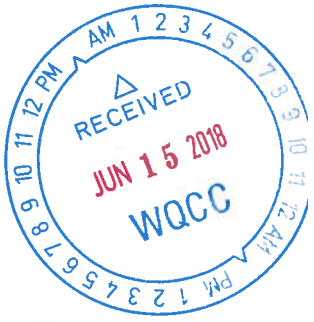

STATE OF NEW MEXICO
BEFORE THE WATER QUALITY CONTROL COMMISSION

In the Matter of:

PROPOSED AMENDMENTS TO *GROUND AND SURFACE WATER PROTECTION* REGULATIONS, 20.6.2 NMAC

No. WQCC 17-03 (R)

JOINT PROPOSED REPORT

This matter comes before the New Mexico Water Quality Control Commission ("Commission" or "WQCC") upon a petition filed by the New Mexico Environment Department ("NMED" or "Department") on May 1, 2017, proposing amendments to the State of New Mexico's Ground and Surface Water Protection Regulations, which are codified as Title 20, Chapter 6, Part 2 of the New Mexico Administrative Code (20.6.2 NMAC).

PROCEDURAL BACKGROUND

1. NMED filed a Petition to Amend the Ground and Surface Water Protection Regulations (20.6.2 NMAC) on May 1, 2017.

2. The Petition was the culmination of a process that began in 2015, when the NMED Ground Water Quality Bureau first set out to identify areas within 20.6.2 NMAC that required updating and develop regulatory language to implement those changes. Part 20.6.2 has not been updated or substantially amended in over 22 years. *See* NMED Exhibit 2, Direct Testimony of Michelle Hunter ("*Hunter Direct*"), at 2:18 – 3:2; *id.* at 4:5-8.

3. On May 20, 2016, the Department held a public meeting in Santa Fe, New Mexico, to present an overview of the amendments to 20.6.2 NMAC that the Department was considering for proposal to the Commission. *Id.* at 4:8-12.

4. In June of 2016, the Department issued a "Public Discussion Draft" of the proposed amendments for a 60-day public comment period. Following receipt of comments on that initial draft, the Department revised the proposed amendments and issued a second "Public Discussion Draft" for a 30-day public comment period. *Id.* at 4:12-15.

5. In September of 2016, the Department held four additional public information meetings throughout the State. These meetings were held in Roswell, Las Cruces, Farmington, and Albuquerque. Additionally, the Department held a "web-ex" online listening session in November of 2016. *Id.* at 4:15-18.

6. In addition to soliciting public comment on proposed amendments and holding public meetings, the Department met and corresponded with numerous stakeholders, including the New Mexico Municipal League, the Dairy and Mining industries, the U.S. Departments of Energy and Defense, Amigos Bravos, the Gila Resources Information Project, William C. Olson, and others to get their input on the proposed amendments. *Id.* at 4:18-22.

7. The Department continued to engage with stakeholders and make edits to the language of its proposed amendments up through October 29, 2017, when the Department filed its final version of the proposed amendments prior to the hearing in this matter. *Id.* at 4:22-5:2.

8. On May 9, 2017 the Commission issued its Order for Hearing and Appointment of Hearing Officer ("Order for Hearing"), appointing the Hearing Officer and setting the hearing for November 14, 2017.

9. In its Order for Hearing, at the Department's request, the Commission specified that the scope of the rulemaking was limited to the amendments proposed by the Department in its Petition, and any logical outgrowths thereof.

10. Following the issuance of the Order for Hearing, the Department sent out notice of the hearing to the Ground Water Quality Bureau's email list serve, as well as to every person who had submitted comments on either of the Public Discussion Drafts, or had signed in at any of the public meetings.

11. Legal notice of the hearing was published in both English and Spanish in the Albuquerque Journal on June 17, 2017, and in the New Mexico Register on June 27, 2017. NMSA 1978, § 74-6-6(C).

12. The hearing on NMED's Petition was scheduled for November 14, 2017. The following parties filed an Entry of Appearance in this matter: City of Roswell ("Roswell); Laun-Dry; Los Alamos National Security, LLC ("LANS"); Amigos Bravos and the Gila Resources Information Project (collectively, "AB/GRIP");[1] the New Mexico Mining Association ("NMMA"); William C. Olson; the Dairy Producers of New Mexico ("DPNM") and the Dairy Industry Group for a Clean Environment ("DIGCE") (collectively, "the Dairies" or "Dairy industry"); the New Mexico Municipal League Environmental Quality Association ("NMML" or "Municipal League"); United States Air Force, Department of Defense ("USAF/DoD"); the New Mexico Energy, Minerals and Natural Resources Department ("EMNRD"); Rio Grande Resources Corporation ("RGR"); American Magnesium, LLC (AmMg); New Mexico Copper Corporation ("NMCC") (collectively, with NMED, the "Parties").

13. On May 31, 2017, Hearing Officer Erin Anderson issued a Procedural Order and Scheduling Order directing non-petitioning parties to file (1) "a statement indicating their support of, opposition to, or no position taken on the amendments proposed by the Department;" and (2)

[1] AB/GRIP's counsel, the New Mexico Environmental Law Center ("NMELC"), initially entered an appearance itself. On June 14, 2017, NMELC filed an Amended Notice of Appearance, clarifying that it was appearing as counsel to AB/GRIP.

"any proposed amendments to 20.6.2 NMAC not contained in NMED's Petition … accompanied by a statement of reasons for the proposed regulatory change."

14. The Parties' Statements of Position on the amendments proposed by the Department and Proposed Amendments to 20.6.2 NMAC that were not contained in NMED's Petition were filed on or before July 27, 2017. Certain parties filed corrected Statements of Positions after these initial filings.

15. NMED filed an "Amended Petition" on July 27, 2017. NMED filed a "Corrected Amended Petition" on August 7, 2017.

16. AB/GRIP filed an Expedited Motion to Stay All Filing Deadlines and Hearing on August 29, 2017. AB/GRIP and NMED filed a Joint Stipulation Regarding Proposed Changes to 20.6.2 NMAC on September 6, 2017.

17. The Parties, with the exception of Rio Grande Resources Corporation, American Magnesium, LLC and New Mexico Copper Corporation, filed a Notice of Intent to Present Technical Testimony on September 11, 2017, including the written pre-filed direct testimony of each party. Certain parties filed corrected or amended Notices of Intent following their initial filings.

18. The Dairy industry filed a Response in Opposition to AB/GRIP's Expedited Motion to Stay All Filing Deadlines and Hearing on September 13, 2017.

19. NMED filed a Response in Opposition to AB/GRIP's Expedited Motion to Stay All Filing Deadlines and Hearing on September 13, 2017.

20. AB/GRIP filed a Consolidated Reply to Dairy industry's and NMED's Responses in Opposition to AB/GRIP's Expedited Motion to Stay All Filing Deadlines and Hearing on September 20, 2017.

21. The Hearing Officer denied AB/GRIP's Expedited Motion to Stay All Filing Deadlines and Hearing on September 25, 2017.

22. AB/GRIP filed a Motion to Dismiss in Part on September 29, 2017. NMED filed a Response in Opposition to AB/GRIP's Motion to Dismiss in Part on October 16, 2017. LANS filed a Response in Opposition to AB/GRIP's Motion to Dismiss in Part on October 16, 2017. NMMA filed a Response in Opposition to AB/GRIP's Motion to Dismiss in Part on October 16, 2017.

