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Governor

State of New Mexico
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Water & Wastewater Infrastructure
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RON CURRY
Secretary

JON GOLDSTEIN
Deputy Secretary

KAREN GALLEGOS
Director

March 20, 2009

Sent by Certified Mail

No. 7004 0750 0001 3311 9122 (Hocker)
No. 7000 1670 0008 7821 9237 (Moquino Mutual Domestic)
No. 7000 1670 0008 7821 9220 (Moquino Water Users Association)

Moquino Water System
Attn: Bill Hocker
P.O. Box 1434
Paguete, NM 87040

Leane P. Hocker, Registered Agent
Moquino Water Users Association II
1 La Mesita Road
Moquino, NM 87014

Leane C. Padilla-Hocker, Registered Agent
Moquino Mutual Domestic Water Consumers' Association
Cibola Count Rd. # 5 & La Mesita Dr.
Paguete, NM 87040

**RE: ADMINISTRATIVE COMPLIANCE ORDER WITH PENALTIES
NO. 2009-CO-08, MOQUINO WATER SYSTEM**

Dear Mr. Hocker and Ms. Padilla:

Please find attached Administrative Compliance Order No. 2009-CO-08 ("Order") issued to Moquino Mutual Domestic Water Consumers' Association and Moquino Water Users Association II. See Exhibit A. In this letter, Moquino Mutual Domestic Water Consumers' Association and Moquino Water Users Association II will be jointly referred to as "you." Please read the Order carefully to understand what you must do to comply.

You have a right to answer the allegations in the Order by requesting a hearing pursuant to 20.1.5 NMAC. See Exhibit B. To request a hearing, complete the instructions in the Order and in 20.1.5.200 NMAC.

**IF YOU DO NOT REQUEST A HEARING AND DO NOT SETTLE THIS MATTER WITHIN
THIRTY DAYS OF RECEIPT OF THIS ORDER,**

THE \$15,400 PENALTY

**SHALL BE FINAL,
SHALL NOT BE SUBJECT TO APPEAL, AND
SHALL NOT BE SUBJECT TO FURTHER REVIEW.**

If you have any questions, please contact:

Carol M. Parker, Assistant General Counsel
Office of General Counsel
New Mexico Environment Department
1190 S. St. Francis Dr.
Santa Fe, NM 87502
505-827-6891 (ph)
505-827-1628
carol.parker@state.nm.us

Sincerely,



Karen E. Gallegos, Director
Water and Wastewater Infrastructure Development Division
New Mexico Environment Department

Cc:

Electronic copies to:

Karen E. Gallegos, Director, WWIDD
Margaret Ryan, Bureau Chief, DWB
Andy Edmondson, Technical Services Manager
Pat Akin, DWB District 1 Manager
Valerio Lopez, Oversight Staff, District I, DWB
Danny Valenzuela, Enforcement Coordinator, DWB
Mike Coffman, Utility Operator Certification Program

And sent by regular mail to:

Leane C. Padilla-Hocker, President
Moquino Water Users Association and
Moquino Mutual Domestic Water Consumers' Association
P.O. Box 999
Paguete, NM 87040

Vina D. Padilla, Secretary/Treasurer
Moquino Water Users Association and
Moquino Mutual Domestic Water Consumers' Association
P.O. Box 947
Paguete, NM 87040

Herman Fidel Padilla, Director
Moquino Water Users Association and
Moquino Mutual Domestic Water Consumers' Association
P.O. Box 947
Paguete, NM 87040

Johnny E. Baca, Director
Moquino Water Users Association and
Moquino Mutual Domestic Water Consumers' Association
HC 77 Box 5
Seboyeta, NM 87014

Dulce Garcia, Director
Moquino Water Users Association and
Moquino Mutual Domestic Water Consumers' Association
HC 77, Box 100
Seboyeta, NM 87014

**STATE OF NEW MEXICO
SECRETARY OF ENVIRONMENT**

**NEW MEXICO ENVIRONMENT DEPARTMENT
WATER AND WASTEWATER INFRASTRUCTURE DEVELOPMENT DIVISION
DRINKING WATER BUREAU,**

Complainant,

v.

No. 2009-CO-008

MOQUINO MUTUAL DOMESTIC WATER CONSUMERS' ASSOCIATION

and

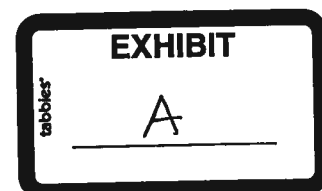
MOQUINO WATER USERS ASSOCIATION II,

WSS # NM3525633

Respondents.

ADMINISTRATIVE COMPLIANCE ORDER WITH PENALTIES

Pursuant to the Environmental Improvement Act ("EIA"), NMSA 1978, § 74-1-10, the Drinking Water Regulations ("DW Regulations"), 20.7.10 NMAC, the Utility Operator Certification Act ("UOCA"), NMSA 1978, § 61-33-10, the Utility Operator Certification Act Regulations, ("UOCA Regulations"), 20.7.4 NMAC, and the Sanitary Projects Act ("SPA"), NMSA 1978, § 3-29-7, the Secretary of the New Mexico Environment Department (the "Department"), acting through the Director of the Water and Wastewater Infrastructure Development Division ("Division"), issues this Administrative Compliance Order with Penalties ("Order") to Respondents, Moquino Mutual Domestic Water Consumers and Sewage Works Association ("Moquino Mutual Domestic") and Moquino Water Users Association II ("Moquino Association II") to enforce the EIA, the DW Regulations, the UOCA, the UOCA Regulations, and the SPA.



FINDINGS OF FACT

1. The Department is an executive agency within the government of the State of New Mexico and is charged with the administration and enforcement of the EIA, the UOCA, the SPA, the DW Regulations and the UOCA Regulations.

Moquino Mutual Domestic

2. Respondent Moquino Mutual Domestic is or was the owner and operator of a public water system serving a residential area in Cibola County, New Mexico; the mailing address for Respondent Moquino Mutual Domestic is P.O. Box 1434, Pagate, NM 87040.

3. According to records obtained from the Public Regulation Commission, the last known registered agent for Respondent Moquino Mutual Domestic is Leane C. Padilla-Hocker, Cibola Count Rd. # 5 & La Mesita Dr., Pagate, NM 87040.

4. Respondent Moquino Mutual Domestic was incorporated in 1949, pursuant to Chapter 206, Laws 1947, with Articles of Incorporation stating its term was fifty years. Moquino Mutual Domestic, Art. VIII, Art. of Incorp., May 23, 1949.

5. On December 18, 1998, Respondent Moquino Mutual Domestic filed an amendment of its Articles of Incorporation with the New Mexico Public Regulation Commission providing for a perpetual term of existence. Moquino Mutual Domestic, Art. of Amd., Dec. 18, 1998.

6. Since 1999, Moquino Mutual Domestic Water Consumers' Association has received Special Appropriations from the New Mexico Legislature in excess of \$200,000.

7. To expend those Special Appropriations, Respondent Moquino Mutual Domestic has submitted resolutions to the Department under the name of the Moquino Mutual Domestic Water Consumers' Association.

8. The latest annual report filed with the Public Regulation Commission under the name of Moquino Mutual Domestic Water Consumers' Association is dated April 11, 2003 and lists the following officers:

President	Leane C. Padilla-Hocker
Sec. Treasurer	Vina D. Padilla
Director	Fidel Padilla
Director	Johnny E. Baca
Director	Dulce Garcia

9. On November 25, 2004, the Public Regulation Commission sent Moquino Mutual Domestic Water Consumers' Association notice by certified mail of its failure to pay its annual fee.

10. On May 6, 2006, the Public Regulation Commission cancelled the Certificate of Incorporation of Moquino Mutual Domestic Water Consumers' Association for failure to pay its annual fee.

Moquino Association II

11. According to records the Department obtained from the Public Regulation Commission, Respondent Moquino Association II operates a domestic water system serving a residential area in Cibola County, New Mexico and having a mailing address of P.O. Box 1434, Pagate, NM 87040; this is the same mailing address as Respondent Moquino Mutual Domestic.

12. The registered agent for Respondent Moquino Association II is Leane C. Hocker, 1 La Mesita Road, Moquino, NM 87014.

13. Respondent Moquino Association II was incorporated on April 20, 1998 under the Water Users Association Act. Moquino Association II, Art. of Incorporation, Apr. 20, 1998.

14. The Public Regulation Commission currently reports on its web site that Moquino Association II is not in good standing.

15. The latest annual report filed with the Public Regulation Commission under the name of Moquino Association II is dated April 11, 2003 and lists the same officers as the latest annual report filed with the Public Regulation Commission for Respondent Moquino Mutual Domestic.

16. The Department is naming both Moquino Mutual Domestic and Moquino Association II as Respondents because, first, it appears that Moquino Mutual Domestic may no longer be a lawful entity under New Mexico law, and second, Moquino Association II states in its reports to the Public Regulation Commission that it provides “domestic water,” suggesting that Moquino Mutual Domestic may have intended Moquino Association II to be a successor entity to Moquino Mutual Domestic. For the purposes of this Order, both entities are included when the unmodified term “Respondent” is used but the Department anticipates that one entity may be dismissed upon receipt of further information from Respondent. Nothing in this Order shall be interpreted as an admission by the Department that a Mutual Domestic Association organized under the Sanitary Projects Act can be converted to an entity organized under the Water Users Association Act or an admission by the Department that assets were lawfully conveyed from Respondent Moquino Mutual Domestic to Respondent Moquino Association II in this case.

