attorney General's questionable motion.

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VII. Conclusion

Given the nature of the Attorney General's motion directly attacking the credibility of the hearing officer, the Department requests that the Commission itself rule on the matter. For the foregoing reasons, the Department respectfully requests that the Commission deny the Attorney General's Motion to Disqualify the Hearing Officer.

Respectfully submitted,

GROUND WATER QUALITY BUREAU
NEW MEXICO ENVIRONMENT DEPARTMENT



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

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

CERTIFICATE OF SERVICE

I hereby certify that a copy of New Mexico Environment Department's Response to Attorney General's Motion to Disqualify Hearing Officer was served on the parties of record in this matter via electronic mail on March 20, 2015.

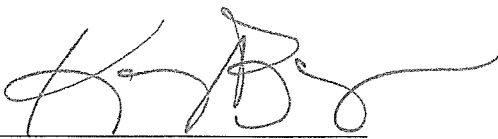
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In the Matter of: PROPOSED AMENDMENT TO 20.6.2 NMAC - WQCC 12-01 (R), the *Copper Rule*.

PETITION TO ADOPT 20.6.7 AND 20.6.8 NMAC AND REQUEST FOR HEARING

RESPONDENTS:

- Andrew Knight and Kathryn Becker - New Mexico Environment Department / Office of the General Counsel;
- Dal Moellenberg and TJ Trujillo - Gallagher & Kennedy;
- Bruce Fredrick and Jonathan Block - New Mexico Environmental Law Center;
- Tannis L. Fox - Office of the New Mexico Attorney General;
- William Olson;
- Louis W. Rose - Montgomery and Andrews, P.A.;
- Tracy Hughes - High Desert Energy + Environment Law LLC; and
- John Indall - Comeau, Maldegen, Templeman and Indall LLP.

The Commission adopted NMED's final rulemaking proposal and *Statement of Reasons* on September 25, 2013. Their *Order and Statement of Reasons* is available online in three parts:

- Part 1;
- Part 2; and
- Part 3.

WQCC 12-01 (R), the Copper Rule.

The Administrator's Pleading Log is available online. The referenced documents are below.

1. Motion to Approve Schedule for Development of Copper Regulations
2. Notice of Docketing
3. Order Approving Revised Schedule for Development of Copper Regulations
4. Petition to Adopt 20.6.7 and 20.6.8 NMAC and Request for Hearing
5. AG's Motion to Admit Record from Tyrone Permit Appeal into Record Proper
6. Freeport-McMoRan's Response to Petition for Rulemaking
7. Entry of Appearance by Dalva Moellenberg and T.J. Trujillo, Gallagher & Kennedy, for FMI
8. Gila Resources Information Project, Amigos Bravos and Turner Ranch Properties' Response to Petition
9. NMED's Response to AG's Motion to Admit Record from Tyrone Permit Appeal
10. Procedural Order
11. Reply in Support of AG's Motion to Admit Record from Tyrone Permit Appeal
12. Freeport-McMoRan's Objections to Procedural Order and Request for Clarification
13. GRIP, Amigos Bravos and Turner Ranch Properties' Joint Motion to Dismiss Petition for Rulemaking
14. Entry of Appearance by Louis Rose of Montgomery & Andrews and Jon Indall of Comeau, Maldegen, Templeman & Indall for the New Mexico Mining Association
15. NMED's Brief on the Commission's Authority to Consider the Petition
16. AG's Motion to Remand the Proposed Copper Mine Rule to NMED
Attachment A, Attachment B, Attachment C, Attachment D, Attachment E, Attachment F, Attachment G
Attachment H, Attachment I, Attachment J, Attachment K
17. Freeport-McMoRan's Brief on the Commission's Authority to Conduct a Copper Industry-Specific Rulemaking
18. AG's Response to FMI's Objections to Procedural Order and Request for Clarification
19. FMI's Consolidated Response to Joint Motion to Dismiss Petition and the AG's Motion to Remand Proposed Rule
20. AG's Response to FMI's Brief on the Commission's Authority to Consider Petition
21. AG's Response to NMED's Brief on Commission's Authority to Consider Petition
22. NM Mining Assoc. Consol. Memorandum in Response to AG's Motion to Remand Proposed Rules and Various Organizations' Joint Motion to Dismiss Petition for Rulemaking
23. NMED's Response to Motions to Remand or Dismiss
24. Entry of Appearance by Tracy Hughes
25. Citizens' Joint Response to FMI's Brief on the Commission's Authority to Conduct Rulemaking and NMED's Brief on the Commission's Authority to Consider Petition
26. Amigos Bravos' Motion to Postpone Hearing
27. Joint Response to FMI's Objections to Procedural Order
28. NMED's Notice of Substitution of Counsel
29. AG's Unopposed Motion to Extend Time to Reply to FMI's Consolidated Response
30. AG's Reply to NMED in Support of Motion to Remand
31. AG's Reply to NM Mining Association in Support of Motion to Remand