23. AB/GRIP filed a Consolidated Reply to NMED, LANS, and NMMA Responses on October 24, 2017.

24. The Parties, with the exception of Roswell, Laun-Dry, RGR, AmMg, and NMCC, filed Notices of Intent to Present Rebuttal Testimony on or before October 27, 2017, including the written pre-filed rebuttal testimony of each party.

25. NMED filed a Notice of Withdrawal of NMED's Proposed Definition of Discharge Permit Amendment and Related Changes to 20.6.2 NMAC on November 7, 2017.

26. NMED filed an Amended Notice of Withdrawal of NMED's Proposed Definition of Discharge Permit Amendment and Related Changes to 20.6.2 NMAC on November 9, 2017. Parties filed a Joint Stipulation Regarding NMED's Notice of Withdrawal of NMED's Proposed Definition of Discharge Permit Amendment and Related Changes to 20.6.2 NMAC on November 13, 2017.

27. USAF/DoD filed a Notice of Intent of Filing of Written Sur-Rebuttal Technical Testimony and Sur-Rebuttal Technical Testimony on November 9, 2017.[2]

[2] The procedural order did not provide for written sur-rebuttal testimony, so no other party filed written sur-rebuttal.

28. The Commission denied AB/GRIP's Motion to Dismiss in Part on November 14, 2017, after hearing oral argument from the parties and deliberating. The Commission issued its Order Denying AB/GRIP's Motion to Dismiss in Part on November 21, 2017.

29. A public hearing was held in Santa Fe, New Mexico from November 14, 2017 through November 17, 2017.

30. The Commission heard technical testimony from NMED; AB/GRIP; NMMA; the Municipal League; the Dairy Groups; EMNRD; USAF/DoD; the City of Roswell; Laun-Dry; LANS; and Mr. Olson. Each of the Parties' pre-filed technical testimony was entered into evidence at the hearing.

31. Public comments were heard from several interested persons. The Commission allowed all interested persons a reasonable opportunity to submit data, views, and arguments, and to examine witnesses.

32. All the Parties except for EMNRD filed post-hearing submittals on February 16, 2018, including closing arguments, proposed statements of reasons, and final proposed rule amendments.

33. NMED filed a Second Notice of Errata on April 23, 2018 that included a Corrected NMED Exhibit 43 containing corrections to NMED's final proposed amendments to 20.6.2 NMAC.

34. NMED filed a Third Notice of Errata on June 13, 2018 that included a Second Corrected NMED Exhibit 43 containing additional corrections to NMED's final proposed amendments to 20.6.2 NMAC.

35. The record containing all pleadings, written testimony, exhibits, hearing transcripts, public comments, and Hearing Officer orders has been submitted to the Commission for review in compiling the report in this matter.

AUTHORITY

36. Under the Water Quality Act, NMSA 1978, §§ 74-6-1 to -17 (1967, as amended through 2013) ("WQA"), the Commission is responsible for adopting water quality standards for surface and ground waters of the state to "protect the public health and welfare, enhance the quality of water and serve the purposes of the [WQA]." NMSA 1978, § 74-6-4(D). Standards must be based on "credible scientific data and other evidence appropriate under the [WQA]." *Id.* In adopting standards the Commission "shall give weight it deems appropriate to all facts and circumstances, including the use and value of the water for water supplies, propagation of fish and wildlife, recreational purposes and agricultural, industrial and other purposes." *Id.*

37. The WQA further requires the Commission to adopt regulations to prevent or abate water pollution in the state. NMSA 1978, § 74-6-4(E). In adopting regulations, the Commission shall give weight it deems appropriate to all relevant facts and circumstances, including:

> (1) character and degree of injury to or interference with health, welfare, environment and property;
> (2) the public interest, including the social and economic value of the sources of water contaminants;
> (3) technical practicability and economic reasonableness of reducing or eliminating water contaminants from the sources involved and previous experience with equipment and methods available to control the water contaminants involved;
> (4) successive uses, including but not limited to domestic, commercial, industrial, pastoral, agricultural, wildlife and recreational uses;
> (5) feasibility of a user or a subsequent user treating water before a subsequent use;
> (6) property rights and accustomed uses; and
> (7) federal water quality requirements.

Id.

38. Any person, including the Department, may petition the Commission at any time to adopt, amend, or repeal a water quality standard or regulation. NMSA 1978, § 74-6-6(B). The Commission is required to hold a public hearing in order adopt, modify, or repeal a standard or regulation. NMSA 1978, § 74-6-6(A).

PROPOSED RULE CHANGES

The following is a summary of the Parties positions regarding each proposed 20.6.2 NMAC rule amendment with citations to the hearing record. Parties not included in the discussion of each proposed rule amendment took no position on that particular proposed amendment as of the close of the Record (though they may have taken a position initially). Page breaks have been inserted between each rule section (highlighted in blue).

20.6.2.7.T(2) NMAC

1. NMED

A. *NMED's Proposed Language*

20.6.2.7 DEFINITIONS: [~~Terms~~] The following terms, as used in this part shall have the following meanings; terms defined in the Water Quality Act, but not defined in this part, will have the meaning given in the act. [~~As used in this part:~~]

* * *

[~~WW.~~] **(2) "toxic pollutant"** means [~~a water contaminant or combination of water contaminants in concentration(s) which, upon exposure, ingestion, or assimilation either directly from the environment or indirectly by ingestion through food chains, will unreasonably threaten to injure human health, or the health of animals or plants which are commonly hatched, bred, cultivated or protected for use by man for food or economic benefit; as used in this definition injuries to health include death, histopathologic change, clinical symptoms of disease, behavioral abnormalities, genetic mutation, physiological malfunctions or physical deformations in such organisms or their offspring; in order to be considered a toxic pollutant a contaminant must be one or a combination of the potential toxic pollutants listed below and be at a concentration shown by scientific information currently available to the public to have potential for causing one or more of the effects listed above;~~] any water contaminant or combination of the water contaminants in the list below [~~creating a lifetime risk of more than one cancer per 100,000 exposed persons is a toxic pollutant:~~

~~(1) acrolein~~
~~(2) acrylonitrile~~
~~(3) aldrin~~
~~(4) benzene~~
~~(5) benzidine~~
~~(6) carbon tetrachloride~~
~~(7) chlordane~~
~~(8) chlorinated benzenes~~
~~(a) monochlorobenzene~~

~~(b) hexachlorobenzene~~
~~(c) pentachlorobenzene~~
~~(9) 1,2,4,5-tetrachlorobenzene~~
~~(10) chlorinated ethanes~~
~~(a) 1,2-dichloroethane~~
~~(b) hexachloroethane~~
~~(c) 1,1,2,2-tetrachloroethane~~
~~(d) 1,1,1-trichloroethane~~
~~(e) 1,1,2-trichloroethane~~
~~(11) chlorinated phenols~~
~~(a) 2,4-dichlorophenol~~
~~(b) 2,4,5-trichlorophenol~~
~~(c) 2,4,6-trichlorophenol~~
~~(12) chloroalkyl ethers~~
~~(a) bis (2-chloroethyl) ether~~
~~(b) bis (2-chloroisopropyl) ether~~
~~(c) bis (chloromethyl) ether~~
~~(13) chloroform~~
~~(14) DDT~~
~~(15) dichlorobenzene~~
~~(16) dichlorobenzidine~~
~~(17) 1,1-dichloroethylene~~
~~(18) dichloropropenes~~
~~(19) dieldrin~~
~~(20) diphenylhydrazine~~
~~(21) endosulfan~~
~~(22) endrin~~
~~(23) ethylbenzene~~
~~(24) halomethanes~~
~~(a) bromodichloromethane~~
~~(b) bromomethane~~
~~(c) chloromethane~~
~~(d) dichlorodifluoromethane~~
~~(e) dichloromethane~~
~~(f) tribromomethane~~
~~(g) trichlorofluoromethane~~
~~(25) heptachlor~~
~~(26) hexachlorobutadiene~~
~~(27) hexachlorocyclohexane (HCH)~~
~~(a) alpha-HCH~~
~~(b) beta-HCH~~
~~(c) gamma-HCH~~
~~(d) technical HCH~~
~~(28) hexachlorocyclopentadiene~~
~~(29) high explosives (HE)~~
~~(a) 2,4-dinitrotoluene (2,4,DNT)~~
~~(b) 2,6-dinitrotoluene (2,6,DNT)~~
~~(c) octrahydro-1,3,5,7-tetranitro-1,3,5,7-tetrazocine (HMX)~~
~~(d) hexahydro-1,3,5-trinitro-1,3,5-triazine (RDX)~~
~~(e) 2,4,6-trinitrotoluene (TNT)~~
~~(30) isophorone~~
~~(31) methyl tertiary butyl ether~~
~~(32) nitrobenzene~~
~~(33) nitrophenols~~
~~(a) 2,4-dinitro-o-cresol~~
~~(b) dinitrophenols~~