Respondent’s Water System

17. Respondent provides piped water for human consumption to approximately nineteen (19) service connections and approximately thirty-one (31) persons in Cibola County, New Mexico.

18. Respondent provides water for human consumption year round to its water users.

Respondent's Violation History

19. Respondent has been issued numerous Notices of Violation, including the following:

- a. January 3, 2006 (total coliform non-sampling violation);
- b. June 30, 2006 (lead/copper sampling, repeat sampling, Consumer Confidence Report);
- c. August 7, 2006 (Consumer Confidence Report);
- d. August 17, 2006 (total coliform non-sampling violation);
- e. January 11, 2007 (disinfectant/disinfection byproducts reporting violation);
- f. July 27, 2007 (total coliform non-sampling violation);
- g. July 29, 2008 (Consumer Confidence Report);
- h. August 27, 2008 (total coliform maximum contaminant level violation);
- i. November 26, 2008 (total coliform non-sampling violation).

20. On November 17, 2006, the Department issued an Administrative Order without penalties, No. 2006-CO-06, to Respondent ("November 2006 Order"). Among other things, the November 2006 Order required Respondent to:

- a. comply with the requirements of 20.7.10.100 and 500 NMAC, incorporating 40 C.F.R. § 141.21 (monitoring for total coliform) by sampling monthly according to its site sampling plan;
- b. comply no later than May 1, 2007 with 20.7.10.100 and 500 NMAC, incorporating 40 C.F.R. § 141.86 (sampling for lead and copper) by sampling for lead and copper action levels;

- c. comply no later than December 4, 2006 with 20.7.10.100 NMAC, incorporating 40 C.F.R. Subpart O (requiring a Consumer Confidence Report) by preparing and delivering a Consumer Confidence Report to the community and the Department;
- d. provide compliance status reports to NMED demonstrating that Respondent had complied with the conditions of the November 2006 Order.

21. The November 2006 Order warned Respondent that violations of a compliance order can result in penalties of up to \$1000 per instance of noncompliance.

22. Respondent did not request a hearing on the November 2006 Order.

23. With regard to lead and copper sampling, Respondent conducted its initial sampling for lead and copper December 27, 2001 and May 13, 2002; Respondent then failed to sample for lead and copper in 2003, 2004, 2005 and 2006; Respondent sampled for lead and copper on July 5, 2007, but then failed to sample in 2008.

24. Since receiving the November 2006 Order, Respondent has:

- a. failed to sample for total coliform in June 2007, September 2008 and November 2008;
- b. provided water to its users that tested positive for total coliform at multiple sites in August 2008;
- c. failed to collect five routine samples in September 2008 after its water tested positive for total coliform in August 2008 at multiple sites;
- d. failed to provide certification to the Department that it had provided required public notices and copies of such public notices of its violations in June 2007, August 2008 and November 2008;
- e. failed to conduct sampling for lead and copper in 2008;

- f. failed to prepare and distribute a Consumer Confidence Report to its customers by December 4, 2006 as required by the November 2006 Order and failed to prepare and distribute a Consumer Confidence Report in 2007 for the sample year of 2006 and 2008 for the sample year of 2007;
- g. failed to submit a disinfectant residual and disinfectant byproducts monitoring plan to the Department upon request;
- h. failed to report quarterly chlorine residuals to the Department.

25. The Department's Facility Operations Section lists Respondent's operator as William Hocker ("Mr. Hocker").

26. Mr. Hocker was at one time a certified operator but his certification lapsed June 30, 2008 when he failed to complete his required continuing education credits.

27. On September 11, 2007, Department oversight staff sent an electronic mail to Respondent's operator William Hocker, requesting several items, including but not limited to: (1) a monthly bacteriological sampling plan, (2) a lead and copper sampling plan, (3) chlorine residual reports and (4) copies of all public notices for violations sent to Respondent's customers. None of these items have been provided to the Department by Mr. Hocker or by Respondent.

CONCLUSIONS OF LAW

28. Paragraphs "1" through "27" above are re-alleged as if fully set forth below.

29. For purposes of enforcement of 20.7.10.100 NMAC, incorporating 40 C.F.R. Part 141, the term "state" means the Department. 20.7.20.100.B NMAC.

30. Respondent Moquino Mutual Domestic is an association subject to the Sanitary Projects Act because Respondent Moquino Mutual Domestic was organized under Chapter 206,

Laws 1947, NMSA 1978, § 3-29-2.B, and it amended its Articles of Incorporation in 1998 pursuant to the Sanitary Projects Act.

31. Respondent's water system is a "public water system" as defined by 20.7.10.100 NMAC, incorporating 40 C.F.R. § 141.2, because it provides water to the public for human consumption through pipes or other constructed conveyances and has at least fifteen (15) service connections and regularly serves at least twenty-five (25) individuals daily at least sixty (60) days out of the year.

32. Respondent's water system is a "community water system" because it is a public water system that serves at least fifteen service connections used by year-round residents or regularly serves at least twenty-five year-round residents. 20.7.10.100 NMAC, incorporating 40 C.F.R. § 141.2.

33. Both Respondent Moquino Mutual Domestic and Respondent Moquino Water Users Association are "person[s]" as defined by the EIA, NMSA 1978, § 74-1-3; the UOCA, NMSA 1978, § 61-33-2.G; *and see* 20.7.10.100 NMAC, incorporating 40 C.F.R. § 141.2.

34. Respondent is subject to the Department's Drinking Water Regulations because Respondent owns or operates a public water system. 20.7.10.2 NMAC.

VIOLATION ONE (1)
Sanitary Projects Act

35. Paragraphs "1" through "34" above are re-alleged as if fully set forth below.

36. **Violation # 1:** Respondent Moquino Mutual Domestic has violated the Sanitary Projects Act because Respondent Moquino Mutual Domestic has not filed annual reports with the Public Regulation Commission as required by NMSA 1978, 3-29-17.4 and has allowed its authority to do business in New Mexico to expire.

**Compliance Order Pursuant
To the Sanitary Projects Act**

37. Within forty-five days of receipt of this Order, Respondent Moquino Mutual Domestic, or its successor entity, if any, shall provide to the Department a written explanation of its status with regard to its good standing at the Public Regulation Commission as a mutual domestic association organized pursuant to the Sanitary Projects Act.

38. Within forty-five days of receipt of this Order, Respondent Moquino Mutual Domestic, or its successor entity, if any, shall provide to the Department a written explanation of the relationship between Moquino Mutual Domestic and Moquino Association II, including a detailed explanation of how Moquino Association II provides “domestic water” to its members. The detailed explanation shall include: (1) a definition of the term “domestic water” as used by Moquino Association II in its Public Regulation Commission filings, (2) a map of the system that Moquino Association II uses to provide “domestic water,” (3), the number of service connections to which Moquino Association II provides “domestic water,” (4) the date when Moquino Association II began to provide “domestic water” to its members, (5) the number of persons served “domestic water” by Moquino Association II, (6) how “domestic water” is used by Moquino Association II members (included but not limited to a statement about whether the water is used for each of the following: drinking, bathing, showering, dishwashing, cooking, or oral hygiene), (6) whether Moquino Association II provides “domestic water” to its members at least sixty days a year, and (7) whether Moquino Association II provides “domestic water” to its members year round.

39. Within sixty days of receipt of this Order, Respondent Moquino Mutual Domestic, or its successor entity, if any, will take appropriate action at the Public Regulation Commission to re-establish the good standing of Moquino Mutual Domestic before the Public

Regulation Commission as a mutual domestic association organized under the Sanitary Projects Act.

40. Failure to take corrective action within the time specified in this Compliance Order may subject Moquino Mutual Domestic, or its successor entity, if any, to a penalty of up to \$250 for each day of noncompliance. NMSA 1978, § 3-29-7.F.

VIOLATIONS TWO (2) THROUGH TWENTY-TWO (22)
DW Regulations

41. Paragraphs “1” through “40” above are re-alleged as if fully set forth below.

42. **Violations # 2 and 3:** Respondent violated 20.7.10.100, incorporating 40 C.F.R. § 141.21(a)(2) (monitoring for total coliform), two (2) times because Respondent owns or operates a community water system and Respondent failed to sample for total coliform in June 2007 and November 2008.

43. **Violation # 4:** Respondent violated 20.7.10.100 NMAC, incorporating 40 C.F.R. § 141.63(a)(2) (maximum contaminant level for total coliform) because Respondent is a public water system and its water tested positive for total coliform in August 2008 from more than one site.

44. **Violation # 5:** Respondent violated 20.7.10.100 NMAC, incorporating 40 C.F.R. 141.21(b)(5) (requiring increased monitoring for total coliform) because Respondent is a public water system that collects fewer than five routine samples per month, had one or more total-coliform positive samples in August 2008 which were not invalidated by the State, and Respondent failed to collect at least five routine samples in September 2008.