- 32. NMED's Reply Brief
- 33. Citizens' Reply to NMED's Response to Remand or Dismiss and to NM Mining Association's Response
- 34. Citizens' Reply to FMI's Response to Joint Motion to Dismiss Petition for Rulemaking
- 35. FMI's Consolidated Reply to the Citizens' and AG's Responses to the Brief on Commission Authority
- 36. NMED's Response to Amigos Bravos' Motion to Postpone Hearing
- 37. FMI's Response to Amigos Bravos' Motion to Postpone Hearing
- 38. Order Granting AG's Motion to Extend Time for Reply
- 39. AG's Reply to FMI's Consolidated Response to Motion to Remand
- 40. Order on AG's Motion to Admit Record from Tyrone Permit Appeal into Record Proper
- 41. Order on FMI's Objection to Procedural Order and Request for Clarification
- 42. Administrator's Service List
- 43. Public notice of Hearing in English and in Spanish
- 44. Order on Amigos Bravos' Motion to Postpone Hearing
- 45. NMED's Amended Petition
- 46. Amigos Bravos' Second Motion to Postpone Hearing
- 47. Order on Amigos Bravos' Second Motion to Postpone Hearing
- 48. Revised Public Notice of Hearing in English and in Spanish
- 49. NMED Notice of Intent to Present Technical Testimony, with Testimony of Adrian Brown and Thomas Skibitski
NMED Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19
- 50. FMI Notice of Intent to Present Technical Testimony, with Testimony of T. Neil Blandford, John Brack, Timothy Eastep, Jim B. Finley, Michael Grass, Lynn Lande, Lewis Munk, James C. Scott, and Thomas L. Shelley
FMI Exhibits Blandford 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23.
Brack 1, 2, 3, 4, 5, 6, 7, 8. Eastep 1. Finley 1, 2, 3, 4, 5, 6. Grass 1, 2, 3, 4. Lande 1, 2, 3, 4, 5, 6, 7. Lande PowerPoint Munk 1, 2.
Scott A, B-1, B-2, C, D, D-1, D-2, D-3, D-4, D-5, D-6, D-7, D-8, D-9, D-10, D-11, D-12, D-13, D-14, D-15, D-16, D-17, D-18, D-19, D-20, D-21, D-22, D-23, D-24, D-25, D-26, D-27, D-28, D-29, D-30, D-31, D-32, D-33, D-34, D-35, D-36, D-37, D-38, D-39, D-40, D-41, D-42, D-43, E. Shelley 1, 2, 3, 4, 5-1, 5-2, 6, 7
- 51. NMAG Notice of Intent to Present Technical Testimony
NMAG Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23.
- 52. Amigos Bravos Notice of Intent to Present Technical Testimony, with Testimony of Brian Shields
AB Exhibits 1, 2, 3, and 4.
- 53. GRIP and Turner Ranch Properties Notice of Intent to Present Technical Testimony, with Testimony of James Kuipers and Sally Smith
Kuipers Exhibits 1 and 2. Smith Exhibits 1, 2, 3 and 4.
- 54. William Olson Notice of Intent to Present Technical Testimony
WCO Exhibits 1, 2, 3, 4-6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17
- 55. FMI Motion for Extension of Time for One Exhibit
- 56. Order Granting Motion for Extension of Time
- 57. FMI Notice of Intent - Supplemental Exhibit - Brack 4
- 58. Revised Service List
- 59. NMED's Notice of Objection to W.C. Olson's NOI
- 60. NMED's NOI to Present Technical Rebuttal, with Testimony of Adrian Brown and Thomas Skibitski and Exhibit 20, Ex. 21, Ex. 22, Ex. 23, Ex. 24, Ex. 25, Ex. 26
- 61. FMI's NOI to Present Technical Rebuttal, with Testimony of T. Neil Blandford, Timothy E. Eastep, Jim B. Finley, Jr., Michael Grass, Lynn Lande, Lewis Munk, James C. Scott, and Thomas L. Shelley. Exhibits: Blandford Ex. 1, Ex. 2, Ex. 3, Ex. 4, Ex. 5, Ex. 6, Ex. 7
- 62. FMI's Motion for Leave to Withdraw Testimony and Re-file Substitute, Condensed Testimony
- 63. AGO Notice of Filing Rebuttal Testimony and Exhibits with Ex. 24, Ex. 25, Ex. 26, Ex. 27, Ex. 28, Ex. 29 and Ex. 30.
- 64. AGO Notice of Errata
- 65. AGO Motion to Strike NMED Notice of Objection
- 66. Amigos Bravos' NOI to Present Rebuttal Technical Testimony
- 67. GRIP and Turner Ranch Properties NOI to Present Technical Rebuttal Testimony with Kuipers Att. A and Att. B
- 68. W.C. Olson NOI to Present Technical Rebuttal Testimony
- 69. Amigos Bravos' Motion to Strike NMED's Notice of Objection
- 70. William C. Olson Response to NMED Notice of Objection
- 71. NMED's Motion to Exclude AGO Exhibits of Written Testimony and Transcripts From Prior Permit Appeal Proceedings
- 72. NMED's Motion to Exclude Mr. Olson's Exhibits of Written Testimony and Transcripts from Prior Permit Appeal Proceedings
- 73. AGO Response to FMI's Motion to Withdraw Testimony and File Substitute Testimony
- 74. AGO Motion to Strike FMI Video - Brack Exhibit 4
- 75. NMED's Response to AGO and Amigos Bravos' Motions to Strike Notice of Objection
- 76. AGO's Response to NMED's Motion to Exclude AGO Exhibits and Testimony from Prior Proceedings
- 77. Olson's Response to NMED's Motion to Exclude Olson's Exhibits and Testimony from Prior Proceedings
- 78. FMI Response to AG Motion to Strike Video Exhibit - Brack 4
- 79. FMI Reply on Motion to Withdraw and File Substitute Testimony
- 80. Supplement to AGO Response to FMI Motion to File Substitute Testimony
- 81. Order on Several Motions and Additional Procedural Matters
- 82. NMAGO Notice of Errata
- 83. FMI Notice of Errata
- 84. Notice of Transcript Filing
- 85. AGO Notice of Supplementing Record with AGO Ex. 48 and Ex. 49
- 86. AGO Notice of Filing Complete Set of AGO Exhibits on CD, with CD
- 87. AGO Disc Correcting Errata on Disc Submitted with Item 86
- 88. Joint Motion to Extend Time to File Post-Hearing Submittals
- 89. Order Granting Joint Motion to Extend Time
- 90. Motion to Extend Filing of Post-hearing Briefs
- 91. Order on Motion to Extend Filing of Post-hearing Briefs
- 92. NMED's Closing Argument
- 93. NMED's Proposed Statement of Reasons
- 94. FMI's Closing Argument
- 95. AGO Closing Argument in Support of Joint Proposal
- 96. AGO Statement of Reasons in Support of Joint Proposal
- 97. Amigos Bravos' Statement of Reasons in Support of its Amendments
- 98. Closing Argument of Gila Resources Information Project, Turner Ranch Properties and Amigos Bravos
- 99. William C. Olson Closing Argument

100. William C. Olson Proposed Statement of Reasons
101. Joint Proposal from the NMAGO, GRIP, Turner Ranch, Amigos Bravos and William C. Olson
102. Notice of Non-Appearance by Tracy Hughes
103. AGO Motion to Estop NMED From Taking Inconsistent Positions Before the Commission
104. AGO Motion to Strike NMED's Request that Commission Re-Determine Place of Withdrawal
105. AGO Motion to Strike NMED's Proposed Findings for Lack of Evidence
106. FMI's Consolidated Responses to AGO's Motions
107. NMED's Consolidated Response to AGO's Motions
108. WQCC Order and Statement of Reasons Adopting the Copper Rule: Part 1, Part 2, Part 3
109. Joint Request for Stay of 20.6.7 NMAC by GRIP, TRP and AB
110. FMI's Motion for Extension of Time to Respond to Request for Stay and Request for Scheduling Conference and Order
111. WCO Concurrence in Motion for Stay of 20.6.7 NMAC
112. Procedural Order Relating to the Joint Motion for Stay
113. AGO's Support of Joint Request for Stay of 20.6.7 NMAC
114. Notice of Proposed Testimony and Other Evidence Offered in Support of Motion to Stay The Copper Rule Pending Appeal: Part 1, Part 2, Part 3, Part 4, Part 5
115. NMED's Response to the Request for Stay
116. FMI's Opposition to the Request for Stay
117. Reply to Responses to Stay by TRP, GRIP and AB
118. Motion to Disqualify the WQCC from Hearing the Motion for Stay
119. Second Procedural Order relating to Motion for Stay
120. NMED's Response to Motion to Disqualify the WQCC from Hearing the Motion to Stay
121. FMI's Response to Motion to Disqualify the WQCC from Hearing the Motion to Stay

Hearing Exhibits

FMI

FCX NOI Excerpts I, Figures from Scott Direct Tx, Ex. J, Ex. K, Ex. L, Blandford Slide Excerpts, Blandford Ex. 8, Ex. 9 and Ex. 10.

NMAG

Ex. 31, Ex. 32 (part 1, part 2, part 3), Ex. 33 (b/w, color), Ex. 34, Ex. 35, Ex. 36, Ex. 37, Ex. 38 (formerly Ex. 33a), Ex. 39, Ex. 40, Ex. 41, Ex. 42, Ex. 43, Ex. 44, Ex. 45, Ex. 46, Ex. 47

GRIP

Kuipers Ex JK-1, JK-2, JK-3.

Amigos Bravos

Ex. 7, Ex. 8

William C. Olson

WCO Surrebuttal Ex. 1, Ex. 2, Ex. 3 and Ex. 4.