~~(34) nitrosamines~~
~~(a) N-nitrosodiethylamine~~
~~(b) N-nitrosodimethylamine~~
~~(c) N-nitrosodibutylamine~~
~~(d) N-nitrosodiphenylamine~~
~~(e) N-nitrosopyrrolidine~~
~~(35) pentachlorophenol~~
~~(36) perchlorate~~
~~(37) phenol~~
~~(38) phthalate esters~~
~~(a) dibutyl phthalate~~
~~(b) di-2-ethylhexyl phthalate~~
~~(c) diethyl phthalate~~
~~(d) dimethyl phthalate~~
~~(39) polychlorinated biphenyls (PCB's)~~
~~(40) polynuclear aromatic hydrocarbons (PAH)~~
~~(a) anthracene~~
~~(b) 3,4-benzofluoranthene~~
~~(c) benzo (k) fluoranthene~~
~~(d) fluoranthene~~
~~(e) fluorene~~
~~(f) phenanthrene~~
~~(g) pyrene~~
~~(41) tetrachloroethylene~~
~~(42) toluene~~
~~(43) toxaphene~~
~~(44) trichloroethylene~~
~~(45) vinyl chloride~~
~~(46) xylenes~~
~~(a) o-xylene~~
~~(b) m-xylene~~
~~(c) p-xylene~~
~~(47) 1,1-dichloroethane~~
~~(48) ethylene dibromide (EDB)~~
~~(49) cis-1,2-dichloroethylene~~
~~(50) trans-1,2-dichloroethylene~~
~~(51) naphthalene~~
~~(52) 1-methylnaphthalene~~
~~(53) 2-methylnaphthalene~~
~~(54) benzo-a-pyrene~~]
(a) acrolein (CAS 107-02-8)
(b) acrylonitrile (CAS 107-13-1)
(c) benzene and alkylbenzenes
(i) benzene (CAS 71-43-2)
(ii) toluene (methylbenzene) (CAS 108-88-3)
(iii) ethylbenzene(CAS 100-41-+4
(iv) xylenes (dimethyl benzene isomers)
(A) o-xylene(CAS 95-47-6)
(B) m-xylene(CAS 108-38-3)
(C) p-xylene (CAS 106-42-3)
(v) styrene (ethenylbenzene) (CAS 100-42-5)
(d) chlorinated benzenes
(i) monochlorobenzene (CAS 108-90-7)
(ii) 1,2-dichlorobenzene (ortho-dichlorobenzene) (CAS 95-50-1)
(iii) 1,4-dichlorobenzene (para-dichlorobenzene) (CAS 106-46-7)
(iv) 1,2,4-trichlorobenzene (CAS 120-82-1)

(v) 1,2,4,5-tetrachlorobenzene (CAS 95-94-3)
(vi) pentachlorobenzene (CAS 608-93-5)
(vii) hexachlorobenzene (CAS 118-74-1)

(e) chlorinated phenols
(i) 2,4-dichlorophenol (CAS 120-83-2)
(ii) 2,4,5-trichlorophenol (CAS 95-95-4)
(iii) 2,4,6-trichlorophenol (CAS 88-06-2)
(iv) pentachlorophenol (PCP) (CAS 87-86-5)

(f) chloroalkyl ethers
(i) bis (2-chloroethyl) ether (CAS 111-44-4)
(ii) bis (2-chloroisopropyl) ether (CAS 108-60-1)
(iii) bis (chloromethyl) ether (CAS 542-88-1)

(g) 1,2-dichloropropane (propylene dichloride, PDC) (CAS 78-87-5)

(h) dichloropropenes (CAS 542-75-6)

(i) 1,4-dioxane (CAS 123-91-1)

(j) halogenated ethanes
(i) 1,2-dibromoethane (ethylene dibromide, EDB) (CAS 106-93-4)
(ii) 1,1-dichloroethane (1,1-DCA) (CAS 75-34-3)
(iii) 1,2-dichloroethane (ethylene dichloride, EDC) (CAS 107-06-2)
(iv) 1,1,1-trichloroethane (TCA) (CAS 71-55-6)
(v) 1,1,2-trichloroethane (1,1,2-TCA) (CAS 79-00-5)
(vi) 1,1,2,2-tetrachloroethane (CAS 79-34-5)
(vii) hexachloroethane (CAS 67-72-1)

(k) halogenated ethenes
(i) chlorothene (vinyl chloride) (CAS 75-01-4)
(ii) 1,1-dichloroethene (1,1-DCE) (CAS 75-35-4)
(iii) cis-1,2-dichloroethene (cis-1,2-DCE) (CAS 156-59-2)
(iv) trans-1,2-dichloroethene (trans-1,2-DCE) (CAS 156-60-5)
(v) trichloroethene (trichloroethylene, TCE) (CAS 79-01-6)
(vi) tetrachloroethene (perchloroethylene, PCE) (CAS 127-18-4)

(l) halogenated methanes
(i) bromodichloromethane (CAS 75-27-4)
(ii) bromomethane (CAS 74-83-9)
(iii) chloromethane (CAS 74-87-3)
(iv) dichlorodifluoromethane (fluorocarbon-12) (CAS 75-71-8)
(v) dichloromethane (methylene chloride) (CAS 75-09-2)
(vi) tribromomethane (bromoform) (CAS 75-25-2)
(vii) trichloromethane (chloroform) (CAS 67-66-3)
(viii) tetrachloromethane (carbon tetrachloride) (CAS 56-23-5)
(ix) trichlorofluoromethane (fluorocarbon-11) (CAS 75-69-4)

(m) hexachlorobutadiene (CAS 87-68-3)

(n) isophorone (CAS 78-59-1)

(o) methyl tertiary-butyl-ether (MTBE) (CAS 1634-04-4)

(p) nitroaromatics and high explosives (HE)
(i) nitrobenzene (CAS 98-95-3)
(ii) 2,4-dinitrotoluene (2,4-DNT) (CAS 121-14-2)
(iii) 2,6-dinitrotoluene (2,6-DNT) (CAS 606-20-2)
(iv) octrahydro-1,3,5,7-tetranitro-1,3,5,7-tetrazocine(HMX)(CAS 2691-41-0)
(v) hexahydro-1,3,5-trinitro-1,3,5-triazine (RDX) (CAS 121-82-4)
(vi) 2,4,6-trinitrotoluene (TNT) (CAS 118-96-7)
(vii) 2,4-dinitro-o-cresol (CAS 534-52-1)
(viii) dinitrophenols (CAS 51-28-5)

