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

**IN THE MATTER OF PETITION TO
APPOINT MEMBERS TO UTILITY
OPERATORS CERTIFICATION
ADVISORY BOARD,**

WQCC No. 20-73

**New Mexico Environment Department,
Drinking Water Bureau,**

Petitioner.

**ORDER APPOINTING MEMBERS TO UTILITY OPERATORS
CERTIFICATION ADVISORY BOARD**

THIS MATTER having come before the Water Quality Control Commission (“Commission”) during its regularly scheduled meeting on January 12, 2021, on the Petition to Appoint Members to the Utility Operators Certification Advisory Board filed on December 29, 2020 (“Petition”) by the Drinking Water Bureau (“Bureau”) of the Water Protection Division (“Division”) of the New Mexico Environment Department (“Department”), requesting that the Commission appoint two regular members and one alternate member to three-year terms on the Utility Operators Certification Advisory Board (“Board”); the Commission having heard from Annie Maxfield, legal counsel for the Department, and from representatives of the Bureau, and thereafter having duly considered the Petition, **FINDS:**

1. NMSA 1978, Section 61-33-4(C) (2005) in relevant part reads: “The [C]ommission shall: appoint a seven-member board from certified operators to function with the [C]ommission to establish qualifications of operators, classify public water supply systems and public wastewater facilities, adopt rules and advise the [Department] on the administration of the Utility Operators Certification Act ...”

2. Section 61-33-4(C) does not contain language creating the Board or specifying its authority. Further, no such power or authority is contained in any of the provisions of the Utility Operators Certification Act, NMSA 1978, Sections 61-33-1 to -10 (1973, as amended through 2005). Agencies are created by statute and limited to the power and authority expressly granted or necessarily implied by those statutes. *See, e.g., Qwest Corp. v. NMPRC*, 2006-NMSC-042, ¶ 20, 143 P.3d 478, 484, as revised (Sept. 25, 2006); *Pub. Serv. Co. of New Mexico v. New Mexico Env'tl. Imp. Bd.*, 1976-NMCA-039, ¶ 7, 549 P.2d 638, 641 (“Administrative bodies are the creatures of statutes. As such they have no common law or inherent powers and can act only as to those matters which are within the scope of the authority delegated to them.”).

3. The Bureau, on the second page of its Petition, under the heading “Background,” acknowledged that “[the procedure whereby the Board has nominated and approved certified board operators for appointment by the Commission] has never been memorialized in statute, regulation, or written agreement.”

4. The Bureau, on the second page of its Petition, under the heading “Background,” advances the argument that in the past the Bureau has assumed the responsibility of recommending to the Commission certified board operators for appointment to the Board, and therefore, the Commission should effectively be precluded from doing so in this matter. Courts are reluctant to apply equitable estoppel against a governmental entity, and then only in exceptional or extreme circumstances. *See, e.g., Waters-Haskins v. New Mexico Human Services Dept., Income Support Div.*, 2009-NMSC-031, ¶ 16, 210 P.3d 817, 823; *Kilmer v. Goodwin*, 2004-NMCA-122, ¶ 26, 99 P.3d 690, 697. Such circumstances are not present here.

5. The Bureau’s legal counsel acknowledged in open meeting that Section 61-33-4(C) does not contain language creating the Board or specifying its authority, and further, that no such power

or authority exists in any of the provisions of the Utility Operators Certification Act. Additionally, the Bureau's representatives in open meeting acknowledged that upon further search and inquiry, the Bureau concluded that the procedure whereby the Board nominated and approved certified board operators for appointment by the Commission has been only a verbal "gentlemen's agreement."

6. Under a plain reading of Section 61-33-4(C), the Commission itself can act to appoint "certified operators," as the term is defined in NMSA 1978, Section 61-33-2(A) (2005) and 20.7.4.7(C) NMAC, to serve as regular or alternate members of the Board.

7. Each individual whose name was submitted by the Bureau to the Commission to serve on the Board is a "certified operator" within the statutory and regulatory meaning of the term.

8. No member of the public in attendance at the meeting voiced any objections to the certified operators named by the Bureau serving on the Board, after those members of the public were given an opportunity to do so by the Commission.

IT IS THEREFORE ORDERED:

A. Joe Bailey and Sydney Hoke are appointed to the two vacant regular positions on the Board, and Rick Mitchell is appointed as an alternate member to the Board, in accordance with Section 61-33-4(C) and 20.7.4.29 NMAC, to function with the Commission as prescribed by applicable statute and regulation.

B. The appointment of the certified board operators named in Paragraph A above shall be as set forth in 20.7.4.29(D) NMAC.

DATED this 10 day of February, 2021.

gabriel wade

Gabriel Wade, Vice Chair
Water Quality Control Commission