Public Comment

Written statements and other documents submitted during the hearing include public comment from Tammy Arguello, Jens Deichmann, Frank Drysdale, Joe Hempfling, League of Women Voters, Marcy Leavitt, Douglas C. Littlejohn, Sean Ormand, Nick Pedraza with letters urging remand, Rio Grande Chapter of the Sierra Club, Allyson Siwik with document, Janet Wallet-Ortiz, Max Yeh with addendum, and a Petition urging remand of the rule.

Written public comment sent to the Commission Administrator includes letters received April 1, April 2, April 3, April 5, April 8, April 9, April 10, April 11, April 13, April 14, April 15, April 16, April 19, April 22, April 23, April 24, April 25, April 26, April 28, April 29, April 30 (part 1, part 2), May 1, May 2 and May 3.

Written public comment sent to the Commission Administrator also includes letters from Sierra Club members dated April 26 (part 1, part 2, part 3, part 4, part 5, part 6, part 7), April 27 (part 1, part 2, part 3, part 4), April 28 (part 1, part 2), April 29, April 30, May 1, May 2 and May 3.

Written public comment was also submitted during 2012 as part of the rule development process, and verbal comment was accepted in Albuquerque and Silver City in September 2012. A disc with audio-recording is available from the Administrator. No transcript was made.

All questions regarding the Commission should be directed to:

<p>Pam Castaneda, Administrator New Mexico Environment Department 1190 S. St. Francis Drive, N2153 P.O. Box 5469 Santa Fe, New Mexico USA 87502 E-mail: Pam.Castaneda@state.nm.us</p>	
Tel. (505) 827-2425	(505) 827-0310 Fax.

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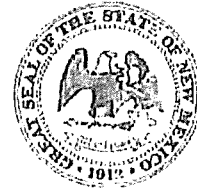
STATE OF NEW MEXICO
WATER QUALITY CONTROL COMMISSION

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
Department of Health
State Parks Division
-Soil and Water Conservation Commission
Bureau of Geology and Mineral Resources
Municipal/County Representative
Members-at Large

Meeting Minutes
New Mexico Water Quality Control Commission
Regular Meeting
November 13, 2012

9:00 a.m.

New Mexico State Capitol Building Room 311
Santa Fe, New Mexico 87501

MEMBERS PRESENT:

Butch Tongate	Chair, Environment Department
Larry Dominguez	Department of Agriculture
Mike Sloane	Department of Game & Fish
Doug Bland	Bureau of Geology and Mineral Resources
Heidi Krapfl	Department of Health
Daniel Sanchez	Oil Conservation Division
Clark Taylor	Soil and Water Conservation Commission
DL Sanders	Office of the State Engineer
David L. Certain	State Parks Division
Steve Glass	Municipal/County Representative
Hoyt Pattison	Member-at Large Conference Call
John Waters	Member-at-Large
Edward Vigil	Member-at-Large

OTHERS PRESENT:

Sean Cunniff, New Mexico Attorney General's Office
Felicia Orth, Hearing Officer
Sally Worthington, Office of the Hearing Officer
Pam Castañeda, Administrator
Please see attached sign-in-sheet

The meeting was called to order by Mr. Tongate at 9:06 a.m.

Item 1. Roll Call.

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

Item 2. Approval of Agenda.

Action: Mr. Tongate recommended switching items 6 and 7. Mr. Sanders questioned this. Mr. Tongate responded that Item 7 discussed commission legal counsel during the Copper Rule hearing. Item 6 was the petition for hearing. Mr. Clark moved approval of the agenda with the correction. Mr. Waters seconded the motion. The motion passed unanimously.

Item 3. Approval of minutes of October 9, 2012 meeting.

Action: Mr. Waters noted that a correction was needed on item 4 page 2. The Commission questioned Mike Coffman about the geographic distribution of the operators on the certification committee. Mr. Sanders questioned line 49. The first page about the sign-in-sheets: where they were kept and if they should be attached to the minutes. Mr. Tongate requested that the sign-in-sheets be attached to the minutes.

Mr. Glass noted a correction was needed on item 2 page 2 line 59: approval of the agenda stated that Mr. Tongate motioned the approval it was Mr. Glass who moved approval of the agenda. Mr. Glass noted a correction on item 7 page 3 line 119. Mr. Glass requested briefing on the criteria, strategy and methods for setting targets for nutrient TMDLs, not Mr. Taylor. Mr. Taylor requested briefing on the monitoring of the Pecos following the Little Bear Fire. These were two separate requests. Last sentence on page 3 line 123 needed to reflect which individual made the statement that no enforcement actions were taken on behalf of the Commission. Mr. Tongate made the statement. Mr. Clark moved approval of the minutes with the corrections. Mr. Glass seconded. The motion passed unanimously.

Item 4. Approval of a Settlement Agreement and Proposed Stipulated Final Order in Mesa Oil Appeal, WQCC 10-12 (CO), Jennifer Hower, NMED/OGC, for Resource Protection Division; Louis Rose, Montgomery and Andrews, for Mesa Oil.

Action: Ms. Hower with the Resource Protection Division New Mexico Environment Department explained the history of this case. Mr. Pattison joined in by phone. The Compliance Order was issued on October 4, 2010 there were a series of motions before the commission and a series of extensions since the compliance order was issued. The parties were able to come to a settlement agreement. Louis Rose, attorney with Montgomery and Andrews representing

Mesa Oil, explained that the compliance order was one of two enforcement actions the department brought against Mesa Oil at the same time. One was under the hazardous waste act. Part of the settlement agreement was signed off by Secretary Martin.

Mr. Tongate noted that a correction was needed on page 10 of the agreement on the last line it had July and August rather than July and October. Ms. Hower responded they could make the change to July and August. Mr. Glass moved for approval. Mr. Waters seconded approval of the Stipulated Order and the settlement agreement. The motion passed unanimously.

Item 5. Hearing in WQCC 12-08 (V), Petition for Variance from 20.6.6.21.L NMAC. Pete V. Domenici, Jr., and Lorraine Hollingsworth, Domenici Law Firm, for Petitioner Bright Star Dairy; Misty Braswell, NMED/OGC, for Ground Water Bureau.

Action: Ms. Orth conducted the hearing in this case. Ms. Hollingsworth represented Bright Star Dairy who requested a two year variance in 20.6.6.21.L NMAC Dairy Rules. The department agreed on two years. Mr. DeRuyter explained his current operation of the land application area and how much it would cost to line the ditches. Ms. Braswell represented Kim Kirby, who testified for the department. Mrs. Orth stated all exhibits were entered into the record and the record was closed.

Mr. Tongate questioned if the commission should rule on this during the meeting or request finding of facts and conclusions of law to consider at the next meeting. Ms. Orth responded that Mr. Tongate could question the Commission to see if they were prepared to deliberate on this or he could request the petitioner or the department to present proposed findings fact and conclusions. After a break the Commission resumed the meeting at 11:05 a.m. The Commission deliberated and discussed whether the rules would be a reasonable burden for the dairy and if another year should be added on.

Mr. Tongate questioned if there was consensus regarding the cost of lining ditches with concrete for the dairy and if it would be a burden on the applicant for at least two or three years. There was a consensus on this issue. Mr. Waters motioned to amend the original motion to three years. Mr. Pattison seconded the motion. Mr. Glass motioned to amend the original motion to thirty months. Mr. Sanders seconded the motion. The motion amended to thirty months and the variance was set for May 13, 2015. The motion passed with one nay vote cast by Mr. Sloane. The variance was granted with a period of thirty months set for May 13, 2015.