(q) nitrosamines
(i) N-nitrosodiethylamine (CAS 55-18-5)
(ii) N-nitrosodimethylamine (CAS 62-75-9)
(iii) N-nitrosodibutylamine (CAS 924-16-3)

(iv) N-nitrosodiphenylamine (CAS 86-30-6)
(v) N-nitrosopyrrolidine (CAS 930-55-2)
(r) perchlorate (CAS 14797-73-0)
(s) perfluorinated-chemicals (PFCs)
(i) perfluorohexane sulfonic acid (PHHxS) (CAS 355-46-4)
(ii) perfluorooctane sulfonate (PFOS) (CAS 1763-23-1)
(iii) perfluorooctanoic acid (PFOA) (CAS 335-67-1)
(t) pesticides
(i) Aldrin (CAS 309-00-2)
(ii) atrazine (CAS 1912-24-9)
(iii) chlordane (CAS 57-74-9)
(iv) DDT (CAS 50-29-3)
(v) dieldrin (CAS 60-57-1)
(vi) endosulfan (CAS 115-29-7)
(vii) endrin (CAS 72-20-8)
(viii) heptachlor (CAS 76-44-8)
(ix) hexachlorocyclohexane (HCH, lindane)
(A) alpha-HCH (CAS 319-84-6)
(B) beta-HCH (CAS 319-85-7)
(C) gamma-HCH (CAS 58-89-9)
(D) technical-HCH (CAS 608-73-1)
(x) hexachlorocyclopentadiene (CAS 77-47-4)
(xi) prometon (CAS 1610-18-0)
(xii) toxaphene (CAS 8001-35-2)
(u) phenol (CAS 108-95-2)
(v) phthalate esters
(i) dibutyl phthalate (CAS 84-74-2)
(ii) di-2-ethylhexyl phthalate (DEHP) (CAS 117-81-7)
(iii) diethyl phthalate (DEP) (CAS 84-66-2)
(iv) dimethyl phthalate (DMP) (CAS 131-11-3)
(w) polycyclic compounds
(i) benzidine (CAS 92-87-5)
(ii) dichlorobenzidine (CAS 91-94-1)
(iii) diphenylhydrazine (CAS 122-66-7
(iv) polychlorinated biphenyls (PCBs) (CAS 1336-36-3)
(x) polynuclear aromatic hydrocarbons (PAHs)
(i) anthracne (CAS 120-12-7)
(ii) benzo(a)pyrene (CAS 50-32-8)
(iii) 3,4-benzofluoranthene (CAS 205-99-2)
(iv) benzo(k)fluoranthene (CAS 207-08-9)
(v) fluoranthene (CAS 206-44-0)
(vi) fluorene (CAS 86-73-7)
(vii) naphthalene (CAS 91-20-3)
(viii) 1-methylnaphthalene (CAS 90-12-0)
(ix) 2-methylnaphthalene (CAS 91-57-6)
(x) phenanthrene (CAS 85-01-8)
(xi) pyrene (CAS 129-00-0)
(y) thiolane 1,1 dioxide (sulfolane) (CAS 126-33-0)

B. *NMED's Basis for Proposed Language*

The Department proposed to reformat the definitions numbering system at 20.6.2.7 NMAC in order to simplify future edits. *Hunter Direct*, 5:14-15. No other party took a position these proposed changes.

LANS proposed to add the Chemical Abstract Service Registry Number ("CAS Number") for each pollutant listed as a "toxic pollutant" (currently 20.6.2.7.WW NMAC; proposed by NMED to be restyled 20.6.2.7.T(2)) NMAC. In support of this proposal, LANS submitted testimony stating that reference to the CAS Numbers, as opposed to the generic name, provides an unambiguous way to identify the pollutants listed as toxic pollutants and ensures consistency throughout the ground and surface water regulations. *See* Direct Testimony of Bob Beers, Pleading Log No. 52 at 1:8-12; 3:17-4:17.

NMED, through the rebuttal testimony of Dennis McQuillan, expressed support for inclusion of LANS' proposed amendment, and included the CAS numbers in its Second Corrected NMED Exhibit 43. *See* Rebuttal Testimony of Dennis McQuillan, Pleading Log No. 81, NMED Exh. 28 ("*McQuillan Rebuttal*") at 4:1-2.

No other party took a position on this proposed change.

The Department proposed to move the narrative standard for toxic pollutants from the definitions section to the groundwater standards section at 20.6.2.3103 NMAC, while leaving the list of toxic pollutants in the definitions section. In support of this proposal, the Department presented testimony that this change would result in regulatory clarity since the first part of the toxic pollutant definition is really a narrative groundwater standard. Doing so will also eliminate the need to refer to the toxic pollutant standard elsewhere in the regulations when reference is also made to the groundwater standards of 20.6.2.3103 NMAC. The Department supported this

proposal through the testimony of Dennis McQuillan, Chief Scientist of the Department. The testimony, argument, and Proposed Statement of Reasons supporting this proposed change can be found in the following parts of the Record: NMED's Closing Argument and Proposed Statement of Reasons, 11-26, ¶¶ 25-26; NMED Exhibit 5, Written Direct Testimony of Dennis McQuillan ("*McQuillan Direct*"), 21:13-18; and Tr. Vol. 2, 382:7-386:21.

The Department also proposed to add 13 chemical constituents to the list of Toxic Pollutants set forth in the existing rule at 20.6.2.7.WW (this would become 20.6.2.7.T(2) under the Department's proposed reorganization of the definitions section). The basis for this proposal is that these constituents are either known pollutants of groundwater in New Mexico, or pose a credible threat of polluting groundwater in New Mexico at concentrations of concern to human health. *McQuillan Direct*, 5:3-21:17; Tr. Vol. 2, 362:9-389:23. The testimony, argument, and Proposed Statement of Reasons supporting this proposed change can be found in the following parts of the Record: NMED's Closing Argument and Proposed Statement of Reasons, ¶¶ 27-28; "*McQuillan Direct*", 21:13-18; and Tr. Vol. 2, 362:9-389:23.

2. LANS

A. *LANS Position on Department's Proposed Language*

LANS indicated its support for the addition of the 13 constituents to the list of toxic pollutants at 20.6.2.7.T NMAC. LANS' Corrected Statement of Position, at 2; Pleading Log 34; LANS' Closing Legal Argument and Proposed Statement of Reasons at 5; Pleading Log 103.

3. NMML

A. *NMML's Position on Department's Proposed Language*

NMML argued that all but two of the proposed additions at 20.6.2.7.T are either regulated or in the regulation development stage under the Safe Drinking Water Act ("SDWA") or the Clean

Water Act, and thus are already regulated as a matter of federal law. Docket No. 55, NMML-4, p.1, lns. 20-22. The remaining two pollutants, prometon (a herbicide) and thiolane 1,1 dioxide (sulfolane) are not regulated. Docket No. 55, NMML-4, p.1, lns. 22-23. NMML argued that NMED failed to provide adequate justification for the addition of prometon and thiolane to the list of toxic pollutants by failing to meet the SDWA criteria for determining whether pollutants should be regulated to protect drinking water. Docket No. 55, NMML-4, p.1-2, lns. 29-42; Docket No. 83, NMML RT1s, p. 1, lns. 25-34. NMML further argued that pollutants should only be added to the list if an approved analytical method is widely available. Docket No. 55, NMML-4, p.2, lns. 44-52. NMML asserted that NMED failed to demonstrate that these pollutants are widespread in New Mexico, or present in sufficient concentrations of concern, in order to justify their regulation. Docket No. 83, NMML Exhibit RT-1, p.1, lns. 26-29.