45. **Violations # 6, 7, 8, and 9:** Respondent violated 20.7.10.100 NMAC, incorporating 40 C.F.R. § 141.201(a) and § 141.31(d) (requiring reporting to the Department) five (5) times because Respondent is an owner or operator of a public water system and failed to

provide certification to the Department that it had provided required public notices and failed to provide copies of such public notices to the Department for: (Viol. 6 and 7) failing to monitor for total coliform in June 2007 and November 2008; (Viol. 8) failing to comply with an applicable maximum contaminant level for total coliform in August 2008; and (Viol. 9) failing to collect at least five routine samples in September 2008 after Respondent's water tested positive for total coliform from more than one site in August 2008.

46. **Violations # 10 and 11:** Respondent violated 20.7.10.100 NMAC, incorporating 40 C.F.R. 141 Subpart O (§§ 141.151—141.155) (Consumer Confidence Reports) two (2) times because Respondent is a community water system and failed to prepare and distribute a Consumer Confidence Report to its customers in 2007 for sample year 2006 and in 2008 for sample year 2007.

47. **Violation # 12:** Respondent violated 20.7.10.100 and 500 NMAC, incorporating 40 C.F.R. § 141.86 (lead and copper sampling rule) because, upon completion of its initial lead and copper sampling in 2001 and 2002, Respondent was required to sample annually for three consecutive years in the period of June through September of each year, 40 C.F.R. § 141.86(d)(4)(i); *and* § 141.86(d)(4)(iv) (annual sampling to be done in the months of June, July, August or September) and Respondent's only annual lead and copper sampling since 2002 was done in 2007.

48. **Violations # 13 through 21:** Respondent violated 20.7.10.100 NMAC, incorporating 40 C.F.R. § 141.134(c)(1) nine (9) times because Respondent has failed to report quarterly results of chlorine residual sampling to the Department in: (Viol. 13) January 2007; (Viol. 14) April 2007; (Viol. 15) July 2007; (Viol. 16) October 2007; (Viol. 17) January 2008;

(Viol. 18) April 2008; (Viol. 19) July 2008; (Viol. 20) October 2008; and (Viol. 21) January 2009.

49. **Violation # 22:** Respondent violated 20.7.10.100 NMAC, incorporating 40 C.F.R. § 141.31(e) (requiring submission of certain information to the Department upon the Department's request) because the Department requested that Respondent provide a copy of its monitoring plan for disinfectant residuals by letter dated January 11, 2007, such monitoring plans are required to be kept pursuant to 20.7.10.100 NMAC, incorporating 40 C.F.R. § 141.33(f), and Respondent failed to provide a copy of its monitoring plan for disinfectant residuals to the Department no later than the date the first monitoring report was due, which was the date the Department had requested.

**Penalty Assessment for
Violations of DW Regulations**

50. The EIA provides that the Secretary may assess a penalty of up to \$1000 per day for violations of the DW Regulations. NMSA 1978, § 74-1-10.B(1).

51. In assessing penalties, the Secretary shall take into account the seriousness of the violations and any good faith efforts to comply. NMSA 1978, § 74-1-10.C.

52. The Department evaluates failures to sample as Serious violations. The purpose of sampling is to monitor the safety of the water that Respondent provides to the public; failures to sample may allow unsafe water to be provided to the public and may prevent appropriate remedial measures from being applied to protect public health.

53. The Department evaluates failures to provide required information to the public as Serious violations. The purpose of required public reporting is to empower Respondent's customers to demand better compliance. Thus, public reporting is key to the effectiveness of the Regulations.

54. The Department generally evaluates failures to report to the Department as Less Serious, subject to certain exceptions. While reporting to the Department is important, such failures are less important than monitoring and informing the public. An exception is when the Department makes a specific request for information; failure to provide information upon request is a Serious violation because it impacts the Department's ability to perform its oversight role.

55. The Department has evaluated eight (8) of Respondent's DW violations as Serious and the remaining thirteen (13) violations as Less Serious:

Viol. #	Reg. Violated (20.7.10.100 NMAC, incorp. 40 C.F.R. Part 141)	Violation	Evaluation
2	§ 141.21(a)(2)	Failure to collect total coliform sample July 2007	Serious
3	§ 141.21(a)(2)	Failure to collect total coliform sample November 2008	Serious
4	§ 141.63(a)(2)	Exceed total coliform maximum contaminant level August 2008	Serious
5	§ 141.21(b)(5)	Failure to collect at least five routine samples in September 2008	Serious
6	§ 141.201(a) and § 141.31(d)	Failure to provide certification of public notice to the Department for failure to sample July 2007	Less Serious
7	§ 141.201(a) and § 141.31(d)	Failure to provide certification of public notice to the Department for failure to sample November 2008	Less Serious
8	§ 141.201(a) and § 141.31(d)	Failure to provide certification of public notice to the Department for exceedance of total coliform level in August 2008	Less Serious
9	§ 141.201(a) and § 141.31(d)	Failure to provide certification of public notice to the Department for failure to collect at least five routine samples in September 2008	Less Serious
10	§ 141.155	Failure to provide a Consumer Confidence Report in 2007 for sample year 2006	Serious
11	§ 141.155	Failure to provide a Consumer Confidence Report in 2008 for sample year 2007	Serious

12	§ 141.86	Failure to conduct lead and copper sampling	Serious
13	§ 141.134(c)(1)	Failure to report chlorine residuals to the Department in January 2007	Less Serious
14	§ 141.134(c)(1)	Failure to report chlorine residuals to the Department in April 2007	Less Serious
15	§ 141.134(c)(1)	Failure to report chlorine residuals to the Department in July 2007	Less Serious
16	§ 141.134(c)(1)	Failure to report chlorine residuals to the Department in October 2007	Less Serious
17	§ 141.134(c)(1)	Failure to report chlorine residuals to the Department in January 2008	Less Serious
18	§ 141.134(c)(1)	Failure to report chlorine residuals to the Department in April 2008	Less Serious
19	§ 141.134(c)(1)	Failure to report chlorine residuals to the Department in July 2008	Less Serious
20	§ 141.134(c)(1)	Failure to report chlorine residuals to the Department in October 2008	Less Serious
21	§ 141.134(c)(1)	Failure to report chlorine residuals to the Department in January 2009	Less Serious
22	§ 141.31(e)	Failure to provide required information to the Department upon request	Serious

56. With regard to good faith, Respondent has violated the DW Regulations more than twenty (20) times; this record speaks for itself and demonstrates a lack of meaningful effort in achieving compliance. Thus, no decrease in the penalty for a good faith effort to comply is warranted.

57. Respondent's eight (8) Serious violations warrant a \$50 penalty for each violation, sub-totaling \$400.

58. Respondent's thirteen (13) Less Serious violations warrant a \$25 penalty for each violation, sub-totaling \$325.

59. This penalty assessment considers the fact that Respondent is a small water system with nineteen (19) service connections. However, the Department has attempted to gain

Respondent's compliance through Notices of Violation and an Administrative Compliance Order without penalties; those measures were insufficient to bring Respondent into compliance. A Penalty Order is therefore necessary.

60. Respondent is assessed a total penalty for violations of the DW Regulations totaling \$725 (325 + 400).

VIOLATIONS TWENTY- THREE (23) THROUGH TWENTY-SIX (26)
Violations of the November 2006 Order

61. Paragraphs "1" through "60" above are re-alleged as if fully set forth below.

62. The November 2006 Order became a Final Order because Respondent did not request a hearing. NMSA 1978, § 74-1-10.E.

63. Pursuant to Paragraph 17 of the November 2006 Order, Respondent was required to comply with 20.7.10.100 and 500, incorporating 40 C.F.R. § 141.21 which requires monitoring for total coliform and certain repeat sampling and routine sampling as appropriate.

64. **Violations # 23, 24, and 25:** Respondent violated Paragraph 17 of the November 2006 Order three (3) times because: (Viol. 23 and 24) Respondent failed to monitor for total coliform in June 2007 and November 2008; and (Viol. 25) failed to collect at least five routine samples in September 2008 after Respondent's water tested positive for total coliform from multiple sites in August 2008.

65. Pursuant to Paragraph 19 of the November 2006 Order, Respondent was required to prepare and distribute a Consumer Confidence Report to the community and to NMED no later than December 4, 2006.

66. **Violation # 26:** Respondent violated Paragraph 19 of the November 2006 Order because Respondent failed to prepare a Consumer Confidence Report by December 4, 2006 and distribute it to the community and to NMED.

**Penalty Assessment for
Violations of a Final Order**

67. The EIA provides that the Secretary may assess a penalty of up to \$1000 for each violation of a Final Order, NMSA 1978, § 74-1-10.D.

68. The Department evaluates failures to comply with an Administrative Order as Serious. An Administrative Order calls the Respondent's attention to the fact that Respondent has violated the law and that there are consequences for such violations. Failing to monitor for total coliform in the face of an Administrative Order presents a severe risk to public health and safety and deserves the full penalty amount. Failing to prepare and distribute a Consumer Confidence Report in the face of an Administrative Order evidences gross negligence and prevents Respondent's customers from learning about its violations and demanding better compliance.

69. Respondent's four (4) violations of a Final Order warrant a penalty of \$1,000 per violation, totaling \$4,000.

Compliance Order Pursuant to the EIA

70. From Respondent's receipt of this Order forward, Respondent shall comply with 20.7.10.100 and 500, NMAC incorporating 40 C.F.R. § 141.21, *Coliform Sampling*, shall sample monthly according to a written site sampling plan, and shall conduct repeat and routine sampling as required.

