

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



In the Matter of:)
PROPOSED AMENDMENT TO)
PART 20.6.6 NMAC - DAIRY RULE)

WQCC 12- 09(R)
and
WQCC 13-08(R)

**THE COALITION
OPPOSITION TO NMED MOTIONS TO EXCLUDE AND TO STRIKE**

Amigos Bravos, Rio Grande Chapter of the Sierra Club, Caballo Concerned Citizens, Lea County Concerned Citizens, and Rio Valle Concerned Citizens [the Coalition] file this Opposition to the New Mexico Environment Department [NMED] October 27, 2014, Motion to Exclude William C. Olson and Strike/Limit His Testimony [Motion to Exclude] and NMED's October 27, 2014, Motion to Strike Entry of Appearance of New Mexico Attorney General [Motion to Strike], respectfully requesting, on the basis of the facts and law below, that the motions be denied and struck.

1.0 FACTUAL BACKGROUND

1.1 Pursuant to the New Mexico Water Quality Control Commission's [Commission] October 3, 2014 Procedural Order, on October 17, 2014, the Coalition filed a Notice of Intent to Present Technical Testimony and the testimony and exhibits of its two experts, William C. Olson, hydrogeologist, and Kathy J. Martin, P.E.

1.2 On October 27, 2014, NMED filed the Motion to Exclude, asserting that Mr. Olson should be excluded as a witness and his testimony should be limited or struck based upon alleged violations of the Government Conduct Act [GCA], NMSA 1978, §10-16-1 et seq. (1967, as amended through 2011), solely because Mr. Olson "was previously

employed as Bureau Chief of the Department Ground Water Quality Bureau . . . and actively participated in developing the Department's and the Bureau's policy and legal strategy related to 20.6.6 NMAC ("Dairy Rule")" with the result that "Mr. Olson has based his testimony on privileged and confidential information in violation of the GCA, which unfairly prejudices the Department and misleads the Water Quality Control Commission..." Motion to Exclude at 1. On the same day, NMED filed the Motion to Strike.

2.0 THE MOTION TO EXCLUDE SHOULD BE DENIED AND THE PLEADINGS STRUCK FOR THE FOLLWING REASONS:

2.1 The GCA Does Not Authorize Excluding Witnesses.

There is no basis in the GCA, NMSA 1978, §10-16-1 *et seq.* (1967, and as amended through 2011), supporting the purpose to which NMED attempts to interpose it here. The GCA reposes enforcement within the discretion of the New Mexico Secretary of State who may refer a matter for prosecution to either the Attorney General or the District Attorney. *See generally, id.* at §§10-16-11 to -17.

2.2 There Is No Basis To Exclude Mr. Olson's Testimony And Exhibits.

There is no provision in the GCA that relates to Mr. Olson's testimony and exhibits in this proceeding. This is not the same proceeding in which he previously participated while a state employee. The Dairy Industry Group for a Clean Environment [DIGCE] filed the new petitions at issue in this new proceeding in 2012 and 2013, *viz.* WQCC 12-09(R) and 13-08(R), captioned above. As Mr. Olson sets forth in the "Affidavit of William C. Olson Setting Forth Facts In Opposition To NMED Motion To

Exclude," attached hereto as Coalition Opposition Exhibit 'A' [Olson Affidavit], he retired from state government in October of 2011, and was neither involved in drafting or framing the petitions which are before the Commission in this case, nor involved in any way in NMED's review of these petitions and the formulation of NMED's responses and legal strategy in relation to the petitions. DIGCE's petitions were, respectively, submitted one and two years after Mr. Olson had already retired as Ground Water Quality Bureau Chief. Olson Affidavit at ¶¶3-6.

2.3 Mr. Olson Does Not Rely Upon, Utilize, Or Reveal Any Confidential And/Or Privileged Information In His Testimony And Exhibits.

NMED's motion falsely asserts that Mr. Olson based his testimony on confidential and privileged information obtained while an employee of NMED, and provides no examples of confidential or privileged information that he has revealed. Motion to Exclude at 2-4. Mr. Olson's testimony is based upon publically available information and facts from the NMED's and WQCC's own public records. Olson Affidavit at ¶5. He also provides expert opinion based on his twenty-eight years of professional experience in New Mexico dealing with issues related to the Water Quality Act and Commission rules. *See generally*, Testimony of William C. Olson and attached Coalition Exhibits WCO-1 through WCO-20, WQCC 12-09(R) and WQCC 13-08(R) (October 17, 2014) [Testimony of William C. Olson and Coalition Exhibits WCO-1 to WCO-20]. Mr. Olson's testimony is supported by known facts in twenty technical exhibits that are attached to and referenced in his testimony. *Compare* Testimony of William C. Olson *with* Coalition Exhibits WCO-1 through WCO-20. All the exhibits that form the basis of