NMML also argued that the language in the introductory paragraph should be retained, and not moved to 20.6.2.3103.A(2) NMAC as a narrative standard. NMML asserted that moving the language from the definitions section to the standards section without reference to the definition has the potential to expand the authority beyond the list within the definition.

NMML's full testimony can be found in the record at Docket Nos. 55 and 83.

B. *Other Parties' Responses to NMML's Position*

NMED

NMED asserted that because "toxic pollutant" is a defined term in the regulations, moving the narrative standard for "toxic pollutants" does not create the potential to expand that standard beyond the list provided under the definition of the term. *McQuillan Rebuttal*, 4:6-6:17; Tr. Vol. 2, 382:7-386:21.

4. William C. Olson

A. *William C. Olson's Position on Department's Proposed Language*

Mr. Olson supported NMED's proposed language. *Olson Closing Argument* pgs. 7-8 and *Olson Statement of Reasons* pg. 8.

New Section 20.6.2.10 NMAC

1. NMED

A. *NMED's Proposed Language*

20.6.2.10 **LIMITATIONS:** These regulations do not apply to the following:

A. Any activity or condition subject to the authority of the environmental improvement board pursuant to the Hazardous Waste Act, NMSA 1978, Sections 74-4-1 to -14, the Ground Water Protection Act, NMSA 1978, Sections 74-6B-1 to -14, or the Solid Waste Act, NMSA 1978, Sections 74-9-1 to -25, except to abate water pollution or to control the disposal or use of septage and sludge; or

B. Any activity or condition subject to the authority of the oil conservation commission pursuant to the provisions of the Oil and Gas Act, NMSA 1978, Section 70-2-12 and other laws conferring power on the oil conservation commission and the oil conservation division of the energy, minerals and natural resources department to prevent or abate water pollution.

B. *NMED's Basis for Proposed Language*

As part of its rebuttal testimony, the Department proposed a new "Limitations" section at 20.6.2.10 NMAC in response to proposals submitted by LANS and USAF/DoD. Ms. Hunter testified that the new Section 20.6.2.10 NMAC mirrors the Limitations section in the WQA at Section 74-6-12. That section clarifies that the WQA does not apply to any activity or condition subject to the authority of the New Mexico Environmental Improvement Board under the New Mexico Hazardous Waste Act, except for abatement of water pollution or controlling the disposal or use of septage and sludge. NMED's Closing Argument and Proposed Statement of Reasons, ¶¶ 30-34; NMED Exhibit 26, Written Rebuttal Testimony of Michelle Hunter ("*Hunter Rebuttal*"), 4:10-5:3; Tr. Vol. 3, 595:20-597:20. EMNRD stated that it did not object to the proposed language for 20.6.2.10.B NMAC. Tr. Vol.3 at 676:3-7.

2. LANS

A. *LANS's Position on NMED's Proposed Language*

LANS did not object to NMED's amended language for 20.6.2.10 NMAC, which more closely tracks the Water Quality Act. See Tr. Vol 3 at 685:20-686:6. NMED's proposed

amendments are identical to LANS' final proposed language for 20.6.2.10 NMAC. Pleading Log 103, Exhibit 1, pg. 1.

3. William C. Olson

A. *William C. Olson's Position on NMED's Proposed Language*

As part of his rebuttal testimony, Mr. Olson testified similar to NMED, asserting that language proposed by LANS and USAF/DoD did not conform with language of the WQA and omitted portions of the statutory language. He also recommended that LANS and USAF/DoD's language be amended to conform with the WQA and proposed amended language identical to NMED's and LANS' proposed language discussed above. Olson Rebuttal Testimony, WCO Rebuttal Exhibit 1, p. 2-3, 5-6; Tr. Vol. 3, 705:19-706:13; and Amended NMED Exhibit 36, p. 9.

4. USAF/DoD

A. *USAF/DoD's Position on NMED's Proposed Language*

USAF/DoD argued that NMED's proposed language does not clarify when the Rules apply, fails to account for NMED's regulatory controls under other environmental programs, and would continue unnecessary and costly duplicative oversight and permitting requirements. *See* Transcript, Vol. 3 at 697:2-698:13. USAF/DoD submitted that the language of NMED's proposal is so broad that a regulated entity engaged in water treatment to New Mexico water standards pursuant to a Hazardous Waste Act permit would not be exempt from the Rules, resulting in two layers of permitting and oversight for the same activity because the Hazardous Waste Act and permits issued pursuant to that law authorize broad powers to NMED to respond to environmental concerns. *See* USAF/DoD Exhibit 6 at 3:10-4:2; Transcript Vol. 3 at 621:4-11; 697:2-18. USAF/Dod stated that under NMED's proposal, a regulated entity subject to a Hazardous Waste

Permit would need to submit a notice of intent to NMED for NMED determination of whether the Rules apply. *See* Transcript Vol. III at 613:12-17.

USAF/DoD argued that the Rules should expressly except from the Rules activities already subject to NMED oversight, authority and enforcement powers. USAF/DoD asserted that the Rules should go beyond "reiterating the statute" and "provide more detail and consider the real-life scenario where the rules need not apply because of the direct oversight in other environmental programs." *See* Transcript, Vol. III, pgs. 697:19 – 698:4. As such, USAF/DoD's proposal for 20.6.2.10 does not contain the carve-out language ("except to abate water pollution or to control the disposal or use of septage and sludge") that is included NMED's proposal.

USAF/DoD stated that while it preferred that the Commission adopt USAF/DoD's proposal for this section of the Rules, s*ee* Tr. Vol. 3, 698:7-9, as an alternative, USAF/DoD would be willing to accept NMED's proposal for this section, provided that USAF/DoD's proposed exception to the discharge permit requirements (20.6.2.3105.N NMAC) is also included in the Rules. *See* Tr. Vol. 3, 698:9-700:5. This is explained further below.

B. USAF/DoD's Proposed Alternative Language

20.6.2.10 LIMITATIONS: These regulations do not apply to the following:

A. Any activity or condition subject to the authority of the environmental improvement board pursuant to the Hazardous Waste Act, NMSA 1978, §§ 74-4-1 to - 14, the Ground Water Protection Act, NMSA 1978, Sections 74-6B-1 to -14, the Solid Waste Act, NMSA 1978, Sections 74-9-1 to -25;

B. Any activity or condition subject to the authority of the oil conservation commission pursuant to the Oil and Gas Act, NMSA 1978, Section 70-2-12 and other laws conferring power on the oil conservation commission and the oil conservation division of the energy, minerals and natural resources department to prevent or abate water pollution.

C. USAF/DoD's Basis for Proposed Alternative Language

USAF/DoD's argued that its proposal will streamline the process and ensure that activities undertaken by the regulated community are protective of human health and the environment, without adding unnecessary layers of confusing and duplicative requirements. *See* USAF/DoD Exhibit 6 at 6:9-12; *see also* Tr. Vol. 3 at 699:2-7. USAF/DoD believes that the Rules should

consider the real-life scenario where the Rules need not apply because of NMED's direct oversight in other environmental programs. *See* Tr. Vol. 3 at 697:25 – 698:4.

D. Other Parties' Responses to USAF/DoD's Position/Proposal

NMED

The Department opposed USAF/DoD's proposed language. Ms. Hunter testified that the WQA sets forth the regulatory authority of the Commission and the Department and sets limits on that authority. She testified that the Department believed it would be inappropriate to include limitations on such authority in the regulations that go beyond the scope of the WQA. Tr. Vol. 3, 595:16-596:20.