Ms. Orth mentioned to Mr. Tongate that there should be a consensus of the Commission after Mr. Cunniff presented him with an order approving the variance with presumably a Statement of Reason. There was a consensus on this.

Item 7. Discussion of legal counsel for the Commission during the Copper Rule hearing, WQCC 12-01 (R), Commission Counsel Sean Cunniff.

Action: The Attorney General's office entered an appearance in the Copper rule. There was a conflict because Mr. Cunniff is Commission Counsel for the commission. Mr. Cunniff stated that under the Commission's rule the commission was not bound to use the Attorney General's Office. They could request another attorney. There was discussion amongst the commission and Mr. Cunniff whether to find other counsel or have Mr. Cunniff represent them. The Commission decided to let Mr. Cunniff represent them. The Commission broke for lunch at 11:50 p.m. and resumed the meeting at 1:02 p.m.

Item 6. Presentation of Petition for Rulemaking in WQCC 12-01 (R), 20.6.2 NMAC-The Copper Rule. Misty Braswell and Andrew Knight, NMED/OGC; Dal Moellenberg and TJ Trujillo, Gallagher & Kennedy; Bruce Fredrick and Jonathan Block, NMELC.

Action: Ms. Orth gave introductory remarks about the packets mailed to the Commission. There was a petition sent in the packets. A late filing called "Response to Petition" from Freeport McMoRan and another "Response to Petition" filed November 12, 2012 the Environmental Law Center were e-mailed to the commission in the morning and distributed during the meeting. There was also a third item that was distributed to the commission in hard copy a motion to admit the record from the Tyrone Permit Appeal. The reason this wasn't sent to the commission on November 2, the day it was filed, was because the commission wouldn't rule on a Motion until there was a reply. The commission didn't need to consider this motion it reflects that the Attorney General had entered an appearance in this matter.

Ms. Braswell and Mr. Knight representing the Environment Department were present to request the Commission set this matter for hearing for January 8. Mr. Mollenberg, representing Freeport-McMoRan Chino Mines Company, concurred with the Environment Department to set a hearing for January 8 and appoint a Hearing Officer to set-up a process or a pre-hearing conference. Mr. Fredrick for the New Mexico Environmental Law Center represented Gila resources information project GRIP, Amigos Bravos and Turner Ranch Property. Rachel Conn with Amigos Bravos

joined him in the presentation. Mr. Fredrick stated what he considered were substantial legal problems with the Department's proposed rule. Ms. Conn spoke about the irregularities in the process that lead up to the department's rule that was being proposed. Mr. Fredrick and Ms. Conn were present to request the Commission to reject the petition and send the copper rule back to the department's advisory board. Ms. Fox, representing Attorney General's office, stated that the proposed copper rule violates the water utility act, water quality regulations that are in place that prevent pollution under sources and the 2007 decision made in Tyrone. The Attorney General Office's opinion is that there is room for compromise and that it is important for the state and the communities involved in this issue and for the parties to come to a consensus rule.

Mr. Sloan motioned to set the hearing for April 9 and appoint Ms. Orth as the Hearing Officer. Mr. Bland seconded the motion. Mr. Dominguez and Mr. Pattison motioned that Ms. Orth be the hearing officer. The motion passed unanimously

The hearing is set for April 9, 2012.

A short break was taken.

Item 8. Reports on criteria, strategy and methods for setting targets for nutrient TMDLs; and plans for monitoring in the Pecos following the Little Bear Fire. James Hogan, NMED Surface Water Quality Bureau.

Action James Hogan, NMED Surface Water Quality Bureau, presented a report on what they are doing to monitor the impact of the fires from the Little Bear Fire and the Las Conchas Fires. They will be looking at the impact of them and at the Pecos Water Shed. He also presented an update on nutrients and how two things have changed. Nutrients are a water quality concern and at the State level the bureau has stopped drafting nutrient TMDLs. The Surface Water Quality has been engaging in meetings and trying to address concerns. Region 6 has asked them to provide them with a report on their nutrient criteria development and control strategy.

Item 9. Dairy Facility & Permitting Status Update. Jerry Schoeppner, NMED Ground Water Bureau.

Action. Jerry Schoeppner, Chief of the Ground Water Quality Bureau, presented an update on dairy permits.

Item 10. Other business and announcement of any enforcement actions taken on behalf of the Commission.

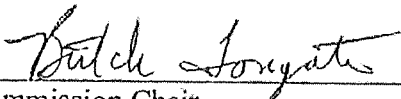
Action: Ms. Orth noted from an administrative point of view there would be a lot of material in the copper rule and in 12-07(R). Ms. Orth questioned how they would like the material to be sent to them. 12-05 (V) the petitioner asked for the variance not to be set on the December agenda.

Mrs. Braswell and Mr. Tongate stated that no enforcement actions were taken on behalf of the Commission.

Item 11. Next Meeting: December 11, 2012

Item 12. Adjournment.

The Chair adjourned the meeting at 3:27 p.m.



Commission Chair

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STATE OF NEW MEXICO

NEW MEXICO ENVIRONMENT DEPARTMENT
PROFESSIONAL SERVICES CONTRACT # 000000000000000000004076

THIS AGREEMENT is made and entered into by and between the State of New Mexico, New Mexico Environment Department, hereinafter referred to as (the "Agency") and Basham & Basham, PC, hereinafter referred to as (the "Contractor"), and is effective as of the date set forth below upon which it is executed by the Department of Finance and Administration ("DFA")

IT IS AGREED BETWEEN THE PARTIES:

1. Scope of Work.

A. The Contractor shall perform the following work:

The scope of work shall consist of attorney services as a hearing officer to assist the Secretary of the Department. These services may include, but are not limited to the following:

- assuring that proper notice is given by the Hearing Clerk to the parties and the public;
- assuring that a proper evidentiary record is made;
- taking testimony at a hearing or in writing;
- ensuring that hearings are conducted in an orderly and fair manner consistent with applicable laws and regulations;
- making rulings on evidence, procedural issues and other motions;
- writing a hearing officer's report that may include a summary of the record, recommended findings of fact and conclusions of law, a recommended decision, or if properly delegated, a final decision;
- assuring notice of the decision is given by the Hearing Clerk to all the parties;
- meeting with, consulting with and advising the Secretary of the Department, as requested;
- and other duties as assigned consistent with the role of a hearing officer or administrative law judge.

B. Services will be performed at various locations around the State of New Mexico as public hearings and adjudicatory hearing are assigned by the Secretary of Environment, the WQCC or the EIB to Contractor.

C. Performance Measures. Contractor shall substantially perform the following Performance Measures:

A hearing officer helps us expedite and complete the solid waste permitting process to ensure that facilities are constructed and operated in compliance with the Solid Waste Act and 20 NMAC 9.1, and that groundwater is protected.

2. Compensation.

A. **The total amount payable to the Contractor under this Agreement, including**

gross receipts tax and expenses, shall not exceed \$30,000 plus state gross receipts taxes. This amount is a maximum and not a guarantee that the work assigned to Contractor under this Agreement to be performed shall equal the amount stated herein.