71. From Respondent's receipt of this Order forward, Respondent shall provide public notice as required by 20.7.10.100 NMAC, incorporating 40 C.F.R. § 141.201, shall provide copies of such notices to the Department, and shall provide timely certification to the Department that it has provided the required public notices pursuant to 20.7.10.100 NMAC, incorporating 40 C.F.R § 141.31(d).

72. Within thirty (30) days of Respondent's receipt of this Order, Respondent shall provide to the Department certification of each public notice that it has provided since January 1, 2007, shall provide to the Department copies of each such public notice, and, for any public notice that was required but not provided, Respondent shall so inform the Department.

73. Within thirty (30) days of Respondent's receipt of this Order, Respondent shall provide to the Department a chlorine residual report for each quarter in 2007 and 2008. For any month in 2007 and 2008 in which Respondent did not measure chlorine residuals, Respondent shall so report. From Respondent's receipt of this Order forward, Respondent shall provide a quarterly chlorine residual report to the Department no later than the tenth day of the month following the end of each calendar quarter pursuant to 20.7.10.100 NMAC, incorporating 40 C.F.R. § 141.134(c)(1).

74. Within forty-five (45) days of Respondent's receipt of this Order, Respondent shall submit written sampling plans to the Department for microbiological sampling, lead and copper sampling, and disinfectant residual and disinfectant byproducts sampling, as required by 20.7.100 NMAC, incorporating 40 C.F.R. § 141.21(a) (coliform); § 141.86(a) (lead and copper); § 141.132(f) (disinfectant residual and byproducts); and § 141.31(e) (requiring submission of certain documents to State upon request).

75. Within sixty (60) days of Respondent's receipt of this Order, Respondent shall comply with 20.7.10.100 NMAC, incorporating 40 C.F.R. Subpart O, *Consumer Confidence Report*, by preparing and distributing a Consumer Confidence Report for sample year 2007 to the community and to the Department.

76. From Respondent's receipt of this Order forward, Respondent shall prepare a Consumer Confidence Report and distribute it to the community and to the Department annually according to the schedule set forth in 40 C.F.R. Subpart O.

77. In 2009, 2010, and 2011, Respondent shall conduct sampling for lead and copper between June 1 and September 30 of each year as required by 20.7.10.100 and 500 NMAC, incorporating 40 C.F.R. § 141.86; thereafter, Respondent shall comply with the lead and copper sampling rule, 20.7.10.100 and 500 NMAC, incorporating 40 C.F.R. § 141.80—141.90 (Subpart I).

78. Failure to comply with this Order may subject Respondent to a penalty of up to \$1000 per violation or the Department may file an action in district court seeking appropriate relief, including injunctive relief. NMSA 1978, § 74-1-10.D.

VIOLATIONS TWENTY-SEVEN (27) AND TWENTY-EIGHT (28)
Violations of the Utility Operator Certification Act

79. Paragraphs "1" through "78" above are re-alleged as if fully set forth below.

80. Because Respondent's water system is a public water system, Respondent is required to have a certified operator to operate its water system, NMSA 1978, § 61-33-6; 20.7.4.20.A NMAC, and to maintain the name of its certified operator on file with the Department, 20.7.4.20.C NMAC.

81. **Violation # 27:** Respondent has violated the UOCA, and the UOCA Regulations, because Respondent has allowed William Hocker ("Mr. Hocker") to operate its water system since June 30, 2008 and Mr. Hocker is not certified to operate Respondent's public water system because he has allowed his certification to lapse. NMSA 1978, § 61-33-6; 20.7.4.20.A NMAC.

82. **Violation # 28:** Respondent has violated the UOCA Regulations by failing to have the name of a certified operator responsible for operating its public water system on file with the Department. 20.7.4.20.C NMAC.

**Penalty Assessment for Violations of the
Utility Operator Certification Act and the UOCA Regulations**

83. The UOCA provides that the Department may assess a penalty of up to \$2500 per day for violations of the UOCA or the UOCA Regulations. NMSA 1978, § 61-33-10.A(1).

84. In assessing penalties, the Department shall take into account the seriousness of the violations and any good faith efforts to comply. NMSA 1978, § 61-33-10.C.

85. Since June 30, 2008 through February 28, 2009, Respondent has violated the UOCA and UOCA Regulations for 243 days by allowing Mr. Hocker, who is not properly certified, to operate its public water system.

86. This is a Serious violation; the Department's experience shows that lack of a certified operator goes hand in hand with Serious violations of regulations intended to protect public health. That experience has been borne out in this case, where Respondent has committed frequent, repeated and Serious violations of the DW Regulations and violations of a Department Order.

87. The fact that Respondent had a certified operator in the past demonstrates that Respondent knew the importance of having a certified operator; thus, Respondent has demonstrated a lack of good faith effort in complying with the UOCA Regulations.

88. Respondent's lack of good faith effort in complying with the UOCA Regulations and 243 days of Serious violations warrant a \$175 penalty per day for each violation which would total \$42,525; the Department will cap this calculation at sixty days, resulting in a penalty to be assessed of \$10,500. The Department believes that this penalty is sufficient to prevent any

economic benefit to Respondent from not having a certified operator and to provide an adequate incentive to bring Respondent into compliance. Although the Department could assess a larger penalty, the Department finds that a larger penalty is not necessary to achieve compliance.

89. Respondent has failed to maintain the name of a certified operator on file with the Department. This is a Less Serious violation but a violation nonetheless.

90. The fact that Respondent listed the name of its certified operator with the Department in the past demonstrates that Respondent knew about this requirement. Respondent has demonstrated a lack of good faith effort in complying with the UOCA Regulations by failing to maintain the name of a certified operator for its water system on file with the Department.

91. Respondent's violation of the requirement to maintain the name of its certified operator on file with the Department warrants a \$175 penalty.

92. Respondent's total penalty assessed for violations of the UOCA and UOCA Regulations is $\$10,500 + \$175 = \$10,675$.

**Compliance Order Pursuant to the
UOCA and the UOCA Regulations**

93. Within ninety (90) days of Respondent's receipt of this Order, Respondent shall hire a properly certified operator and submit the certified operator's name to the Department's Utility Operator Certification Program.

94. From ninety (90) days of Respondent's receipt of this Order forward, Respondent shall not allow anyone who is not properly certified to operate its water system.

95. Failure to comply with this Order may subject Respondent to a penalty of up to \$5,000 for each day of noncompliance with the Order.

SUMMARY OF PENALTIES ASSESSED IN THIS ORDER

96.		
	a. Drinking Water Regulations, Violations 2—22	\$ 725
	b. November 2006 Final Order, Violations 23-26	\$ 4,000
	c. Utility Operator Certification, Violations 27 and 28	\$ 10,675
	<u>TOTAL PENALTY</u>	<u>\$ 15,400</u>

97. Respondent shall pay the above penalty within forty-five (45) days of the issuance of this Administrative Compliance Order with Penalties unless Respondent requests a hearing as set out below. Payment shall be by certified check payable to NMED and sent to:

Andy Edmondson, Technical Services Manager
New Mexico Environment Department
Drinking Water Bureau
525 Camino de Marquez, Suite 4
Santa Fe, NM 87505

98. Written confirmation of payment shall be sent to:

Carol M. Parker, Assistant General Counsel
New Mexico Environment Department
Office of General Counsel
1190 S. St. Francis Dr. Suite N-4084
Santa Fe, NM 87501

99. IF RESPONDENT FAILS TO COMPLY WITH ANY REQUIREMENT OF THIS ORDER, THE SECRETARY MAY ASSESS ADDITIONAL PENALTIES AND MAY TAKE FURTHER LEGAL ACTION.

RIGHT TO ANSWER AND REQUEST A HEARING

Pursuant to NMSA 1978, § 3-29-7.G, § 61-33-10.E and § 74-1-10.E and 20.1.5 NMAC (available at www.nmenv.state.nm.us), Respondent has the right to request a hearing. If

Respondent contests any material fact or legal matter upon which this Order is based; (b) contends that Respondent is entitled to prevail as a matter of law; or (c) otherwise contests the appropriateness of this Order, Respondent may mail or deliver, within thirty (30) days of receipt of this Order, a written Request for Hearing to the following address:

Hearing Clerk
New Mexico Environment Department
P.O. Box 5469
Santa Fe, New Mexico 87502-5469

Respondent must attach a copy of this Order to the Request for Hearing.

20.1.5.200.A(2)(d) NMAC.

The Request for Hearing shall include an Answer. Respondent's Answer shall clearly and directly admit, deny or explain each of the factual allegations contained in this Order with regard to which Respondent has any knowledge. Where Respondent has no knowledge of a particular factual allegation, Respondent should so state, and Respondent may deny the allegation on that basis. Any allegation of this Order not specifically denied shall be deemed admitted. 20.1.5.200.A(2)(a) NMAC.

Respondent's Answer shall also include any affirmative defenses upon which Respondent intends to rely. Any affirmative defense not asserted in the Answer, except a defense asserting lack of subject matter jurisdiction, shall be deemed waived. 20.1.5.200.A(2)(b) NMAC.