William C. Olson

Mr. Olson testified that the language proposed by USAF/DoD did not conform with the language of the WQA and omitted portions of the statutory language. Mr. Olson proposed that USAF/DoD's language be amended to conform with the WQA, as discussed above with respect to NMED's proposed language. Olson Rebuttal Testimony, WCO Rebuttal Exhibit 1, p. 2-3, 5-6; and Tr. Vol. 3, 705:19-706:13.

20.6.2.1201 NMAC

1. NMED

A. *NMED's Proposed Language*

20.6.2.1201 NOTICE OF INTENT TO DISCHARGE:

A. [~~Any~~] Except for the notices specified in paragraphs (1) and (2) of this subsection, any person intending to make a new water contaminant discharge or to alter the character or location of an existing water contaminant discharge, unless the discharge is being made or will be made into a community sewer system or subject to the Liquid Waste Disposal Regulations adopted by the New Mexico environmental improvement board, shall file a notice with the ground water quality bureau of the department for discharges that may affect ground water, and/ or the surface water quality bureau of the department for discharges that may affect surface water. [~~However, notice regarding discharges from facilities for the production, refinement, pipeline transmission of oil and gas or products thereof, the oil field service industry, oil field brine production wells, geothermal installations and carbon dioxide facilities shall be filed instead with the oil conservation division.~~]

(1) Notices regarding discharges from facilities for the production, refinement, pipeline transmission of oil and gas or products thereof, the oil field service industry as related to oil and gas production activities, oil field brine production wells, and carbon dioxide facilities shall be filed with the oil conservation division of the energy, minerals and natural resources department.

(2) Notices regarding discharges related to geothermal resources, as defined in Section 71-9-3 of the Geothermal Resources Development Act, NMSA 1978, Sections 71-9-1 to -11 (2016) shall be filed with the energy conservation and management division of the energy, minerals and natural resources department.

B. [~~A~~]Except for the notices specified in paragraphs (1) and (2) of this subsection any person intending to inject fluids into a well, including a subsurface distribution system, unless the injection is being made subject to the Liquid Waste Disposal Regulations adopted by the New Mexico environmental improvement board, shall file a notice with the ground water quality bureau of the department. [~~However notice regarding injection to wells associated with oil and gas facilities as described in Subsection A of Section 20.6.2.1201 NMAC shall be filed instead with the oil conservation division.~~]

(1) Notices regarding injections to wells associated with oil and gas facilities as described in subsection A.(1) of 20.6.2.1201 NMAC shall be filed with the oil conservation division.

(2) Notices regarding injections to wells associated with exploration, development or production of geothermal resources, as described in subsection A.(2) of 20.6.2.1201 NMAC, shall be filed with the energy conservation and management division of the energy, minerals and natural resources department pursuant to the Geothermal Resources Development Act, NMSA 1978, Sections 71-9-1 to -11 (2016).

C. Notices shall state:

(1) the name of the person making the discharge;

(2) the address of the person making the discharge;

(3) the location of the discharge;

(4) an estimate of the concentration of water contaminants in the discharge; and

(5) the quantity of the discharge.

D. Based on information provided in the notice of intent, the department will notify the person proposing the discharge as to which of the following apply:

(1) a discharge permit is required;

(2) a discharge permit is not required;

(3) the proposed injection well will be added to the department's underground injection well inventory;

(4) the proposed injection activity or injection well is prohibited pursuant to 20.6.2.5004 NMAC.

B. ***NMED's Basis for Proposed Language***

The Department proposed to change the Notice of Intent procedures in 20.6.2.1201 NMAC for certain types of wells. The Department's witness, Michelle Hunter, testified that, in 2016, the New Mexico legislature enacted a new statute called the Geothermal Resources Development Act. The statute defines geothermal energy as a resource in excess of 250 degrees Fahrenheit which is subject to regulation by the Energy Conservation Management Division of the Energy, Minerals, and Natural Resources Department ("EMNRD"). The changes as proposed by the Department are necessary to make the Commissions regulations consistent with the new statute. Similar changes are proposed throughout 20.6.2 NMAC as identified in Ms. Hunter's written direct testimony. *Hunter Direct*, 5:17-6:3.

C. ***Other Parties' Responses to NMED's Proposal***

EMNRD

EMNRD provided testimony in support of the Department's proposed amendments in response to the Geothermal Resources Development Act through its witness, William Brancard. Tr. Vol. 3, 678:11-680:6.

William C. Olson

Mr. Olson supported NMED's proposed language. *Olson Closing Argument* pgs. 7-8 and *Olson Statement of Reasons* pg. 8.

20.6.2.1210 NMAC

1. NMED

A. *NMED's Proposed Language*

20.6.2.1210 VARIANCE PETITIONS:

A. Any person seeking a variance pursuant to Section 74-6-4(H)[~~(G)~~] NMSA 1978, shall do so by filing a written petition with the commission. The petitioner may submit with his petition any relevant documents or material which the petitioner believes would support his petition. Petitions shall:

(1) state the petitioner's name and address;

(2) state the date of the petition;

(3) describe the facility or activity for which the variance is sought;

(4) state the address or description of the property upon which the facility is located;

(5) describe the water body or watercourse affected by the discharge for which the variance is sought and provide information on uses of water that may be affected;

(6) identify the regulation of the commission from which the variance is sought;

(7) state in detail the extent to which the petitioner wishes to vary from the regulation;

(8) state why the petitioner believes that compliance with the regulation will impose an unreasonable burden upon his activity; and

(9) [~~state the period of time for which the variance is desired.~~]state in detail how any water pollution above standards will be abated; and

(10) state the period of time for which the variance is desired including all reasons, data, reports and any other information demonstrating that such time period is justified and reasonable.

B. The variance petition shall be reviewed in accordance with the adjudicatory procedures of 20 NMAC 1.3.

C. The commission may grant the requested variance, in whole or in part, may grant the variance subject to conditions, or may deny the variance. [~~The~~]If the variance is granted in whole or in part, or subject to conditions, the commission shall [~~not grant a~~]specify the length of time that the variance [~~for a period of time in excess of five years.~~] shall be in place.

D. For variances associated with a discharge permit or abatement plan, the existence and nature of the variance shall be disclosed in all public notices applicable to the discharge permit or abatement plan.

E. For variances granted for a period in excess of five years, the petitioner shall provide to the department for review a variance compliance report at five year intervals to demonstrate that the conditions of the variance are being met, including notification of any changed circumstances or newly-discovered facts that are material to the variance. At such time as the department determines the report is administratively complete, the department shall post the report on its website, and mail or e-mail notice of its availability to those persons on a general and facility-specific list maintained by the department who have requested notice of discharge permit applications, and any person who participated in the variance process. If such conditions are not being met, or there is evidence indicating changed circumstances or newly-discovered facts or conditions that were unknown at the time the variance was initially granted, any person, including the department, may request a hearing before the commission to revoke, modify, or otherwise reconsider the variance within 90 days of the issuance of the notice of availability of the report.

F. An order of the commission is final and bars the petitioner from petitioning for the same variance without special permission from the commission. The commission may consider, among other things, the development of new information and techniques to be sufficient justification for a second petition. If the petitioner, or his authorized representative, fails to appear at the public hearing on the variance petition, the commission shall proceed with the hearing on the basis of the petition. A variance may not be extended or renewed unless a new petition is filed and processed in accordance with the procedures established by this section.