B. The Agency shall pay to the Contractor in full payment for services satisfactorily performed as follows:

	Service Category	Rate Per Hour
1. Mark Basham	Attorney	\$150.00
2.. Variable	Paralegal	\$ 50.00

Such compensation not to exceed \$30,000 (as set forth in Paragraph A) excluding gross receipts tax. The New Mexico gross receipts tax levied on the amounts payable under this Agreement totaling \$30,000 shall be paid by the Agency to the Contractor. Payment is subject to availability of funds pursuant to the Appropriations Paragraph set forth below and to any negotiations between the parties from year to year pursuant to Paragraph 1, Scope of Work, and to approval by the DFA. All invoices MUST BE received by the Agency no later than fifteen (15) days after the termination of the Fiscal Year in which the services were delivered. Invoices received after such date WILL NOT BE PAID.

Payment in FY07 and FY08, is subject to availability of funds pursuant to the Appropriations Paragraph set forth below and to any negotiations between the parties from year to year pursuant to Paragraph 1, Scope of Work, and to approval by the DFA. All invoices MUST BE received by the Agency no later than fifteen (15) days after the termination of the Fiscal Year in which the services were delivered. Invoices received after such date WILL NOT BE PAID.

C. Contractor must submit a detailed statement accounting for all services performed and expenses incurred. If the Agency finds that the services are not acceptable, within thirty days after the date of receipt of written notice from the Contractor that payment is requested, it shall provide the Contractor a letter of exception explaining the defect or objection to the services, and outlining steps the Contractor may take to provide remedial action. Upon certification by the Agency that the services have been received and accepted, payment shall be tendered to the Contractor within thirty days after the date of acceptance. If payment is made by mail, the payment shall be deemed tendered on the date it is postmarked. However, the agency shall not incur late charges, interest, or penalties for failure to make payment within the time specified herein.

3. **Term.**

THIS AGREEMENT SHALL NOT BECOME EFFECTIVE UNTIL APPROVED BY THE DFA. This Agreement shall terminate on June 30, 2008 unless terminated pursuant to paragraph 4, infra, or paragraph 5. In accordance with Section 13-1-150 NMSA 1978, no contract term for a professional services contract, including extensions and renewals, shall exceed four years, except as set forth in Section 13-1-150 NMSA 1978.

4. **Termination.**

A. **Termination.** This Agreement may be terminated by either of the parties hereto upon written notice delivered to the other party at least ten (10) days prior to the intended date of termination. By such termination, neither party may nullify obligations already incurred for performance or failure to perform prior to the date of termination. Notwithstanding the foregoing, this Agreement may be terminated immediately upon written notice to the Contractor if the

Contractor becomes unable to perform the services contracted for, as determined by the Agency or if, during the term of this Agreement, the Contractor or any of its officers, employees or agents is indicted for fraud, embezzlement or other crime due to misuse of state funds or due to the Appropriations paragraph herein. THIS PROVISION IS NOT EXCLUSIVE AND DOES NOT WAIVE THE STATE'S OTHER LEGAL RIGHTS AND REMEDIES CAUSED BY THE CONTRACTOR'S DEFAULT/BREACH OF THIS AGREEMENT.

B. Termination Management. Immediately upon receipt by either the Agency or the Contractor of notice of termination of this Agreement, the Contractor shall: 1) not incur any further obligations for salaries, services or any other expenditure of funds under this Agreement without written approval of the Agency; 2) comply with all directives issued by the Agency in the notice of termination as to the performance of work under this Agreement; and 3) take such action as the Agency shall direct for the protection, preservation, retention or transfer of all property titled to the Agency and records generated under this Agreement. Any non-expendable personal property or equipment provided to or purchased by the Contractor with contract funds shall become property of the Agency upon termination and shall be submitted to the agency as soon as practicable.

5. Appropriations.

The terms of this Agreement are contingent upon sufficient appropriations and authorization being made by the Legislature of New Mexico for the performance of this Agreement. If sufficient appropriations and authorization are not made by the Legislature, this Agreement shall terminate immediately upon written notice being given by the Agency to the Contractor. The Agency's decision as to whether sufficient appropriations are available shall be accepted by the Contractor and shall be final. If the Agency proposes an amendment to the Agreement to unilaterally reduce funding, the Contractor shall have the option to terminate the Agreement or to agree to the reduced funding, within thirty (30) days of receipt of the proposed amendment.

6. Status of Contractor.

The Contractor and its agents and employees are independent contractors performing professional services for the Agency and are not employees of the State of New Mexico. The Contractor and its agents and employees shall not accrue leave, retirement, insurance, bonding, use of state vehicles, or any other benefits afforded to employees of the State of New Mexico as a result of this Agreement. The Contractor acknowledges that all sums received hereunder are reportable by the Contractor for tax purposes, including without limitation, self-employment and business income tax. The Contractor agrees not to purport to bind the State of New Mexico unless the Contractor has express written authority to do so, and then only within the strict limits of that authority.

7. Assignment.

The Contractor shall not assign or transfer any interest in this Agreement or assign any claims for money due or to become due under this Agreement without the prior written approval of the Agency.

8. Subcontracting.

The Contractor shall not subcontract any portion of the services to be performed under this Agreement without the prior written approval of the Agency.

9. **Release.**

Final payment of the amounts due under this Agreement shall operate as a release of the Agency, its officers and employees, and the State of New Mexico from all liabilities, claims and obligations whatsoever arising from or under this Agreement.

10. **Confidentiality.**

Any confidential information provided to or developed by the Contractor in the performance of this Agreement shall be kept confidential and shall not be made available to any individual or organization by the Contractor without the prior written approval of the Agency.

11. **Product of Service -- Copyright.**

All materials developed or acquired by the Contractor under this Agreement shall become the property of the State of New Mexico and shall be delivered to the Agency no later than the termination date of this Agreement. Nothing developed or produced, in whole or in part, by the Contractor under this Agreement shall be the subject of an application for copyright or other claim of ownership by or on behalf of the Contractor.

12. **Conflict of Interest; Governmental Conduct Act.**

The Contractor warrants that it presently has no interest and shall not acquire any interest, direct or indirect, which would conflict in any manner or degree with the performance or services required under the Agreement. The Contractor certifies that the requirements of the Governmental Conduct Act, Sections 10-16-1 through 10-16-18, NMSA 1978, regarding contracting with a public officer or state employee or former state employee have been followed.

13. **Amendment.**

This Agreement shall not be altered, changed or amended except by instrument in writing executed by the parties hereto.

14. **Merger.**

This Agreement incorporates all the Agreements, covenants and understandings between the parties hereto concerning the subject matter hereof, and all such covenants, Agreements and understandings have been merged into this written Agreement. No prior Agreement or understanding, oral or otherwise, of the parties or their agents shall be valid or enforceable unless embodied in this Agreement.

15. **Penalties for violation of law.**

The Procurement Code, Sections 13-1-28 through 13-1-199, NMSA 1978, imposes civil and criminal penalties for its violation. In addition, the New Mexico criminal statutes impose felony penalties for illegal bribes, gratuities and kickbacks.

