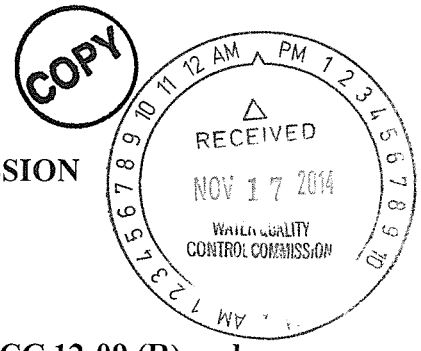


STATE OF NEW MEXICO
WATER QUALITY CONTROL COMMISSION

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

REPLY IN SUPPORT OF NEW MEXICO ENVIRONMENT DEPARTMENT'S MOTION TO STRIKE ENTRY OF APPEARANCE OF THE NEW MEXICO ATTORNEY GENERAL

The New Mexico Environment Department ("NMED" or "Department"), pursuant to Section 106.C of the Procedural Order issued on October 3, 2014, hereby files this Reply to the Attorney General's Response to NMED's Motion to Strike Entry of Appearance of Attorney General and the Coalition's Opposition to NMED's Motion to Strike Entry of Appearance of the New Mexico Attorney General. The Water Quality Control Commission ("Commission") should strike the New Mexico Attorney General's ("Attorney General") Entry of Appearance in the Proposed Amendment to 20.6.6 NMAC ("Dairy Rule") hearing based on the fact that the State's interest in protecting New Mexico's groundwater is adequately represented in this proceeding by the Department.

The Attorney General contends that he may participate in this rulemaking because NMSA 1978, Section 8-5-2 grants him authority to participate, and because there is no express limitation in law on the Attorney General's authority to participate. AG Response, pp. 1; 4-5. The Department recognizes the Attorney General's duty to appear before local, state, and federal courts "when...the interest of the state requires such action." NMSA 1978, § 8-5-2(J) (1975). However, the Department maintains that the Attorney General's duties have not been triggered in this instance, and in fact, the Attorney General is precluded from inserting himself to "be heard

on behalf of the state" in matters where the legislature has designated another agency to be heard on behalf of the State. In the cases that the Attorney General cites for his authority to represent the State's interest, there is no other state agency with the authority to represent the State's interests. *See State ex rel. Bingaman v. Valley Sav. & Loan Ass'n*, 1981-NMSC-108, 97 N.M. 8 (Attorney General brought suit against savings and loan associations to enforce provisions of the due-on-sale law; the due-on-sale clauses were of a general public nature affecting the State at large and not within the purview of another state agency); *State v. Block*, 2011-NMCA-101, 150 N.M. 598 (Attorney General was granted exclusive authority to initiate criminal proceedings for violations of the Voter Action Act, therefore no other state agency had jurisdiction to prosecute).

In accordance with the rules of statutory construction, the Commission must assume that when the Department of Environment Act, NMSA 1978, Sections 9-7A-1 to -15 (1991, as amended through 2005) was enacted, the legislature was familiar with Section 8-5-2, and the Commission must assume that the legislature intended to change the law as it existed under Section 8-5-2. *Bettini v. City of Law Cruces*, 1971-NMSC-054, ¶ 12, 82 N.M. 633 (where the Court determined that by enacting a statute, the legislature thereby intended to modify the law as it had theretofore existed). When two statutes are inconsistent, the latter enactment repeals the former by implication to the extent of the inconsistency. *Hall v. Regents of Univ. of New Mexico*, 1987-NMSC-069, ¶ 9, 106 N.M. 167. The Court must apply a more specific statute over a general statute. *State ex rel. Bird v. Apodaca*, 1977-NMSC-110, ¶ 13, 91 N.M. 279. The Court cannot assume that the legislature intended to enact a useless statute. *Leyba v. Renger*, 1992-NMSC-061, ¶ 10, 114 N.M. 686. The Department of Environment Act that established the Department was enacted in 1991, after Section 8-5-2, and provides the Department with the exclusive authority to represent the State's interest in environmental matters. *See* NMSA 1978, §

9-7A-3 (1991) (establishing "a single department to administer the laws and exercise the functions relating to the environment").

The Attorney General's claim that his authority under Section 8-5-2 cannot be restricted by implication but only by express provision is false. The Attorney General cites to *State v. Block* for the notion that a limitation on the Attorney General's authority "provided by law" must be express. AG Response, p. 1. *State v. Block* is distinguishable because the case dealt with a statute in the Voter Action Act that specifically vested the Attorney General with the power to prosecute on behalf of the Secretary of State. The exact statute reads: "the secretary [of state] shall impose a fine or *transmit the finding to the attorney general for prosecution.*" NMSA 1978, § 1-19A-17(A) (2003) (emphasis added). The Attorney General in *State v. Block* had authority to represent the State's interest in prosecution where the Secretary of State did not have such authority. In contrast, here the Department has statutory authority to represent the State's interest in this administrative hearing.