The Answer shall be signed by Respondent under oath or affirmation that the information contained therein is to the best of the signer's knowledge believed to be true and correct.

20.1.5.200.A(2)(c) NMAC.

FINALITY OF ORDER

Pursuant to NMSA 1978, § 3-29-7.G, § 61-33-10.E and § 74-1-10.E, this Order shall become final unless Respondent files a Request for Hearing with the Hearing Clerk within thirty (30) days of receipt of this Order.

SETTLEMENT CONFERENCE

Whether or not a Request for Hearing has been filed, Respondent may confer with the Department concerning settlement of this Order. The Department encourages settlement consistent with the provisions and objective of the EIA, the UOCA, the SPA and the DW and UOCA Regulations. Settlement discussions neither extend the thirty (30) day deadline for filing a request for hearing and answer, nor alter the deadlines imposed for compliance with the mandates of this Order. Settlement discussions may be pursued as an alternative to, and simultaneously with, the hearing proceedings. Respondent may appear at the settlement conference alone or accompanied or represented by legal counsel.

A Stipulated Order shall finalize any settlement reached by the parties. The Stipulated Order must resolve all issues raised in this Order, shall be final and binding on all parties, and may not be appealed.

To explore the possibility of settlement in this matter, contact:

Carol M. Parker, Assistant General Counsel
New Mexico Environment Department
Office of General Counsel
1190 S. St. Francis Dr.
Santa Fe, NM 87501
505-827-6891 (ph); 505-827-1628(f)
carol.parker@state.nm.us

COMPLIANCE WITH OTHER LAWS

Compliance with the requirements of this Order does not relieve Respondent of the obligation to comply with all other applicable laws and regulations. This Order does not constitute a waiver, suspension, or modification of the requirements of the EIA, the UOCA, the SPA, or the DW or UOCA Regulations, which remain in full force and effect. The Department does not waive any administrative, civil or criminal action otherwise authorized under the EIA, UOCA, the SPA, or the DW or UOCA Regulations.

TERMINATION

This Order shall terminate when Respondent certifies that all requirements of this Order have been met, and the Department has approved such certification in writing, or when the Secretary approves a Final Stipulated Order.

3-20-2009.
DATE

Karen E Gallegos .
KAREN E. GALLEGOS
Director
Water and Wastewater Infrastructure
Development Division
525 Camino de los Marquez, Suite 4
Santa Fe, NM 87505
(505) 476-8611

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Administrative Compliance Order with Penalties was sent via certified first class mail to the following persons on March 20 2009.

Moquino Water System
Attn: Bill Hocker
P.O. Box 1434
Pagate, NM 87040

Leane P. Hocker, Registered Agent
Moquino Water Users Association II
1 La Mesita Road
Moquino, NM 87014

Leane C. Padilla-Hocker, Registered Agent
Moquino Mutual Domestic Water Consumers' Association
Cibola Count Rd. # 5 & La Mesita Dr.
Pagate, NM 87040

And was also sent by regular mail to the last known Board Members and Officers of Respondents as follows:

Leane C. Padilla-Hocker, President
Moquino Water Users Association and
Moquino Mutual Domestic Water Consumers' Association
P.O. Box 999
Pagate, NM 87040

Vina D. Padilla, Secretary/Treasurer
Moquino Water Users Association and
Moquino Mutual Domestic Water Consumers' Association
P.O. Box 947
Pagate, NM 87040

Herman Fidel Padilla, Director
Moquino Water Users Association and
Moquino Mutual Domestic Water Consumers' Association
P.O. Box 947
Pagate, NM 87040

Johnny E. Baca, Director
Moquino Water Users Association and
Moquino Mutual Domestic Water Consumers' Association
HC 77 Box 5
Seboyeta, NM 87014

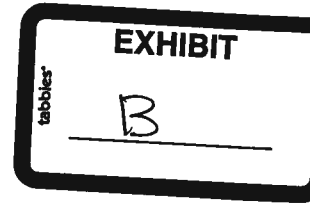
Dulce Garcia, Director
Moquino Water Users Association and
Moquino Mutual Domestic Water Consumers' Association
HC 77, Box 100
Seboyeta, NM 87014


Carol M. Parker

Cc: Karen E. Gallegos, Director, WWIDD
Margaret Ryan, Bureau Chief, DWB
Andy Edmondson, Technical Services Manager, DWB
Pat Akin, DWB District 1 Manager
Valerio Lopez, Oversight Staff, District I, DWB
Danny Valenzuela, Enforcement Coordinator, DWB
Mike Coffman, Program Leader, Utility Operator Certification Program

This rule was filed as 20 NMAC 1.5

TITLE 20 ENVIRONMENTAL PROTECTION
CHAPTER 1 ENVIRONMENTAL PROTECTION GENERAL
PART 5 ADJUDICATORY PROCEDURES – ENVIRONMENT DEPARTMENT



20.1.5.1 ISSUING AGENCY: Environment Department.
 [11/30/95; 20.1.5.1 NMAC – Rn, 20 NMAC 1.5.I.100, Recompiled 11/27/01]

20.1.5.2 SCOPE: Except as otherwise specifically provided by statute or by any other rule or regulation of the Board or the Department, this Part governs administrative appeals of compliance orders, administrative orders, field citations or compliance determinations issued or administered by the Department. This Part further governs administrative hearings for permit suspensions and revocations. In any Department proceeding conducted under the Uniform Licensing Act, NMSA 1978, Sections 61-1-1 et seq. (ULA), the procedures in the ULA shall govern the proceeding. In the absence of a specific provision in the ULA governing an action, the Department may look to this Part for guidance.
 [11/15/90, 11/30/95; 20.1.5.2 NMAC – Rn, 20 NMAC 1.5.I.101, Recompiled 11/27/01]

20.1.5.3 STATUTORY AUTHORITY: This Part is adopted under the authority of NMSA 1978, 9-7A-6, 74-2-12, 74-4-10, 74-6B-8, 74-6B-13, 74-9-28.A(2), 74-9-29, 74-9-36, 74-11-10 and 74-11-11, as amended.
 [11/15/09, 11/30/95; 20.1.5.3 NMAC – Rn, 20 NMAC 1.5.I.102, Recompiled 11/27/01]

20.1.5.4 DURATION: Permanent.
 [11/30/95; 20.1.5.4 NMAC – Rn, 20 NMAC 1.5.I.103, Recompiled 11/27/01]

20.1.5.5 EFFECTIVE DATE: November 1, 1995.
 [11/30/95; 20.1.5.5 NMAC – Rn, 20 NMAC 1.5.I.104, Recompiled 11/27/01]

20.1.5.6 OBJECTIVE: The objective of this Part is to establish regulations that govern adjudicatory proceedings of the Environment Department. This Part is to ensure due process for all the parties and give an orderly structure to the proceedings.
 [11/30/95; 20.1.5.6 NMAC – Rn, 20 NMAC 1.5.I.105, Recompiled 11/27/01]

20.1.5.7 DEFINITIONS:

A. GENERAL. As used in this Part:

- (1) "Act" means, as the context requires:
 - (a) the Department of Environment Act, NMSA 1978, Chapter 9, Article 7A, and its subsequent amendments and successor provisions;
 - (b) the Air Quality Control Act, NMSA 1978, Chapter 74, Article 2, and its subsequent amendments and successor provisions;
 - (c) the Hazardous Waste Act, NMSA 1978, Chapter 74, Article 4, and its subsequent amendments and successor provisions;
 - (d) the Solid Waste Act, NMSA 1978, Chapter 74, Article 9, and its subsequent amendments and successor provisions;
 - (e) the Ground Water Protection Act, NMSA 1978, Chapter 74, Article 6B, and its subsequent amendments and successor provisions;
 - (f) the Tire Recycling Act, NMSA 1978, Chapter 74, Article 11, and its subsequent amendments and successor provisions; or
 - (g) any other statute enacted or amended by the Legislature and including authority for issuance of compliance orders or field citations by the Division or the Secretary or any other adjudicatory proceedings as consistent with law;
- (2) "Board" means the Environmental Improvement Board;
- (3) "Complainant" means the Division that issues Compliance Orders, or the party requesting a hearing on a Compliance Determination;
- (4) "Compliance Determination" means a decision by the Division listed in the Corrective Action Fund Payment and Reimbursement, 20 NMAC 5.17; [20.5.17 NMAC]
- (5) "Compliance Order" means a written administrative order or any field citation issued by the Division;
- (6) "Department" means the New Mexico Environment Department or its successor agency under the Act;
- (7) "Division" means the appropriate Division within the Environment Department;
- (8) "document" means, except as otherwise used in Subpart III, any pleading, motion, response, memorandum, decision, order, or other written material filed or served in a proceeding under this Part, but does not include a cover letter

accompanying a document transmitted for filing;

(9) "final order" means an order issued by the Secretary that is dispositive of the matter;

(10) "Hearing Clerk" means the person designated by the Secretary to maintain the official record of the proceeding;

(11) "Hearing Officer" means the person appointed by the Secretary to conduct a proceeding under this Part;

(12) "Notice of Contemplated Action" means a notice issued by the Secretary under NMSA 1978, Section 61-1-4 of the ULA;

(13) "party" means the Complainant, the Division, Respondent, any person who is entitled and who timely requests to be heard under the ULA, or any person who is permitted to intervene in the hearing pursuant to SCRA 1986, 1-024;

(14) "Petition" means a Petition for revocation or suspension of a permit;

(15) "Petitioner" means the Department when the Petition is for revocation or suspension of a permit;

(16) "Record Proper" means all documents filed by or with the Hearing Clerk during the proceeding and includes the written transcript or tape of the hearing and all exhibits offered into evidence at the hearing, whether or not admitted;

(17) "Regulations" means any rule promulgated and adopted pursuant to the Act;

(18) "Request for Hearing" means a written appeal for review of a decision or Compliance Order issued by Division;

(19) "Respondent" means any person to whom a Compliance Order has been issued; or the Division in the case of a Compliance Determination under the Ground Water Protection Act; and

(20) "Secretary" means the Secretary of Environment, or any person who assumes the role of Secretary for purposes of this Part in the event of the Secretary's disqualification.