16. **Equal Opportunity Compliance.**

The Contractor agrees to abide by all federal and state laws and rules and regulations, and executive orders of the Governor of the State of New Mexico, pertaining to equal employment opportunity. In accordance with all such laws of the State of New Mexico, the Contractor assures that no person in the United States shall, on the grounds of race, religion, color, national origin, ancestry, sex, age, physical or mental handicap, or serious medical condition, spousal affiliation, sexual orientation or gender identity, be excluded from employment with or participation in, be

denied the benefits of, or be otherwise subjected to discrimination under any program or activity performed under this Agreement. If Contractor is found not to be in compliance with these requirements during the life of this Agreement, Contractor agrees to take appropriate steps to correct these deficiencies.

17. **Applicable Law.**

The laws of the State of New Mexico shall govern this Agreement, without giving effect to its choice of law provisions. Venue shall be proper only in a New Mexico court of competent jurisdiction in accordance with Section 38-3-1 (G) NMSA 1978. By execution of this Agreement, Contractor acknowledges and agrees to the jurisdiction of the courts of the State of New Mexico over any and all lawsuits arising under or out of any term of this Agreement.

18. **Workers Compensation.**

The Contractor agrees to comply with state laws and rules applicable to workers compensation benefits for its employees. If the Contractor fails to comply with the Workers Compensation Act and applicable rules when required to do so, this Agreement may be terminated by the Agency.

19. **Records and Financial Audit.**

The Contractor shall maintain detailed time and expenditure records that indicate the date; time, nature and cost of services rendered during the Agreement's term and effect and retain them for a period of three (3) years from the date of final payment under this Agreement. The records shall be subject to inspection by the Agency, the Department of Finance and Administration and the State Auditor. The Agency shall have the right to audit billings both before and after payment. Payment under this Agreement shall not foreclose the right of the Agency to recover excessive or illegal payments

20. **Indemnification.**

The Contractor shall defend, indemnify and hold harmless the Agency and the State of New Mexico from all actions, proceeding, claims, demands, costs, damages, attorneys' fees and all other liabilities and expenses of any kind from any source which may arise out of the performance of this Agreement, caused by the negligent act or failure to act of the Contractor, its officers, employees, servants, subcontractors or agents, or if caused by the actions of any client of the Contractor resulting in injury or damage to persons or property during the time when the Contractor or any officer, agent, employee, servant or subcontractor thereof has or is performing services pursuant to this Agreement. In the event that any action, suit or proceeding related to the services performed by the Contractor or any officer, agent, employee, servant or subcontractor under this Agreement is brought against the Contractor, the Contractor shall, as soon as practicable but no later than two (2) days after it receives notice thereof, notify the legal counsel of the Agency and the Risk Management Division of the New Mexico General Services Department by certified mail.

21. **Invalid Term or Condition.**

If any term or condition of this Agreement shall be held invalid or unenforceable, the remainder of this Agreement shall not be affected and shall be valid and enforceable.

22. **Enforcement of Agreement.**

A party's failure to require strict performance of any provision of this Agreement shall not

waive or diminish that party's right thereafter to demand strict compliance with that or any other provision. No waiver by a party of any of its rights under this Agreement shall be effective unless express and in writing, and no effective waiver by a party of any of its rights shall be effective to waive any other rights.

23. Notices.

Any notice required to be given to either party by this Agreement shall be in writing and shall be delivered in person, by courier service or by U.S. mail, either first class or certified, return receipt requested, postage prepaid, as follows:

To the Agency: Felicia Orth
NMED Administrative Hearing Officer
P.O. 26110
Santa Fe, NM 87502
505-827-0339

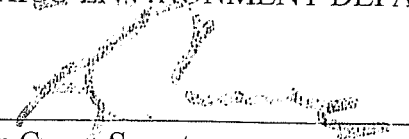
To the Contractor: Mark Basham
Basham & Basham, PC
2205 Miguel Chavez Road, Suite A
Santa Fe, NM 87505-110
505-988-4575

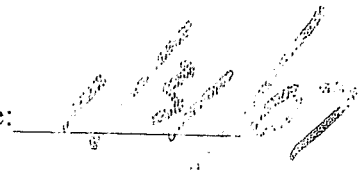
24. Authority.

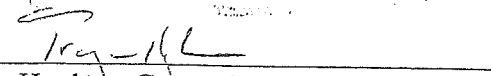
If Contractor is other than a natural person, the individual(s) signing this Agreement on behalf of Contractor represent and warrant that he or she has the power and authority to bind Contractor, and that no further action, resolution, or approval from Contractor is necessary to enter into a binding contract.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date of signature by the DFA Contracts Review Bureau below.

NEW MEXICO ENVIRONMENT DEPARTMENT


By: 
Ron Curry, Secretary

Date: 

By: 
Tracy Hughes, General Counsel -Certifying legal sufficiency

Date: 1/25/07

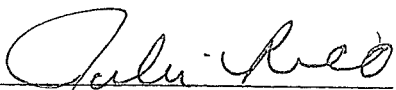
BASHAM & BASHAM, PC

By: 
Mark Basham

Date: 1/22/07

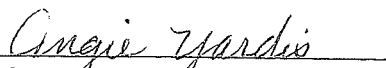
The records of the Taxation and Revenue Department reflect that the Contractor is registered with the Taxation and Revenue Department of the State of New Mexico to pay gross receipts and compensating taxes.

ID Number: 02-460411-00-9

By: 
Taxation and Revenue Department

Date: 2/5/07

This Agreement has been approved by the DFA Contracts Review Bureau:

By: 
DFA Contracts Review Bureau

Date: 02/15/07

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STATE OF NEW MEXICO
DEPARTMENT OF ENVIRONMENT
PROFESSIONAL SERVICES CONTRACT # 06-667-3500-0001

THIS AGREEMENT is made and entered into by and between the State of New Mexico, New Mexico Environment Department, hereinafter referred to as the "Department" and Ripley B. Harwood, P.C., hereinafter referred to as the "Contractor".

IT IS MUTUALLY AGREED BETWEEN THE PARTIES:

1. Scope of Work.
 - a. The scope of work shall consist of attorney services as a hearing officer to assist the Secretary of the Department, the Water Quality Control Commission ("WQCC"), the Environmental Improvement Board ("EIB") or the Occupational Health and Safety Review Commission ("OHSRC"). These services may include, but are not limited to the following:
 - assuring that proper notice is given to the parties and the public;
 - assuring that a proper record is made;
 - taking testimony at a hearing or in writing;
 - ensuring that hearings are conducted in an orderly and fair manner consistent with applicable laws and regulations;
 - making rulings on evidence, procedural issues and other motions;
 - writing a hearing officer's report that may include findings of fact, conclusions of law, a recommended decision, or if properly delegated, a final decision;
 - assuring notice of the decision is given to all the parties;
 - meeting with, consulting with and advising the Secretary of the Department, WQCC or EIB as requested;
 - defending the final action in the District Court, Court of Appeals or Supreme Court as requested, including consultation, brief writing and oral argument; and
 - other duties as assigned consistent with the role of a hearing officer or administrative law judge.
 - b. The scope of work shall consist of attorney services for collection of fees and penalties; and subrogation and insurance recovery actions for the various bureaus within the Department. The services may include, but are not limited to the following:
 - meeting with the bureau client;
 - asserting and defending the Department's authority to assess the fee or penalty;
 - asserting and defending the Department's authority to add interest as requested to the total amount;
 - writing demand letters;
 - negotiating settlements and payment plans;
 - filing and pursuing lawsuits to collect the amount due;
 - defending any counterclaims;

- filing and responding to motions;
- taking the claim to trial and final resolution;
- obtaining a final order;
- arranging for collection;
- overseeing collection until the judgment or order is satisfied; and
- other duties as assigned consistent with the role of an attorney in a collection proceeding.