[7-19-68, 11-27-70, 9-3-72, 2-20-81, 11-15-96; 20.6.2.1210 NMAC - Rn, 20 NMAC 6.2.I.1210, 1-15-01; A, XX/XX/18]

B. ***NMED's Basis for Proposed Language***

The Department proposed a number of changes to 20.6.2.1210 NMAC, which governs petitions seeking variances from the Commission's regulations pursuant to Subsection 74-6-4(H) of the WQA. The Department's proposed changes at 20.6.2.1210.A(9), A(10), C, D, and E would remove the five-year limit on variances and replace it with a requirement that the variance holder submit a compliance report every five years for the term of the variance. The compliance report would include: (1) a demonstration that the conditions of the variance are being followed; (2) any newly discovered facts; and (3) any changed circumstances. A hearing could be requested by the public or the Department to revoke, modify, or reconsider the variance if the conditions of the variance were not being met based on changed circumstances or newly discovered facts.

The Department's reasoning behind its proposal was that limiting all variances to five years is not required under the statute, and is impractical in many circumstances, particularly given the highly prescriptive regulations the Commission has developed in recent years for the dairy and copper mining industries. The Department argued that its proposed changes would bring the regulations in line with the language of the statute, giving the Commission the flexibility to determine the appropriate time period for a variance on a case-by-case basis.

The Department also incorporated William C. Olson's proposed changes to 20.6.2.1210.A(5) and (9) NMAC regarding the information that must be provided in a variance petition. At 20.6.2.1210.A(5) NMAC, the person requesting a variance would be required to "provide information on uses of water that may be affected." Mr. Vollbrecht testified that this language was included because the Department believes it is important for a variance petition to include an evaluation of existing uses of water that could be affected by the requested variance. Tr. Vol. 1, 78:18-79:8.

The Department incorporated language by the Dairies and NMMA specifying that changes of circumstances or newly discovered facts identified in the variance compliance report must be "material to the variance," and changing the plural "variances" to the singular, "a variance" in 20.6.2.1210.D and E NMAC.

The Department supported its proposed changes through the testimony of Kurt Vollbrecht, Manager of the Mining Environmental Compliance Section in the Department's Ground Water Quality Bureau. The Commission can find the testimony, argument, and Proposed Statement of Reasons supporting the Department's proposed changes to 20.6.2.1210 NMAC in the following parts of the Record: NMED's Closing Argument and Proposed Statement of Reasons, 14-17, ¶¶ 38-48; NMED Exhibit 13, Written Direct Testimony of Kurt Vollbrecht ("*Vollbrecht Direct*"), 13:20-15:21; NMED Exhibit 30, Written Rebuttal Testimony of Kurt Vollbrecht ("*Vollbrecht Rebuttal*"); and Tr. Vol. 1, 79:1-128:18.

2. AB/GRIP

A. *AB/GRIP Position on Department's Proposed Language*

AB/GRIP opposed the Department's proposed language on variances.

B. A/B GRIP Proposed Alternative Language

20.6.2.1210 VARIANCE PETITIONS:

A. Any person seeking a variance pursuant to Section 74-6-4(H)[~~(G)~~] NMSA 1978, shall do so by filing a written petition with the commission. The petitioner may submit with his petition any relevant documents or material which the petitioner believes would support his petition. Petitions shall:

(1) state the petitioner's name and address;

(2) state the date of the petition;

(3) describe the facility or activity for which the variance is sought;

(4) state the address or description of the property upon which the facility is located;

(5) describe the water body, [~~or~~] watercourse, or aquifer affected by the discharge for which the variance is sought;

(6) identify the regulation of the commission from which the variance is sought;

(7) state in detail the extent to which the petitioner wishes to vary from the regulation;

(8) state why the petitioner believes that compliance with the regulation will impose an unreasonable burden upon his activity; and

(9) [~~state the period of time for which the variance is desired.~~]state in detail how any water pollution above standards will be abated; and

(10) state the period of time for which the variance is desired including all reasons, data, reports and any other information demonstrating that such time period is justified and reasonable.

B. The variance petition shall be reviewed in accordance with the adjudicatory procedures of 20 NMAC 1.3 and shall be reviewed for compliance with existing federal regulations.

C. The commission may grant the requested variance, in whole or in part, may grant the variance subject to conditions, or may deny the variance. The commission shall not grant a variance for a period of time in excess of five years.

D. For variances associated with a discharge permit or abatement plan, the existence and nature of the variance shall be disclosed in all public notices applicable to the discharge permit or abatement plan.

E. The commission shall deny the variance petition unless the petitioner establishes evidence that:

(1) application of the regulation would result in an arbitrary and unreasonable taking of an applicant's property or would impose an undue economic burden upon any lawful business, occupation or activity; and

(2) granting the variance will not result in any condition injurious to public health, safety or welfare or the environment.

G. Variance or renewal of a variance shall be granted for time periods and under conditions consistent with reasons for the variance but within the following limitations:

(1) if the variance is granted on the grounds that there are no practicable means known or available for the adequate prevention of degradation of the environment or the risk to public health, safety or welfare, it shall continue only until the necessary means for the prevention of the degradation or risk become known and available;

(2) if the variance is granted on the grounds that it is justified to relieve or prevent hardship of a kind other than that provided for in Paragraph (1) of this subsection, it shall not be granted for more than one year.

I. An order of the commission is final and bars the petitioner from petitioning for the same variance without special permission from the commission. The commission may consider, [~~among other things,~~] the development of new information and techniques to provide significantly different [~~be sufficient~~] justification for a second petition. If the petitioner, or his authorized representative, fails to appear at the public hearing on the variance petition, the commission shall proceed with the hearing [~~on the basis of~~] and the petition shall be denied. A variance may not be extended or renewed unless a new petition is filed and processed in accordance with the procedures established by this section.

[7-19-68, 11-27-70, 9-3-72, 2-20-81, 11-15-96; 20.6.2.1210 NMAC - Rn, 20 NMAC 6.2.I.1210, 1-15-01; A, XX/XX/18]

C. AB/GRIP Basis for Proposed Alternative Language

AB/GRIP did not participate in the Joint Proposed Report. Their arguments and testimony regarding the proposed changes to 20.6.2.1210 NMAC and their proposed alternative language can be found in the following parts of the Record:

- AB/GRIP Closing Argument (all)
- AB/GRIP Proposed Statement of Reasons, p. 7-38
- AB/GRIP Notice of Intent to Present Technical Rebuttal Testimony, Exhibit A, Pre-Filed Written Rebuttal Testimony of Kathy J. Martin, PE, at 1-13
-
- Tr. Vol. 1: 88-104 (AB/GRIP cross-examination of Mr. Vollbrecht)
- Tr. Vol. 1:168-204 (AB/GRIP opening statement and testimony of Ms. Martin)

D. Other Parties' Responses to AB/GRIP's Position/Proposal

NMED

The Department opposed AB/GRIP's proposed language on variances on the basis that it was unsupported by substantive testimony explaining the basis for that proposal. *See* Tr. Vol. 1, 155:2-156:3, 186:20-188:10 (Counsel for Dairies and Department objections to cross-examination questions and testimony by AB/GRIP witness regarding AB/GRIP's proposed variance language, and Counsel for AB/GRIP acknowledging lack of testimony in support of AB/GRIP's proposed language).

At the hearing, the Commission denied AB/GRIP's Motion to Dismiss the Department's variance proposal, finding that the statute does not limit the Commission to granting variances for periods of 5 years. Tr. Motion to Dismiss, 61:6-66:17.