his testimony and expert opinion are publically available facts. *Compare id. with Olson Affidavit ¶¶4-6.* Even under a cursory examination of the cited testimony and exhibits, it is readily apparent that NMED is utilizing unfounded allegations in an attempt to discredit him before the Hearing Officer and Commission. Moreover, as factual and legal matters which are or should be known to NMED, Mr. Olson has no confidential and/or privileged information concerning NMED's legal strategy in relation to the DIGCE petitions now before the Commission. Olson Affidavit at ¶ 3.

2.4 Mr. Olson's testimony does not present a conflict of interest pursuant to the GCA; NMED's motion misrepresents facts related to this hearing and Mr. Olson's hearing participation.

NMED states that Mr. Olson is revealing confidential information for private gain in violation of the GCA, NMSA 1978, §10-16-6. Motion to Exclude at 1-4. Significantly, there is only an allegation of the use of confidential information without any substantive showing of the use of such information or a request for *in camera* inspection of the allegedly confidential information to demonstrate that it is confidential. Furthermore, Mr. Olson is receiving no private gain for his expert witness testimony in this hearing. Mr. Olson volunteered to be an unpaid expert witness for the Coalition to protect public interests and safeguard and preserve New Mexico ground water from pollution due to dairy operations. There is also no private gain to the Coalition from Mr. Olson's testimony as the Coalition is comprised of non-profit public interest groups and community groups whose public members do not receive financial benefits from implementation of the rule. In addition, Mr. Olson has not revealed confidential or privileged information as discussed herein and in the attached Olson Affidavit.

NMED falsely misrepresents *this* matter as a proceeding Mr. Olson was personally and substantially involved in while a public officer or employee and that, therefore, Mr. Olson has a conflict of interest in this hearing. Motion to Exclude at 2-4. WQCC hearings 12-09(R) and 13-08(R) are brand new rulemaking hearings based upon 2012 and 2013 petitions which DIGCE filed to substantially alter the current Dairy Rule (which the WQCC approved in late 2011).

DIGCE's petitions for amendment of the Dairy Rule were submitted after Mr. Olson retired from state government in October of 2011. This is not a hearing or continuation of a hearing that Mr. Olson participated in as a state official. These rule-making hearings concern dairy industry proposals for substantially altering the current Dairy Rule and, significantly, are not NMED-proposed rules. Mr. Olson was not involved in the development of DIGCE's proposed rule amendments and had no substantial, personal, direct, or immediate participation and authority over the development of DIGCE's proposed rule amendments. Mr. Olson also has had no substantial, personal, direct and immediate participation and authority over any position that NMED has chosen to take in this proceeding. *See generally* Olson Affidavit, attached hereto.

2.5 Mr. Olson's testimony is not prejudicial to NMED and does not in any way imply that he is representing the position of NMED.

NMED asserts that Mr. Olson is attempting to represent the position of NMED and that his testimony is prejudicial to NMED. Motion to Exclude at 1-4. NMED provides examples from Mr. Olson's testimony that purport to show this but fails to specify exactly what is objectionable in these examples. Motion to Exclude at 5-6. In any

event, NMED's assertions are patently false, misrepresent Mr. Olson's testimony, and are unsupported by the facts as discussed below.

Mr. Olson plainly states on the first page of his direct testimony that he is testifying as an expert witness on behalf of the Coalition. At no point in his testimony does he state that he is speaking on behalf of NMED. *See generally*, Testimony of William C. Olson. NMED states that, because Mr. Olson bases his opinions on his experience, he is attempting to speak for NMED. NMED uses as an example Mr. Olson's testimony at page 26, wherein he states that in his experience, lending institutions are concerned about liability over permitting and pollution issues at dairies. This is his expert opinion based upon professional experience and he in no way states that this opinion represents the position of NMED.

NMED objects to Mr. Olson's testimony presenting facts and information about pollution at dairies in his testimony at pages 6-7, the history of enforcement of the Water Quality Act [WQA] and the Commission rules in his testimony at pages 18-19, place of withdrawal issues in his testimony at pages 20-21, potential harm to water quality programs in his testimony at page 26, cases of dairy pollution from impoundments in his testimony at page 28, and statistics about 57% of dairies causing water pollution in his testimony at exhibit WCO-4. NMED states that this testimony shows he is revealing NMED strategy and speaking for NMED. Yet, in fact, Mr. Olson's testimony only presents known and publically available facts supported by exhibits--not NMED legal strategy, internal policy or any other confidential and/or privileged matter in relation to this case. He uses these public facts to form his expert opinions and does not state or

imply that he is speaking on behalf NMED. *Compare* averments in Olson Affidavit *with* Testimony of William C. Olson and attached exhibits WCO-1 to WCO-20.