In *State ex rel. Attorney Gen. v. Reese*, the New Mexico Supreme Court limited the application of the Attorney General's duties under Section 8-5-2, stating: "The language, in our view, permits the attorney general to bring an action on behalf of the State if no other provision has been made for it to be brought, or to step into litigation brought by another where the interests of the State are not being adequately represented or protected." 1967-NMSC-172, ¶ 14, 78 N.M. 241. Adding additional language restricting the Attorney General's authority to act when another state entity fails to do so "would be clearly surplusage and unnecessary." *Id.* ¶ 16. The Court reasoned that the legislature surely intended for there to be "no duplication of duties." *Id.* The Court stated that the Attorney General *may* act on behalf of the State in any case where the State has an interest that is not being adequately represented or protected. *Id.*

In this proceeding, the Attorney General does not show how the Department is failing to represent the interests of the State to warrant the Attorney General's participation. The Department has been a party in the Dairy Rule hearing since January 2013, employs technical staff in the Ground Water Quality Bureau to administer the Dairy Rule, has conducted meetings to ascertain the merits of the proposed amendments in the Dairy Industry Group for a Clean Environment's petitions, and has held a public meeting to better understand the public's views on the regulations governing dairies. The Attorney General did not enter an appearance in this proceeding until October 27, 2014, did not participate in any meetings, did not submit a notice of intent to present technical testimony in the Dairy Rule hearing, and has not conveyed to the Department or the Commission how the Department is allegedly failing in its duties to represent the state's interest. Simply citing to the Attorney General's authority to "represent and be heard on behalf of the State when, in his judgment, the public interest of the State requires such action" is insufficient to overcome the fact that the Department *is* adequately representing the public interest of the State in this hearing.

The Attorney General points to the Water Quality Act, NMSA 1978, Sections 74-6-1 to -17 (1967, as amended through 2013), and the Guidelines for Commission Regulation Hearings allowing for broad participation to claim that the Department seeks to obtain special status by seeking to exclude the Attorney General from participating. AG Response, pp. 2-4, 6. The Department is not seeking to disallow anyone from participating in hearings before the Commission, but rather, seeks to limit who can appear before the Commission purporting to represent the State's interests in environmental protection. The Attorney General states that "the public interest in protecting the State's ground water warrants his entry as a party in this proceeding." AG Response, p. 5. However, the Department, *not the Attorney General*, has

primary jurisdiction over pollution control. *State ex re. Norvell v. Arizona Pub. Serv. Co.*, 1973-NMSC-051, ¶ 43, 85 N.M. 165. It is improper for the Attorney General to attempt to usurp the role of the Department in representing the State's interest in this realm. Sections 74-6-9(F) and (G), stating that the Department will be given the same status as any other party in a hearing, simply reinforce the fairness of the proceeding and the fact that the state agency tasked with representing the State in matters involving pollution control will be treated in the same manner as other parties who represent *other* interests. It does not suggest that state entities other than the Department may step in to represent the State's interest in environmental protection.

The Attorney General likens his participation in this hearing to that of the New Mexico Mining Association in the Copper Rule proceeding. AG Response, p. 7. These situations are very different. The New Mexico Mining Association did not purport to represent the State's interests in environmental protection. The Mining Association served as a spokesperson for the mining industry in New Mexico. *See* New Mexico Mining Association About Us, http://www.nmmining.org/_pages/about/about.html (last visited Nov. 14, 2014). In the Dairy Rule hearing, there are presently two state agencies representing the State's interests in pollution control, presenting a conflict that interferes with the Department's duty to execute its statutory and regulatory requirements.

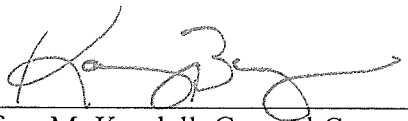
The Department should not be admonished for seeking to exclude the Attorney General from participating in the Dairy Rule hearing. The Commission would be amiss to ignore the obvious conflict in permitting multiple state entities to represent the same public interest in protecting New Mexico's groundwater. It constitutes a duplication of duties and is a waste of public resources, including the Commission's resources and time. While one office is responsible for representing the State's interest generally, the other is *specifically responsible* for

representing the State's interest in environmental protection. The Department asserts that the former has improperly entered into this proceeding, thereby implicitly diminishing the statutory authority of the latter to carry out its duties.

For the reasons set forth herein and in the Department's Motion to Strike Entry of Appearance of the New Mexico Attorney General, the Department respectfully requests that the Commission exclude the Attorney General from the current proceedings.

Respectfully submitted,

GROUND WATER QUALITY BUREAU
NEW MEXICO ENVIRONMENT DEPARTMENT



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CERTIFICATE OF SERVICE

I hereby certify that on November 17, 2014, a copy of the Department's Reply in Support of New Mexico Environment Department's Motion to Strike Entry of Appearance of the New Mexico Attorney General was served on the following parties of record via e-mail and/or regular first-class mail:

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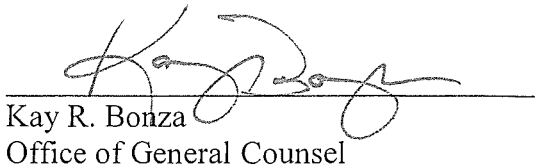

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