B. Terms Used in Act or Regulations: Terms defined in the Act or Regulations and not defined in this Part are used consistent with the meanings given in the Act or Regulations.

[11/15/95, 11/30/95; 20.1.5.7 NMAC – Rn, 20 NMAC 1.5.I.111, Recompiled 11/27/01]

20.1.5.8 to 20.1.5.99 RESERVED]

20.1.5.100 GENERAL [PROVISIONS]:

A. Applicability of Rules of Civil Procedure: In the absence of a specific provision in this Part governing an action, the New Mexico Rules of Civil Procedure, SCRA 1986, 1-001 to 1-102 and the New Mexico Rules of Evidence, SCRA 1986, 11-101 to 11-102 may apply as necessary in the discretion of the Secretary or Hearing Officer. The reference to the Rules of Civil Procedure or the Rules of Evidence shall not be construed to extend or otherwise modify the authority and jurisdiction of the Secretary under any statute.

B. Liberal Construction: This Part shall be liberally construed to carry out its purpose.

C. Severability: If any Part or application of this Part is held invalid, the remainder of the Part, or its application to other persons or situations, shall not be affected.

D. Replacement of Prior Rules: This Part replaces the Rules Governing Appeals From Compliance Orders Under the Hazardous Waste Act and the Solid Waste Act, HED 90-10 (EID), filed October 16, 1990. Any reference in this Title to these Rules shall be construed as a reference to this Part.

E. Savings Clause: Replacement of the Rules Governing Appeals From Compliance Orders Under the Hazardous Waste Act and the Solid Waste Act, HED 90-10 (EID), filed October 16, 1990, does not affect pending litigation, nor any Compliance Orders or Compliance Determinations issued prior to the effective date of this Part.

F. Powers and Duties of the Secretary, Hearing Officer:

(1) Secretary: The Secretary shall exercise all powers and duties as prescribed under the Act and this Part, and not otherwise delegated to a staff member, the Hearing Officer, or the Hearing Clerk.

(2) Hearing Officer: The Secretary may appoint one or more Hearing Officers to perform the functions described in Paragraph 2 of this Subsection [Subparagraph (b) of this Subsection].

(a) Qualifications: If an independent Hearing Officer is required by the Act, then the Hearing Officer may be an independent contractor or a State employee who is employed in the capacity as a Hearing Officer. The Hearing Officer shall not be anyone who has performed prosecutorial or investigative functions in connection with the matter at issue in the proceeding.

(b) Functions: The Hearing Officer shall exercise all powers and duties prescribed or delegated by the Secretary under the Act or this Part. The Hearing Officer shall conduct a fair and impartial proceeding, assure that the facts are fully elicited, and avoid delay. The Hearing Officer shall have authority to take all measures necessary for the maintenance of order and for the efficient, fair and impartial adjudication of issues arising in proceedings governed by this Part, which includes, but is not limited to authority to:

(i) conduct hearings under this Part;

(ii) rule upon motions, procedural requests, offers of proof, and issue all necessary orders;

(iii) issue subpoenas, as authorized by the Act, for the attendance and testimony of witnesses and the production of documentary evidence as provided for in Subpart III [20.1.5.300 NMAC];

- (iv) administer oaths and affirmations, examine witnesses and admit or exclude evidence;
 - (v) require parties to attend conferences for the settlement or simplification of the issues, or the expedition of the proceedings; and
 - (vi) impose sanctions, subject to review by the Secretary, on parties who cause undue delay or fail to cooperate in the proceeding.
- (3) Secretary or Hearing Officer; Disqualification or Withdrawal:
- (a) Neither the Secretary nor any Hearing Officer may perform functions provided for in this Part regarding any matter in which the Secretary or the Hearing Officer:
 - (i) has a personal bias or prejudice concerning a party or personal knowledge of facts or information concerning the proceeding;
 - (ii) has a financial interest in the proceeding;
 - (iii) is related to a party; or
 - (iv) is an officer, director or trustee of a party to the proceeding.
 - (b) The Secretary shall not be disqualified solely because of having been briefed on the matter prior to issuance of the Compliance Order or having authorized further investigation of the matter prior to issuance of the Compliance Order.
 - (c) Any party, by motion and for cause listed in Section 112.C.1, [Subparagraph (a) of Paragraph (3) of this Subsection] may request the disqualification of the Secretary or the Hearing Officer within ten (10) days after the matter has been docketed or the Hearing Officer designated, or if a new Secretary is appointed, within ten (10) days after the Secretary takes office.
 - (d) Any motion seeking disqualification of the Hearing Officer or the Secretary shall be ruled upon by the Secretary. Upon disqualification of the Secretary, the Deputy Secretary shall assume the duties of the Secretary. In the event that the Deputy Secretary is also subject to disqualification, a division director other than the Complainant shall assume the duties of the Secretary.

G. Computation and Extension of Time:

- (1) Computation of Time: In computing any period of time prescribed or allowed by this Part, except as otherwise specifically provided, the day of the event from which the designated period begins to run shall not be included. The last day of the computed period shall be included, unless it is a Saturday, Sunday, or legal state holiday, then the time is extended until the next day which is not a Saturday, Sunday, or legal state holiday. Whenever a party must act within a prescribed period after service upon him and service is by mail, three (3) days is added to the prescribed period. The three days extension does not apply to any deadline mandated otherwise under the Act.
 - (2) Extensions of Time : The Secretary or Hearing Officer may grant an extension of time to file a document or continuance of a hearing upon timely motion of a party to the proceeding, for good cause shown, and after consideration of prejudice to other parties and undue delay to the proceedings.
- H. Ex Parte Discussions: At no time shall any party to a proceeding under this Part discuss ex parte with the Secretary or the Hearing Officer the merits of the proceeding.
- I. Filing, Service, and Form of Documents:
- (1) Filing of Documents:
 - (a) Except as otherwise provided, the original of all documents served in the proceeding shall be filed with the Hearing Clerk.
 - (b) Except as otherwise provided, a party filing documents shall serve copies thereof upon all other parties. A certificate of service, as shown in Section 118, [Subsection L. of this Section] shall accompany each filed document.
 - (2) Service of Documents: Except as otherwise provided, all documents may be served personally, by express mail, by telefax or by first class mail.
 - (3) Form of Documents:
 - (a) Unless otherwise ordered by the Hearing Officer, all documents, except exhibits, shall be on 8 1/2 x 11-inch white paper, and where appropriate, the first page of every document shall contain a heading and caption as illustrated in Section 118 [Subsection L. of this Section]. Any field citation may be on a pre-printed, multi-copy form.
 - (b) The original of each document, except exhibits, shall be signed by the party or the party's counsel or other representative, and shall include address and telephone number. The signature constitutes a certificate that the signer has read the document; that to the best of the signer's knowledge, information, and belief, there is good ground to support it; and that, except for motions for extension of time, it is not interposed for delay.
 - (c) Any notice or service required under this Part shall be deemed adequate if made to the most recent address provided by the person upon whom service is made.

J. Filing and Service of Documents Issued by Secretary or Hearing Officer: All documents issued by the Hearing Officer shall be filed with the Hearing Clerk. The Hearing Clerk shall promptly serve copies of the document upon all parties.

K. Examination of Documents Filed:

- (1) Examination Allowed: Subject to the provisions of law restricting the public disclosure of confidential information, any person may, during normal business hours, inspect and copy any document filed in any proceeding. Such

documents shall be made available by the Hearing Clerk, as appropriate.

(2) Cost of Duplication: Unless waived by the Department, the cost of duplicating documents filed in any proceeding shall be borne by the person seeking copies of such documents.

L. Sample Document:
STATE OF NEW MEXICO
SECRETARY OF ENVIRONMENT

NAME OF COMPLAINANT,
Complainant,

v.

No.

NAME OF RESPONDENT,
Respondent.

TITLE OF DOCUMENT

Signature _____
NAME
ADDRESS & TELEPHONE NUMBER

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing [name of document] was [hand-delivered/express mailed/faxed/mailed first class] on the following [party/counsel] of record [date]:

[names and addresses of persons upon whom service is made.]