As demonstrated above and in Mr. Olson's direct testimony and exhibits, it is clear that Mr. Olson's testimony presents factual information and the informed judgments underlying his professional opinions. His testimony neither represents itself as the opinions or strategy or current policies of NMED, and cannot, therefore "prejudice" NMED before this Hearing Officer and/or the Commission. Significantly, NMED does no more than allege such prejudice without any substantive showing of prejudice or precise citation to such specifically prejudicial statements or information. A comparison of the Motion to Exclude at 4-6 with the Olson Affidavit and Testimony of William C. Olson and Coalition Exhibits WCO-1 to WCO-20 further supports the contention that NMED's claims are completely baseless and unfounded.

3.0 LEGAL BASIS FOR DENYING MOTIONS AND STRIKING THEM.

3.1. GCA Provides No Jurisdiction For The Hearing Officer Or Commission To Adjudicate The Motion To Exclude.

A long-accepted elementary principle of statutory interpretation is that "[w]hen a statute limits a thing to be done in a particular mode, it includes the negative of any other mode." *Botany Mills v. United States*, 278 U.S. 282, 289 (1929); *see also Kissinger v. Reporters Committee For Freedom Of The Press*, 445 U.S. 136, 148-149 (1980) (it is "an elemental canon of statutory construction that, where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it").

Where the New Mexico legislature, as in the GCA, NMSA 1978, §16-10-1 *et seq.* (1967, and as amended through 2011), sets out a specific means for the exercise of jurisdiction to administer and enforce a statute, that is the sole and exclusive means for doing so. *See, e.g., Fancher v. Board of Commissioners of Grant County*, 1921-NMSC-039 at ¶¶ 11-12; 29 N.M. 179, 189-190 (the applicable rule of law is that the Legislature may prescribe the method for exercising jurisdiction; where it prescribes a mode of procedure, that mode must be followed and is exclusive of all others); *accord, S.A. Bettini v. City of Las Cruces*, 1971-NMSC-054, ¶¶ 10-11; 82 N.M. 633, 635; *City of Albuquerque et al. v. PRC*, 2003-NMSC-028 at ¶¶ 21-22; 134 N.M. 472, 483.

Here, the New Mexico Legislature chose to expressly place the means of enforcing compliance with the GCA in the hands of the Secretary of State who is provided discretion as to whether to seek enforcement from the Attorney General or a District Attorney. *Compare* GCA, NMSA 1978, §§10-16-8(B) and (D) (portions of Act prohibiting former employees or officers of state from representing persons dealing with state government in matter they personally and substantially participated while officers or employees) *with* the enforcement section of the Act at: §10-16-13.1 (secretary of state shall seek first to ensure voluntary compliance person who violates ... act ... shall be given ten days notice to correct ... referrals for civil enforcement ... only after efforts to secure voluntary compliance ... have failed), §10-16-18(A) (a civil action to enforce may be commenced if the Secretary of State reasonably believes...), §10-16-18(B) (attorney general or a district attorney may institute) (emphasis added).

Plainly, the entire mode and means of enforcement of the Act is in the hands of the Secretary of State with discretion to request prosecution from the Attorney General or a District Attorney. There is, thus, no jurisdiction provided to the New Mexico Environment Department, the Hearing Officer in this case, the Water Quality Control Commission, or to any other agency or individual for the enforcement or use of the GCA to any other purpose or in any other way than that which is set out in the plain language of the statute. Consideration of any portion of NMED's Motion to Exclude in this regard is *ultra vires* of the jurisdictional limitation on enforcement in the GCA. It invites the Hearing Officer and Commission to erroneously usurp the limited enforcement jurisdiction expressly provided only to the Secretary of State. Only the Secretary of State has discretion to request (or not request) prosecution. *See generally, Marbob Energy Corporation v. New Mexico Oil Conservation Commission*, 2009-NMSC-013, ¶¶ 14-15; 146 N.M. 24, 30 (statute does not give the Commission jurisdiction to enforce; enforcement exclusively in hands of Attorney General). For this reason, the Hearing Officer should deny the motion.