Performance Measures. Contractor's scope of work does not directly support the Petroleum Storage Tank Bureau's (PSTB) performance measures, but supports PSTB's objectives and therefore indirectly supports PSTB's performance measures. See Attachment 1.

2. Compensation.

A. The Department shall pay to the Contractor in full payment for services satisfactorily performed pursuant to the Scope of Work rendered at the following rate(s) per hour.

	Service Category	Rate Per Hour
1. Ripley B. Harwood	Attorney	\$124.00
2. Variable	Paralegal	\$ 64.00

The total compensation under this Agreement will not exceed \$50,000.00 including gross receipts taxes. The Contractor shall be reimbursed for expenses as follows: all litigation costs such as copy costs, postage, deposition court reporter, travel if approved in advance.

B. The Department shall pay the Contractor upon receipt of a detailed statement of accounting for services performed and expenses incurred hereunder.

C. Within fifteen days after the date the Department receives written notice from the Contractor that payment is requested for services or items of tangible personal property delivered on site and received, the Department shall issue a written certification of complete or partial acceptance or rejection of the services or items of tangible personal property. If the Department finds that the services or items of tangible personal property are not acceptable, it shall, within thirty days after the date of receipt of written notice from the Contractor that payment is requested, provide to the Contractor a letter of exception explaining the defect or objection to the services or delivered tangible personal property along with details of how the Contractor may proceed to provide remedial action. Upon certification by the Department that the services or items of tangible personal property have been received and accepted, payment shall be tendered to the Contractor within thirty days after the date of certification. If payment is made by mail, the payment shall be deemed tendered on the date it is postmarked. After the thirtieth day from the date that written certification of acceptance is issued, late payment charges shall be paid on the unpaid balance due on the contract to the Contractor at the rate of 1.5% per month.

3. Term.

THIS AGREEMENT SHALL NOT BECOME EFFECTIVE UNTIL APPROVED BY THE DEPARTMENT OF FINANCE AND ADMINISTRATION. This Agreement shall terminate on December 31, 2006, unless terminated pursuant to paragraph 4, infra, or paragraph 5. In accordance with Section 13-1-150 NMSA 1978, no contract term, including extensions and renewals, shall exceed four years, except as set forth in Section 13-1-150 NMSA 1978.

4. Termination.

A. Termination

This Agreement may be terminated by either of the parties hereto upon written notice delivered to the other party at least ten (10) days prior to the intended date of termination. By such termination, neither party may nullify obligations already incurred for performance or failure to perform prior to the date of termination. This Agreement may be terminated immediately upon written notice to the Contractor, if the Contractor becomes unable to perform the services contracted for, as determined by the Department or if, during the term of this Agreement, the Contractor or any of its officers, employees or agents is indicted for fraud, embezzlement or other crime due to misuse of state funds or due to the Appropriations paragraph herein. THIS PROVISION IS NOT EXCLUSIVE AND DOES NOT WAIVE THE STATE'S OTHER LEGAL RIGHTS AND REMEDIES CAUSED BY THE CONTRACTOR'S DEFAULT/BREACH OF THIS AGREEMENT.

B. Termination Management

Immediately upon receipt by either the Department or the Contractor of notice of termination of this Agreement, the Contractor shall: 1) not incur any further obligations for salaries, services or any other expenditure of funds under this Agreement without written approval of the Department; 2) comply with all directives issued by the Department in the notice of termination as to the performance of work under this Agreement; and 3) take such action as the Department shall direct for the protection, preservation, retention or transfer of all property titled to the Department and [client records generated under this Agreement] and any non-expendable personal property or equipment purchased by the Contractor with contract funds shall become property of the Department upon termination. On the date the notice of termination is received, the Contractor shall furnish to the Department a complete, detailed inventory of non-expendable personal property purchased with funds provided under the existing and previous Department agreements with the Contractor; the property listed in the inventory report including client records and a final closing of the financial records and books of accounts which were required to be kept by the Contractor under the paragraph of this Agreement regarding financial records.

5. Appropriations.

The terms of this Agreement are contingent upon sufficient appropriations and authorization being made by the Legislature of New Mexico for the performance of this Agreement. If sufficient appropriations and authorization are not made by the Legislature, this Agreement shall terminate immediately upon written notice being given by the Department to the Contractor. The Department's decision as to whether sufficient appropriations are available shall be accepted by the Contractor and shall be final. If the Department proposes an amendment to the Agreement to unilaterally reduce funding, the Contractor shall have the option to terminate the Agreement or agree to the reduced funding, within thirty (30) days of receipt of the proposed amendment.

6. Status of Contractor.
The Contractor and its agents and employees are independent contractors performing professional services for the Department and are not employees of the State of New Mexico. The Contractor and its agents and employees shall not accrue leave, retirement, insurance, bonding, use of state vehicles, or any other benefits afforded to employees of the State of New Mexico as a result of this Agreement. The Contractor acknowledges that all sums received hereunder are personally reportable by it for income tax purposes as self-employment or business income and are reportable for self-employment tax [.
7. Assignment.
The Contractor shall not assign or transfer any interest in this Agreement or assign any claims for money due or to become due under this Agreement without the prior written approval of the Department.
8. Subcontracting.
The Contractor shall not subcontract any portion of the services to be performed under this Agreement without the prior written approval of the Department.
9. Release.
The Contractor's acceptance of final payment of the amount due under this Agreement shall operate as a release of the Department, its officers and employees, and the State of New Mexico from all liabilities, claims and obligations whatsoever arising from or under this Agreement. The Contractor agrees not to purport to bind the State of New Mexico unless the Contractor has express written authority to do so, and then only within the strict limits of that authority.
10. Confidentiality.
Any confidential information provided to or developed by the Contractor in the performance of this Agreement shall be kept confidential and shall not be made available to any individual or organization by the Contractor without the prior written approval of the Department.
11. Product of Service -- Copyright.
All materials developed or acquired by the Contractor under this Agreement shall become the property of the State of New Mexico and shall be delivered to the

Department no later than the termination date of this Agreement. Nothing produced, in whole or in part, by the Contractor under this Agreement shall be the subject of an application for copyright or other claim of ownership by or on behalf of the Contractor.

12. Conflict of Interest.
The Contractor warrants that it presently has no interest and shall not acquire any interest, direct or indirect, which would conflict in any manner or degree with the performance or services required under the Agreement. The Contractor certifies that the requirements of the Governmental Conduct Act, Sections 10-16-1 through 10-16-18, NMSA 1978, regarding contracting with a public officer or state employee have been followed.
13. Amendment.
This Agreement shall not be altered, changed or amended except by instrument in writing executed by the parties hereto.
14. Merger.
This Agreement incorporates all the agreements, covenants and understandings between the parties hereto concerning the subject matter hereof, and all such covenants, agreements and understandings have been merged into this written Agreement. No prior agreement or understanding, oral or otherwise, of the parties or their agents shall be valid or enforceable unless embodied in this Agreement.
15. Penalties.
The Procurement Code, Sections 13-1-28 through 13-1-199, NMSA 1978, imposes civil and criminal penalties for its violation. In addition, the New Mexico criminal statutes impose felony penalties for illegal bribes, gratuities and kickbacks.
16. Equal Opportunity Compliance.
The Contractor agrees to abide by all federal and state laws and rules and regulations, and executive orders of the Governor of the State of New Mexico, pertaining to equal employment opportunity. In accordance with all such laws of the State of New Mexico, the Contractor agrees to assure that no person in the United States shall, on the grounds of race, religion, color, national origin, sexual preference, ancestry, sex, age or handicap, be excluded from employment with or participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity performed under this Agreement. If Contractor is found not to be in compliance with these requirements during the life of this Agreement, Contractor agrees to take appropriate steps to correct these deficiencies.
17. Applicable Law.
The laws of the State of New Mexico shall govern this Agreement.
18. Workers Compensation.