Signature _____
Name of signer

[11/15/90, 11/30/95; 20.1.5.100 NMAC – Rn, 20 NMAC 1.5.I.106 through 110, and 20 NMAC 1.5.I.112 through 118, Recompiled 11/27/01]

20.1.5.101 to 20.1.5.199 [RESERVED]

20.1.5.200 PREHEARING PROCEDURES:

A. Initiation of Process:

(1) Filing of Request: The appeal process governed by this Part shall be initiated by the filing of a Request for Hearing and served on the Department and any other party.

(2) Request for Hearing: The Request for Hearing shall include an Answer. The Answer shall:

(a) clearly and directly admit or deny each of the factual assertions contained in the Compliance Order/Determination; but where the Respondent/Complainant has no knowledge of a particular factual assertion and so states, the assertion may be denied on that basis. Any allegation of the Compliance Order/Determination not specifically denied shall be deemed admitted;

(b) indicate any affirmative defenses upon which the Respondent/Complainant intends to rely. Any affirmative defense not asserted in the Request for Hearing, except a defense asserting lack of subject matter jurisdiction, shall be deemed waived;

(c) be signed under oath or affirmation that the information contained therein is to the best of the signer's knowledge believed to be true and correct; and

(d) have a copy of the Compliance Order/Determination attached.

B. Notice of Docketing; Notice of Hearing Officer Assignment:

(1) Notice of Docketing; Notice of Hearing Officer Assignment: The Hearing Clerk shall, as soon as practicable after receipt of a Request for Hearing, issue a Notice of Docketing containing the caption and docket number of the case, the date upon which the Request for Hearing was received by the Hearing Clerk, and the name of the Hearing Officer, if one has been designated. If a Hearing Officer has not been designated, the parties shall be notified of the name and address of the Hearing Officer as soon as one is assigned. A copy of this Part shall be included with a Notice of Docketing sent to the Respondent/Complainant.

(2) **Untimeliness:** The Hearing Clerk shall docket any Request for Hearing, without regard to whether it appears to be timely; but any party may move to dismiss an untimely Request for Hearing.

C. **Scheduling the Hearing:**

(1) **Compliance Determinations:** The hearing for Compliance Determinations shall be scheduled to begin no later than ninety (90) days after the date the Request for Hearing was received, unless a stipulated or unopposed motion is filed requesting that the ninety day deadline be waived. The motion to waive must be filed prior to the expiration of the ninety day deadline.

(2) **Tire Recycling Act Compliance Order:** Within five days of receipt of a Request for Hearing, a public hearing shall be scheduled to begin at least fifteen days and not more than twenty days after the date the notice of hearing is mailed to the Respondent.

(3) **Notice of Hearing:** The Hearing Clerk shall in consultation with the Hearing Officer, but no later than thirty (30) days prior to the hearing date, issue and serve upon the parties a Notice of Hearing setting forth the date, time, and location of the hearing.

(4) **Postponement of Hearing:** No request for postponement of a hearing shall be granted except upon consent of all parties or for good cause shown.

(5) **Location of the Hearing:** Unless otherwise ordered by the Secretary, the hearing shall be in Santa Fe.

D. **Motions:**

(1) **General:** All motions, except those made orally during a hearing, shall be in writing, specify the grounds for the motion, state the relief sought and state whether it is opposed or unopposed. Each motion may be accompanied by an affidavit, certificate, or other evidence relied upon and shall be served as provided by Section 115 [Subsection I. of 20.1.5.100 NMAC].

(2) **Unopposed Motions:** An unopposed motion shall state that concurrence of all other parties was obtained. The moving party shall submit a proposed order approved by all parties for the Hearing Officer's review.

(3) **Opposed Motions:** Any opposed motion shall state either that concurrence was sought and denied, or why concurrence was not sought. A memorandum brief in support of such motion may be filed with the motion.

(4) **Response to Motions:** Any party upon whom an opposed motion is served shall have fifteen (15) days after service of the motion to file a response. A non-moving party failing to file a timely response shall be deemed to have waived any objection to the granting of the motion.

(5) **Reply to Response:** The moving party may, but is not required to, submit a reply to any response within ten (10) days after service of the response.

(6) **Decision:** All motions shall be decided by the Hearing Officer without a hearing, unless otherwise ordered by the Hearing Officer sua sponte or upon written request of any party.

[11/15/90, 11/30/95; 20.1.5.200 NMAC – Rn, 20 NMAC 1.5.II 200 through 203, Recompiled 11/27/01]

20.1.5.201 to 20.1.5.299 [RESERVED]

20.1.5.300 **DISCOVERY:**

A. **Scope of Discovery:**

(1) **Grounds:** For a ULA Hearing, discovery shall be governed by the provisions of the ULA. Discovery of information not privileged may be permitted if it meets the following:

- (a) the discovery will not unreasonably delay the proceeding;
- (b) the information to be obtained is not unreasonably cumulative or duplicative, or not otherwise reasonably obtainable;
- (c) the discovery is not unreasonably burdensome; and
- (d) 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.

(2) **Request:** Unless otherwise directed by the Hearing Officer, a party requesting discovery shall serve the discovery request directly upon the party from whom discovery is sought and shall file a notice with the Hearing Clerk, indicating the date of service of the discovery request, the type of discovery sought and the party from whom discovery is sought.

(3) **Response to Discovery Request:** A party responding to a discovery request shall serve the response, including any objections, upon the party making the discovery request and shall file a notice with the Hearing Clerk, indicating the date of service of the response, the type of discovery request being responded to, and the party upon whom the response was served.

(4) **Continuing Obligation to Supplement Responses:** Any party from whom discovery is sought has a continuing obligation, subject to any objections interposed and not overruled by the Hearing Officer, to supplement responses with relevant information obtained after serving of the initial response and any previous supplemental responses. Unless otherwise ordered by the Hearing Officer, supplemental responses shall be served as soon as practicable, but no later than five (5) days from when the information became available. If the information becomes available less than five days before the hearing or during the hearing, it shall be brought to the attention of the Hearing Officer for direction and ruling on use of the information.

(5) **Privilege:** A list of privileged documents, identified by titles, author, date, and privilege or protection claimed shall be provided in response to discovery.

(6) **Protective Order:** The Hearing Officer may, upon motion and for good cause shown, protect the discovery from disclosure. If such motion is granted, the moving party may not present the protected discovery at the hearing.

(7) **Motion to Compel, Sanctions:** A party may move for an order compelling discovery where the party from whom discovery was requested has failed to adequately or timely respond. The Hearing Officer may order the response and may impose such sanctions as may be appropriate, including but not limited to the following:

(a) refusal to allow the testimony of a witness not identified as required by Section 301 [Subsection B. of this Section];

(b) denial of admission of a document not disclosed as required by Section 302; [Subsection C. of this Section]

(c) drawing of adverse inferences against the non-responsive party; and

(d) in an extreme case, dismissal or default judgment against the non-responding party.

B. Identity of Witness: Except as provided in Subsection B of this Section [Paragraph (2) of Subsection A. of this Section] or allowed by the Hearing Officer, each party shall, within fifteen (15) days after receipt of notice of the scheduling of the hearing or within forty-five (45) days before the hearing, whichever is closer to the hearing date, provide the name and address of each person expected to be called as a witness and a description of the general subject matter of the anticipated testimony of each witness.

C. Production of Documents:

(1) **Definition:** As used in this Subpart, "document" includes writings, memos, correspondence, financial information, drawings, graphs, charts, photographs, video tapes and other data compilations from which information can be obtained, and if necessary, translated by the party through detection devices into reasonably usable form. In addition, each copy of a document that is not identical in all respects to every other copy shall be considered a separate document.

(2) **Request:** Provided the grounds in Section 300.A [Paragraph (1) of Subsection A. of this Section] are met, any party, upon written request to another party, may inspect and make copies of any designated documents in the possession or control of the other party. The request shall set forth the items to be inspected either by individual item or by category and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place and manner of making the inspection and copies. Reasonable time means not less than twenty (20) days after service of the request in the case of a Compliance Order and not less than ten (10) days after service of the request in the case of a Compliance Determination.

D. Subpoenas: As allowed by the Act, the Hearing Clerk shall, upon written request by any party, issue a subpoena requiring the attendance and testimony of any witness and the production of any evidence in the possession or under the control of the witness at the hearing or at deposition authorized by the Hearing Officer under Section 304 [Subsection E. of this Section]. A subpoena may be issued with the name and address of the witness blank, to be completed by the requesting party.

E. Request for Admissions: Provided the grounds in Section 300.A [Paragraph (1) of Subsection A. of this Section] are met, any party may serve upon any other party a written request for the admission of any statement or opinion of fact or the application of law to fact, including the genuineness of any document. If the request includes a request for admission of the genuineness of a document, the document shall be attached to the request unless it has been or is otherwise furnished or made available for inspection and copying. Each statement shall be deemed admitted unless, within twenty (20) days after service of the Request, or such longer or shorter period as the Hearing Officer may prescribe, the party to whom the request is directed serves upon the requesting party a sworn written response specifically denying such matter.

F. Depositions and Interrogatories:

(1) **Motion:** Requests for Depositions and Interrogatories must be made by motion to the Hearing Officer and may be permitted only upon determination by the Hearing Officer that the Grounds listed in Section 300.A [Paragraph (1) of Subsection A. of this Section] are met.