3.2. Prejudice Is Rare When An Expert Is Subject To Cross Examination.

3.2.1 Expert witnesses are rarely excluded for prejudice.

The NMED Motion to Exclude alleges potential prejudice in Mr. Olson's testimony and provides no basis for this other than NMED's concern about confusion between Mr. Olson as a former Chief of the Ground Water Quality Bureau and the current Bureau Chief. Motion to Exclude at 4-6. Mere assertion of prejudice is not a showing of prejudice. *In re Ernesto M., Jr.*, 1996-NMCA-39, ¶10, 121 N.M. 562.

Moreover, the proper place to examine whether there is prejudice is through cross-examination of the witness by the adverse parties and the Commission. There is good reason for this.

"Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." *Davis v. Alaska*, 415 U.S. 308, 316 (1974). This is because cross examination allows the parties and the Commission to explore the basis of the testimony of a witness by questioning the witness. This is a process that further explains, modifies, elucidates, rebuts, or even contradicts the testimony. Thus, in this case, the Parties and the Commission, through cross-examination of Mr. Olson's expert testimony, would be able to arrive at the truth or falsity of that testimony. *State v. Urioste*, 1980-NMCA-103, ¶15; 94 N.M. 767, 770, *cert. denied*, 94 N.M. 806 (1980). For that reason, excluding a witness, particularly a technical witness offering expert opinion, should not be done lightly. As the United States Court of Appeals for the Tenth Circuit has stated, the exclusion of the testimony of an expert witness is almost never imposed "in the absence of a constitutional violation or statutory authority for such exclusion." *United States v. Gonzales*, 164 F.3d 1285, 1292 (10th Cir. 1999).

3.2.2. The Ortiz Case Is Not On Point.

The Office of General Counsel cites a single case to support its frivolous, misleading and harassing allegations that Mr. Olson has violated statutory ethical standards. Motion to Exclude at 4. The case is not on point, as the Court in *Ortiz* only addressed issues concerning the alleged unconstitutionality of the act and its interfering with the judiciary's regulation of the legal profession. Unlike Mr. Olson, the appellant in

the *Ortiz* case was an attorney who had left state employment less than a year before representing a paying client in a matter identical to that on which the attorney worked while in state government. *Ortiz v. Taxation & Revenue Dep't, Motor Vehicle Div.*, 1998-NMCA-027, 124 N.M. 677, 954 P.2d 109. Moreover, unlike Attorney Ortiz, Mr. Olson has not worked in state government for less than one year and is not representing a paying client. Furthermore, unlike Attorney Ortiz, Mr. Olson is testifying as an expert witness in a proceeding that is not the same as one on which he worked while in state government. This new proceeding, as presented in the facts herein above, is not a petition that NMED initiated. This new petition--or more correctly the consolidation of two new petitions--is one that the dairy industry group "DIGCE" initiated to substantially alter the existing regulations. Significantly, in *Ortiz* the appellant did not object on the grounds that the GCA only provides limited jurisdiction for enforcement. Therefore, the appellate Court never addressed that issue.

3.3. NMED's Pleading Should Be Denied and Struck.

The Commission's Guidelines for Regulation Hearings do not address frivolous, harassing, intimidating and disparaging pleadings designed to prejudice the Hearing Officer and the Commission. The Procedural Order is also silent on this matter. The Rules of Civil Procedure for the District Courts, although not used in Commission proceeding, may be looked to for guidance in this regard. Procedural Order, § 401.A. Under Rule 1-011.A, an attorney or party to a proceeding must have "good ground to support" a pleading; see also Rule 16-301 NMRA (a lawyer may not assert an issue "unless there is a basis in law and fact for doing do that is not frivolous, which includes

a good faith argument for an extension, modification or reversal of existing law").

Pleadings in violation of Rule 1-011 may be stricken. Rule 1-011.A NMRA. In this instance, the Motion to Exclude should be both denied and struck from the record as there is no basis in law or fact for filing such a pleading--and the Office of General Counsel knew or should have known that to be the case. Rule 1-011 is intended "to deter baseless filings" "by testing the conduct of counsel." *Rivera v. Brazos Lodge Corp.*, 1991-NMSC-030, ¶ 14, 111 N.M. 670, 674. The language and object of the rule is, in the first instance, to put a moral obligation on an attorney to take the investigatory and research effort necessary to satisfy her/him self that legitimate grounds exist for filing the pleading. This presumes there will be honesty and good faith exercised in the filing of pleadings. *Id.* at ¶¶13, 15.

