

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

IN THE MATTER OF:)	
Water Protection Division of the)	WQCC 20-08 (CO)
New Mexico Environment Department,)	
v.)	
Cannon Air Force Base)	

Response to Motion for Additional Discovery

Comes now the Water Protection Division of the New Mexico Environment Department (“Department”) and submits its Response to Respondent’s Motion for Additional Discovery pursuant to 20.1.3.15(D) NMAC. The Department respectfully requests that the Hearing Officer deny Respondent’s Motion for Additional Discovery (“Motion”) because it was not submitted in the appropriate form pursuant to 20.1.3.15(A) NMAC and because Respondent fails to meet its burden to demonstrate why additional discovery is necessary.

ARGUMENT

I. Motion in Improper Form

Initially, 20.1.3.15(A) NMAC requires that all motions, “...state whether it is opposed or unopposed.” The motion does not so state or indicate that it sought the Department’s position on the Motion. Since the Motion fails to include a necessary requirement pursuant to 20.1.3.15(A) NMAC, the Hearing Officer should deny the Motion pursuant to his authority found at 20.1.3.10(B)(2)(b) NMAC.

II. Motion Fails to Rebut the Presumption that Interrogatories are Unfavored and Discouraged

The regulations governing this procedure clearly state that additional discovery is not favored and is discouraged, including specifically interrogatories. 20.1.3.19(I) NMAC. As such, Respondent must rebut this presumption in arguing for additional discovery. Respondent has not done so, and the Hearing Officer should deny the Motion.

Respondent must set forth in its Motion the circumstances and necessity warranting the taking of the discovery, the nature of the information expected to be discovered, and the proposed time and place where the discovery will be taken. 20.1.3.19(I)(1) NMAC. Following this, the Hearing Officer must determine that such discovery will not unreasonably delay the proceeding; the information to be obtained is not otherwise reasonably obtainable, may be lost, or may become unavailable because of physical illness or infirmity; and there is a substantial reason to believe that the information sought will be admissible at the hearing or will be likely to lead to the discovery of admissible evidence. 20.1.3.19(I)(2) NMAC.

Respondent fails in describing the circumstances and necessity warranting the taking of additional discovery because Respondent has not yet received the Department's response to its Request for Admissions and Request for Production. Without knowing what the Department's response contains it is impossible to state with certainty whether Respondent's proposed interrogatories are necessary or that the information is otherwise unobtainable. Indeed, Respondent provides only conclusory statements that the Requests for Admission and Production are insufficient. Motion at p. 8. Respondent cannot provide evidence to support this presumption because it cannot cite to any of the Department's responses. The mere conclusion that the Department's response will be insufficient is not enough to rebut the presumption that

additional discovery is generally not allowed. Since necessity is a required element for allowing additional discovery, Respondent's motion should be denied.

In adopting its adjudicatory rules, the Water Quality Control Commission ("Commission") has necessarily determined that the discovery mechanisms in 20.1.3.19 NMAC are sufficient to prepare a defense for an administrative compliance order hearing. The New Mexico Legislature explicitly granted this authority to the Commission at NMSA 1978, Section 74-6-10(J)(1). Rules promulgated pursuant to this authority are presumed valid if they are reasonably consistent with the authorizing statute. *Communities for Clean Water v. New Mexico Water Quality Control Commission*, 2018-NMCA-024, ¶ 14 (citing *Carillo v. My Way Holdings, LLC*, 2017- NMCA-024, ¶22). The Motion does not suggest that the Commission's procedural regulations are inconsistent with the governing statute; thus, they should be presumed valid. The Motion states that the Department's responses will be insufficient, sight unseen. The Motion further states that the other discovery methods in 20.1.3.9 NMAC are likewise insufficient. Motion at p. 9. However, the Commission listed them as the only pre-approved discovery methods in 20.1.3.19 NMAC. Indeed, the Commission then explicitly states that interrogatories are not favored and are discouraged. 20.1.3.19(I)(1) NMAC.

Rather than explain why these discovery methods are insufficient, the Motion mischaracterizes the Administrative Compliance Order ("ACO") as unexplained, though it has cited to paragraphs within the ACO as well as specific regulations throughout its Motion. See e.g. Motion at pp. 5-6. In the Motion, Respondent indicates that the Department provides no further detail on allegations supporting the identified violations, but paragraph 14 of the ACO includes specific facts leading to a violation of the regulations. Motion, Atch. 3, ¶ 14. Respondent also cites

to the assessed civil penalty as further support for going beyond the Commission's presumption, Motion at p. 9; yet there is no support for this proposition anywhere in the regulations. Since the Motion addresses the content of the ACO and not necessarily the sufficiency of the allowed discovery methods, the Motion should fail.

CONCLUSION

The Commission has developed detailed regulations governing administrative compliance order hearings. Indeed, it is presumed that these procedures will be sufficient for administrative compliance order hearings. Respondent has failed to rebut this presumption because it has not demonstrated that the Department's responses to its earlier discovery request will be insufficient. Further, Respondent's presumption that the Commission's pre-approved discovery methods are insufficient is unsupported by its argument or any evidence submitted with its Motion. Therefore, the Department respectfully requests that the Hearing Officer deny the Motion for Additional Discovery.

Respectfully submitted,
WATER PROTECTION DIVISION

Christopher N. Atencio
Assistant General Counsel
New Mexico Environment Department
121 Tijeras Ave. NE, Ste. 1000
Albuquerque, NM 87102
(505) 222-9554
christopher.atencio@state.nm.us

Andrew P. Knight
Assistant General Counsel
New Mexico Environment Department
121 Tijeras Ave. NE, Ste. 1000
Albuquerque, NM 87102
(505) 222-9540
andrew.knight@state.nm.us

Certificate of Service

I hereby certify that a copy of this motion was emailed to the persons listed below on May 29, 2020. A copy will be mailed via First Class Mail upon request.

Maj. Mark E. Coon, Regional Counsel
AFLOA/JACE-ER
1492 First Street, Ste. 213
Dobbins Air Reserve Base, Georgia 30069
(678 655-9535
mark.coon@us.af.mil
Counsel for Cannon Air Force Base

Robert F. Sanchez
New Mexico Office of the Attorney General
408 Galisteo St.
Santa Fe, NM 87501
rfsanchez@nmag.gov
Counsel for the Water Quality Control Commission



Christopher N. Atencio