(2) **Order:** Upon determining that a motion for depositions or interrogatories should be granted, the Hearing Officer shall issue an order for the taking of such discovery together with any conditions and terms of the discovery. [11/15/90, 11/30/95; 20.1.5.300 NMAC – Rn, 20 NMAC 1.5.III.300 through 305, Recompiled 11/27/01]

20.1.5.301 to 20.1.5.399 [RESERVED]

20.1.5.400 **HEARING PROCEDURES:**

A. Evidence:

(1) **General:** The Hearing Officer shall admit all relevant evidence, unless the Hearing Officer determines that the evidence is irrelevant, immaterial, unduly repetitious or otherwise unreliable or of little probative value. Evidence relating to settlement that would be excluded in the courts under SCRA 1986, 11-408 is not admissible.

(2) **Examination of Witnesses:** Witnesses shall be examined orally, under oath or affirmation, except as otherwise provided in this Part or by the Hearing Officer. Parties shall have the right to cross-examine a witness. The Hearing Officer may limit cross-examination that is unduly repetitious, harassing or beyond the scope of the witness' direct testimony.

(3) Exhibits: All exhibits offered in evidence shall be marked with a designation identifying the person by whom the exhibit is offered, and numbered serially in the sequence in which offered. Large charts and diagrams, models, and other bulky exhibits are discouraged. Exhibits should be limited to 8 1/2 by 11 inches or be capable of being folded to that size, unless otherwise necessary for adequate presentation of evidence.

(4) Official Notice: Official notice may be taken of any matter that may be judicially noticed in the New Mexico courts. In a ULA Hearing, parties shall be given adequate opportunity to show that such facts are erroneously noticed.

B. Objections and Offers of Proof:

(1) Objection: Any objection concerning the conduct of the hearing may be stated orally or in writing during the hearing. The party raising the objection must supply a short statement of its grounds. The ruling by the Hearing Officer on any objection and the reasons given for it shall be part of the record.

(2) Offer of Proof: Whenever evidence is excluded from the record, the party offering the evidence may make an offer of proof, which shall be included in the record. The offer of proof for excluded oral testimony shall consist of a brief statement describing the nature of the evidence excluded and what such evidence would have proved. The offer of proof for excluded documents or exhibits shall consist of the insertion in the record of the documents or exhibits excluded. Where the Secretary decides that the ruling of the Hearing Officer in excluding the evidence was both erroneous and prejudicial, the hearing may be reopened to permit the taking of such evidence.

C. Burden of Persuasion:

(1) Compliance Order: The Complainant has the burden of going forward with the evidence and of proving by a preponderance of the evidence the facts relied upon to show the violation occurred and that the proposed civil penalty is appropriate. Following the establishment of a prima facie case, the Respondent shall have the burden of going forward with any adverse evidence or defense to the allegations.

(2) Compliance Determination: The Complainant has the burden of proving cost eligibility and substantial compliance with the Act and Corrective Action Fund Payment and Reimbursement Regulations.

(3) Preponderance of Evidence: Each matter of controversy shall be determined by the Hearing Officer upon a preponderance of the evidence.

[11/15/90, 11/30/95; 20.1.5.400 NMAC – Rn, 20 NMAC 1.5.IV.400 through 402, Recomplied 11/27/01]

20.1.5.401 to 20.1.5.499 [RESERVED]

20.1.5.500 POST-HEARING PROCEDURES:

A. Filing the Transcript: Unless otherwise ordered by the Secretary or Hearing Officer, The hearing shall be transcribed verbatim. The Hearing Clerk shall promptly notify all parties and interested participants of the availability of the transcript. Any person desiring a copy of the transcript must order a copy from the reporter.

B. Proposed Findings and Conclusions: Unless otherwise ordered by the Hearing Officer, within thirty (30) days after the filing of the transcript, or within such time as may be fixed by the Hearing Officer, any party may submit proposed findings of fact and conclusions of law and closing argument. All such submissions shall be in writing, served on all parties and contain adequate references to the record and authorities relied on. No new evidence shall be presented unless specifically allowed by the Hearing Officer.

C. Recommended Decision:

(1) Content: Unless otherwise ordered by the Secretary, the Hearing Officer shall issue a recommended decision within thirty (30) days after the period for filing of proposed findings and conclusions under Section 501 [Subsection B. of this Section] has expired. The recommended decision shall contain the following:

(a) the Hearing Officer's findings of fact; conclusions regarding all material issues of law or discretion, as well as reasons therefor;

(b) if applicable, a review of the penalty amount to determine if the agency acted within its discretion in setting the penalty amount. If the Hearing Officer decides to recommend a civil penalty different in amount or nature from the penalty recommended to be assessed in the Compliance Order, the Hearing Officer shall set forth in the recommended decision the specific reasons for the change; and

(c) a proposed final order.

(2) Comment on Recommended Decision: Any party may file, within fifteen (15) days after service of the recommended decision, comments regarding the recommended decision, including argument for, against or modification of the recommended decision.

(3) Argument Before the Secretary: The Secretary may, upon request of a party or sua sponte, allow oral argument on the recommended decision. If oral argument is allowed, the Secretary shall specify the time and place for such oral argument, after giving due consideration to the convenience of the parties and the need for expeditious resolution of the proceeding.

D. Final Order by Secretary: As soon as practicable, but not later than thirty (30) days, after expiration of the time for filing of comments on the recommended decision or conclusion of oral argument, if allowed, the Secretary shall issue a final written order in the matter.

(1) Decision: The Secretary may adopt, modify, or set aside the Hearing Officer's recommended decision, and

shall set forth in the final order the reasons for the action taken. In a ULA Hearing, if the Secretary takes any action specified in the ULA against the licensee, the final order shall specify that the licensee shall bear all costs of the proceeding.

(2) **Penalty:** The Secretary may change the amount and nature of the civil penalty, if any, assessed from the amount recommended by the Hearing Officer and shall set forth reasons for the change. The final order shall also specify the fund to which any civil penalty assessed shall be paid.

E. **Payment of Civil Penalty:** The Respondent shall pay the full amount of the civil penalty, if any, assessed in the final order within ninety (90) days after receipt of the final order unless otherwise ordered by the Secretary. Payment shall be made by forwarding to the Hearing Clerk a cashier's check or certified check in the amount of the penalty assessed in the final order, payable to the fund specified in the final order.

F. **Judicial Review:** Judicial review of the Secretary's final order shall be as provided by law. The filing of an appeal does not stay any action, compliance, corrective action or payment of penalty required by the final order, unless otherwise ordered by the Secretary or the Court.

G. **Preparation of Record Proper:** The preparation of the Record Proper for an appeal or for any other reason shall be the responsibility of the Hearing Clerk. Appellant shall make satisfactory arrangements, including copying or transcript costs, with the Hearing Clerk.

[11/15/90, 11/30/95; 20.1.5.500 NMAC – Rn, 20 NMAC 1.5.V.500 through 506, Recompiled 11/27/01]

20.1.5.501 to 20.1.5.599 [RESERVED]

20.1.5.600 **ALTERNATE RESOLUTION:**

A. **Summary Procedures:**

(1) **Use of Summary Procedures:** Under the following limited circumstances, the Secretary may dispose of a Request for Hearing after an expedited hearing for:

(a) a motion by a party to dismiss the Request for Hearing for jurisdictional defects (i.e. an untimely Request, lack of final action); or

(b) a request by a party to decide the merits of the Request for Hearing on legal arguments presented in writing and oral argument.

(2) **Expedited Hearing:** If the Hearing Officer determines that a request for an expedited hearing has a likelihood of success and could fairly expedite the resolution of the proceeding, then notice for a hearing shall be given as set forth in this Part. The Hearing Officer shall then submit a recommended decision to the Secretary. The Secretary shall either follow Section 503 [Subsection D. of 20.1.5.500 NMAC] for final orders or remand to the Hearing Officer to proceed with a full hearing under this Part.

B. **Settlement:**

(1) **Settlement Policy:** The Secretary encourages settlement of a proceeding at any time if the settlement is consistent with the provisions and objectives of the Act and Regulations. Settlement conferences shall not affect any party's obligation to timely respond to any matter governed by this Part, including the Respondent's obligation to file a timely Request for Hearing under Section 200 [20.1.5.200 NMAC].

(2) **Stipulated Final Order:** The Secretary may approve a Stipulated Final Order signed by all the parties. The Stipulated Final Order shall include all the terms and conditions agreed to by the parties, and shall state that, for the purpose of this proceeding, the parties admit the jurisdictional allegations of the Compliance Order/Determination and consent to the relief specified, including the assessment of the stated civil penalty, if any. If the Secretary disapproves the Stipulated Final Order, the matter shall proceed as if there had been no Stipulated Final Order or settlement.

(3) **Withdrawal:** The Respondent/Complainant may withdraw the Request for Hearing or the Compliance Order at any time prior to a decision by the Secretary. A Notice of Withdrawal shall be filed with the Hearing Clerk and served on all other parties. The parties may file written objections to the Notice within ten (10) days after receipt. If any objection is filed, the Secretary shall rule on the Notice.

[11/15/90, 11/30/95; 20.1.5.600 NMAC – Rn, 20 NMAC 1.5.VI.601, Recompiled 11/27/01]

20.1.5.601 to 20.1.5.699 [RESERVED]

HISTORY OF 20.1.5 NMAC: [RESERVED]

History of Repealed Material: [RESERVED]