The Contractor agrees to comply with state laws and rules applicable to workers compensation benefits for its employees. If the Contractor fails to comply with the Workers Compensation Act and applicable rules when required to do so, this Agreement may be terminated by the Department.

19. Records and Financial Audit.

The Contractor shall maintain detailed time and expenditure records that indicate the date; time, nature and cost of services rendered during the Agreement's term and effect and retain them for a period of three (3) years from the date of final payment under this Agreement. The records shall be subject to inspection by the Department, the Department of Finance and Administration and the State Auditor. The Department shall have the right to audit billings both before and after payment. Payment under this Agreement shall not foreclose the right of the Department to recover excessive or illegal payments.

20. Indemnification.

The Contractor shall defend, indemnify and hold harmless the Department and the State of New Mexico from all actions, proceedings, claims, demands, costs, damages, attorneys' fees and all other liabilities and expenses of any kind from any source which may arise out of the performance of this Agreement, caused by the negligent act or failure to act of the Contractor, its officers, employees, servants, subcontractors or agents, or if caused by the actions of any client of the Contractor resulting in injury or damage to persons or property during the time when the Contractor or any officer, agent, employee, servant or subcontractor thereof has or is performing services pursuant to this Agreement. In the event that any action, suit or proceeding related to the services performed by the Contractor or any officer, agent, employee, servant or subcontractor under this Agreement is brought against the Contractor, the Contractor shall, as soon as practicable but no later than two (2) days after it receives notice thereof, notify the legal counsel of the Department and the Risk Management Division of the New Mexico General Services Department by certified mail.

21. Notices.

Any notice required to be given to either party by this Agreement shall be in writing and shall be delivered in person, by courier service or by U.S. mail, either first class or certified, return receipt requested, postage prepaid, as follows:

To the Department: Karen Thomas
New Mexico Environment Department
P.O. Box 26110
Santa Fe, NM 87502-6110

To the Contractor: Ripley B. Harwood
Ripley B. Harwood, P.C.
901 Rio Grande Boulevard NW, Suite G 250
Albuquerque, NM 87104

22. Malpractice Insurance:

Contractors shall provide professional liability insurance during the term of any contract awarded in the amount of \$500,000 per claim and \$1,000,000 aggregate. Contractor shall provide proof that such insurance is in full force and effect at the time of contracting and at any other time at the request of the Department.

IN WITNESS WHEREOF, parties have executed this Agreement as of the date of signature by the DFA Contracts Review Bureau, below.

NEW MEXICO ENVIRONMENT DEPARTMENT

By: _____
Ron Curry, Secretary

Date: _____

By: Troy L
Department's Legal Counsel - Certifying legal sufficiency

Date: 9/28/05

RIPLEY B. HARWOOD, P.C.

By: Ripley B. Harwood
Ripley B. Harwood

Date: 7/19/05

The records of the Taxation and Revenue Department reflect that the Contractor is registered with the Taxation and Revenue Department of the State of New Mexico to pay gross receipts and compensating taxes.

ID Number: 03 - 005010 - 00-3

By: Julie R...
Taxation and Revenue Department

Date: 9/29/05

This Agreement has been approved by the DFA Contracts Review Bureau:

By: Teresa Martinez
DFA Contracts Review Bureau

Date: 10-01-05

OGC	Percent of enforcement actions brought within one year of inspection or documentation of a violation.	90%	Output
OGC	Percent of legal requests reviewed and assigned within 3 days of receipt. <i>The intent of this measure is to reflect the Office of General Counsel's response to requests from programs within the department. In years past, requests for legal assistance often did not receive a response for months. As a result, important policy issues were not resolved in a timely manner and enforcement cases became stale due to inactivity.</i>	95%	Output
OGC	Percent of clients contacted within two weeks of assignment of case. <i>Like the previous measure, this one will indicate the timeliness of responses from the Office of General Counsel to requests for legal assistance.</i>	90%	Output
IT	Percent of total scheduled time the network is available to department users. <i>Information technology supports all program work within the department. The IT performance measures relate to system availability, which in turn allow NMED staff to perform their core mission in an efficient and effective manner.</i>	99%	Output
IT	Percent of total scheduled time mission critical servers are available to department users.	99%	Output
Construction Programs	Percent customer satisfaction with the Construction Program services provided in conjunction with federal and state loan and grant projects for construction of water, wastewater, and solid waste projects, based on written customer surveys. <i>Surveys have proven useful in the past to identify areas of weakness. The programs administered by CPB result in the construction of water and waste facilities that protect public health and the environment. Identifying problems with programs so they may be remedied, leads to more efficient and effective use of State resources for environmental protection.</i>	100%	Outcome

P568 Water and Waste Management Program

The purpose of the water and waste management program is to monitor, regulate and remediate impacts to New Mexico's soil, groundwater and surface water; to provide regulatory oversight and

	<i>along with comments as to whether the condition resulted from a natural event (high winds/dust storm, or wildfire) or from conditions requiring further study. The goal for this performance measure is an annual count because the occurrences in question are not spread out evenly over the calendar quarters.</i>		
PSTB	Percent of payments made within 60 days from the Corrective Action Fund after the submission of the payment application and proper documentation. <i>Section 74-6B-13 NMSA 1978 states that "a payment of costs from the Corrective Action Fund shall occur not later than 60 days after the submission of the application and proper documentation." Since the payment application is audited and reviewed by several persons, a monthly tracking system has been implemented to ensure that warrants are issued by DFA within 60 days of a payment application that is deemed complete and proper documentation on the work performed has been received.</i>	100%	Outcome
PSTB	Percent of underground storage tank facilities in significant operational compliance with release prevention and release detection regulations of the Petroleum Storage Tank regulations. <i>Facilities must be in operational compliance with underground storage tank release prevention regulations (spill, overfill, and corrosion protection) and with release detection regulations. This statistic is a direct measure of actions designed to prevent a petroleum product release from occurring. Compliance with these requirements allows a facility to access the Corrective Action Fund for remediation purposes in the case of a release at the facility. The significant operational compliance performance measure will be calculated for the total number of facilities inspected during the reporting period.</i>	80%	Outcome
Solid Waste	Percent of landfills meeting ground water monitoring requirements. <i>Solid waste regulations require active and closed landfills to monitor ground water quality (unless the owner petitions for an exemption and one is granted following a public hearing). If contamination is detected at a landfill, the owner is then required to assess the extent of the contamination, and possibly initiate corrective action. A major component of the Solid Waste Bureau's compliance monitoring effort is ensuring that landfill owners comply with ground water monitoring requirements.</i>	93%	Outcome