For the reasons and law set forth above, the Coalition contends that the NMED Motion to Exclude dishonestly and in bad faith attempts to smear Mr. Olson's ethical reputation and prejudice the Hearing Officer and the Commission against believing Mr. Olson's testimony. The charges are baseless and unsupported by fact and/or law as set forth herein above. For those reasons, NMED's Motion to Exclude is frivolous and interposed for improper purposes, and, therefore, should be denied and struck.

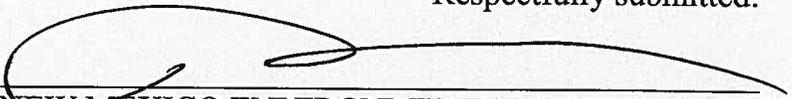
3.4. The Attorney General's Office Is a Proper Party To The Proceeding.

The Coalition incorporates by reference herein the factual basis and legal argumentation of the Office of the Attorney General in opposing the NMED motions, and further sets forth that the Motion to Strike should be denied.

4.0 CONCLUSION AND REQUESTED RELIEF.

For the above stated reasons of fact and law supported by the attached affidavit, there is no legal or factual basis to support the NMED motions. Wherefore, both motions should be denied and the Motion to Exclude should be struck.

Respectfully submitted:



NEW MEXICO ENVIRONMENTAL LAW CENTER
Jon Block, Bruce Frederick,
Eric Jantz, Douglas Meiklejohn
1405 Luisa Street, Ste. 5
Santa Fe, NM 87505
(505) 989-9022
jblock@nmelc.org

Attorneys for The Coalition

CERTIFICATE OF SERVICE

I, Jon Block, hereby certify that on November 5, 2014, I caused to be served by hand the Coalition's *Opposition To NMED's Motions To Exclude and Strike* upon the parties listed below and on the following page by emailing digital copies to them, mailing them paper copies, and emailing and by hand delivering an original and the requisite number of copies to the WQCC administrator:

Jeffrey Kendall and Chris Attencio
New Mexico Environment Department
1190 St. Francis Drive
Santa Fe, New Mexico 87502

Joshua Granata, Ass't Attorney General
Office of the Attorney General
408 Galisteo Street
Santa Fe, NM 87501

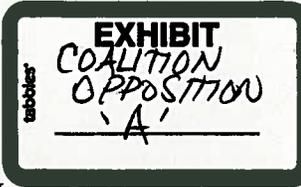
Dal Moellenberg, TJ Trujillo, Bob Stranahan IV
Gallagher and Kennedy, PA
1239 Paseo de Peralta
Santa Fe, New Mexico 87501

Pam Castaneda, WQCC Administrator
New Mexico Environment Department
1190 St. Francis Drive
Santa Fe, New Mexico 87502

Tannis Fox, Assistant Attorney General
Office of the Attorney General
408 Galisteo Street
Santa Fe, NM 87501



Jon Block



STATE OF NEW MEXICO
BEFORE THE WATER QUALITY CONTROL COMMISSION

In the Matter of:) WQCC 12- 09(R)
PROPOSED AMENDMENT TO) and
PART 20.6.6 NMAC - DAIRY RULE) WQCC 13-08(R)

AFFIDAVIT OF WILLIAM C. OLSON
PROVIDING FACTS IN OPPOSITION TO NMED MOTION TO EXCLUDE

I, William C. Olson, having been placed under oath, depose as follows

- 1. My name is William C. Olson and I reside on Cosmic Way in Lamy, New Mexico.
2. I have pre-filed expert testimony in the above captioned matter which provides facts and my expert opinion on the Dairy Industry for a Clean Environment ("DIGCE") petitions filed in this matter.
3. Since October of 2011, I have not worked as an employee of the New Mexico Environment Department in a capacity that would provide me with any privileged and confidential information on its legal strategy or policy positions related to the new dairy rule petitions.
4. I have reviewed the testimony and exhibits that I filed in this matter and they do not contain any privileged, confidential or strategic information that I am aware of based upon my past employment with the State of New Mexico.
5. My testimony and the exhibits attached are based upon and include matters and materials that are of public record before the Water Quality Control Commission and the New Mexico Environment Department.
6. I am unaware of any confidential information in my pre-filed testimony but, in any event, my testimony relies on my expertise and publicly available information.

[Signature of William C. Olson]
William C. Olson

STATE OF NEW MEXICO
COUNTY OF SANTA FE, ss.

On this 5th day of November, 2014, appeared before me the above named William C. Olson, known to me, and swore that the above information is true and correct to the best of his knowledge and belief.



[Signature of Notary Public]
NOTARY PUBLIC