In his rebuttal Mr. Vollbrecht explained that variances are not necessarily tied to permits, and that the Department's proposal would not eliminate the mandatory public hearing under NMSA 1978, § 74-6-4(H). Mr. Vollbrecht's rebuttal testimony outlining the Department's responses to AB/GRIP's arguments on variances can be found at Tr. Vol. 1, 79:9-.86:12.

Dairies

Dairies opposed AB/GRIP's proposed revisions to 20.6.2.1210 NMAC because they are not adequately explained and supported by any testimony, they do not reflect the different types of variances contemplated under the Dairy Rule, 20.6.6 NMAC, and because they would impose unduly burdensome requirements. Testimony of Eric Palla, Dairies Exhibit C, pages 3-4.

NMMA

NMMA opposed AB/GRIP's proposed revisions to 20.6.2.1210 NMAC because they are not adequately explained and supported by any testimony. Testimony of Michael Neumann,

NMMA Exhibit E, page 5. NMMA also opposed AB/GRIP's legal arguments and position that a variance must be limited to five years. Pleadings Item 70, "New Mexico Mining Association's Response to Amigos Bravos's and Gila Resources Information Project's Motion to Dismiss in Part the New Mexico Environment Department's Petition to Amend 20.6.2 NMAC." The Commission denied that Motion.

3. William C. Olson

A. William C. Olson's Position on NMED's Proposed Language

Mr. Olson generally supported NMED's proposed language, with the exception of taking no position on the elimination of the 5-year term of a variance in 20.6.2.1210.E NMAC. *See* Olson Closing Argument p. 8; and Olson Statement of Reasons pp. 8-10. Mr. Olson also suggested additional language to address concerns raised by NMMA and Dairies. Olson Statement of Reasons, p. 9-10.

B. William C. Olson's Proposed Alternative Language

20.6.2.1210 VARIANCE PETITIONS:

* * *

E. For variances granted for a period in excess of five years, the petitioner shall provide to the department for review a variance compliance report at five year intervals to demonstrate that the conditions of the variance are being met, including notification of any changed circumstances or newly-discovered facts that are material to the variance. At such time as the department determines the report is administratively complete, the department shall post the report on its website, and mail or e-mail notice of its availability to those persons on a general and facility-specific list maintained by the department who have requested notice of discharge permit applications, and any person who participated in the variance process. If such conditions are not being met, or there is evidence indicating changed circumstances or newly-discovered facts or conditions that were unknown at the time the variance was initially granted and which are material to the variance or the conditions under which the variance was approved, the department or any person who is adversely affected may request a hearing before the commission to revoke, modify or otherwise reconsider the variance within 90 days of the issuance of notice of availability of the report.

C. William C. Olson's Basis for Proposed Alternative Language

William C. Olson provided testimony that the NMMA's and Dairies proposed language limiting appeals to a person who has "*standing to appeal a permit decision*" is not consistent with the Water Quality Act. The Water Quality Act specifies that appeals of agency and Commission

actions can be made by "*a person who is adversely affected*" (*see* NMSA 1978 74-6-5.O and NMSA 1978 74-6-7.A) and are not limited to a legal standing for appeal. Mr. Olson also testified that it is not appropriate to link the five-year compliance report submission to a permit renewal for several reasons. *See* Olson Statement of Reasons, p. 10. In addition, Mr. Olson testified that the NMMA's and Dairies insertion of language regarding "*substantially different*" circumstances into this section is vague and creates ambiguity about what needs to be included in the report. William C. Olson proposed compromise language that addressed the above issues consistent with the WQA and other Commission Rules. Olson Rebuttal Testimony, WCO Rebuttal Exhibit 1, pgs. 6-8 and pg. 10; and Olson Testimony Tr. vol. 2, pg. 340, line 16 to pg. 342, line 20].

D. Other Parties' Positions on William C. Olson's Proposed Alternative Language

NMED

NMED does not oppose the compromise language offered by William C. Olson. Tr. Vol 1, 105, 22-25 and 106:13-107:9.

Dairies

Mr. Olson's alternative language is consistent with the Dairies' final position as discussed on page 3 of its Written Closing Argument and its Partial Proposed Statement of Reasons regarding this subsection in the same document on pages 9-10.

NMMA

Mr. Olson's alternative language is consistent with NMMA's final position as discussed on page 3 of its Written Closing Argument and its Partial Proposed Statement of Reasons regarding this subsection.

4. RGR/NMCC/AmMg

A. *RGR/NMCC/AmMg's Position on NMED's Proposed Language*

Rio Grande Resources Corporation ("RGR"), New Mexico Copper Corporation ("NMCC"), and American Magnesium, LLC ("AmMg") did not submit pre-filed testimony or provide a witness, but they jointly participated in the hearing for NMED's proposed rule change on November 14 and 15, 2018 and filed a post-hearing submittal on February 16, 2018, in which they expressly stated their opposition to NMED's proposed language on variances found at 20.6.2.1210.A(5) NMAC, and their support for NMED's proposed language on variances found at 20.6.2.1210.C NMAC (hereinafter referred to as "RGR/NMCC/AmMg Post-Hearing Submission"). The basis for these positions is fully set forth in the Post-Hearing Submission of RGR, NMCC and AmMg.

In their post-hearing submittal, RGR, NMCC and AmMg supported NMED's language amending 20.6.2.1210.C NMAC to eliminate the five-year limit on variances. *See* RGR/NMCC/AmMg Post-Hearing Submission, pp. 3-4. RGR, NMCC and AmMg noted that the five-year limit on variances can be counterproductive in such contexts as mining, where the need for variances longer than five years associated with long-term projects and/or impacts may be shown to the Commission as being justified. RGR/NMCC/AmMg Post-Hearing Submission, p. 3. RGR, NMCC and AmMg also supported NMED's original proposal to add the phrase "for which the variance is sought" to the requirement in 20.6.2.1210.A(5) NMAC that variance petitions "describe the water body or watercourse affected by the discharge." RGR, NMCC and AmMg pointed out that this language recognizes that it would be nonsensical to require the information where the variance either has nothing to do with a discharge, or to require the information for all of what could be multiple discharges, such as for a discharge permit covering multiple units of a

large mine, where the variance sought may implicate only one of the discharge locations. RGR/NMCC/AmMg Post-Hearing Submission, p. 4.

RGR, NMCC and AmMg opposed NMED's proposed language at 20.6.2.1210.A(5) NMAC (which was based on earlier proposals by Mr. Olson which Mr. Olson withdrew based on NMED's amended language) that would require an applicant to provide an analysis of present and future uses of water that may be affected by the variance. RGR, NMCC and AmMg argued that this proposed language creates a confusing requirement that would unduly complicate the variance application process for the permittee, would introduce unnecessary uncertainty into the regulations, and would likely be the subject of future controversy, as it has been in the past. RGR/NMCC/AmMg Post-Hearing Submission, p. 5.

B. *Other Parties' Responses to RGR/NMCC/AmMg's Position*

RGR/NMCC/AmMg did not submit pre-filed testimony or provide a witness at the hearing, Their positions were only stated in their post-hearing submittal. Therefore, responses to RGR/NMCC/AmMg's positions do not exist in the Record in this proceeding.

20.6.2.3103.A(1) and B, and C NMAC (CAS Numbers)

1. LANS

A. *LANS's Proposed Language*

LANS' proposed CAS numbers are included in NMED's proposal in the following section.

B. *LANS's Basis for Proposed Language*

LANS proposed to add the CAS Number for each pollutant listed at 20.6.2.3103 NMAC. In support of this proposal, LANS submitted testimony stating that reference to the CAS Numbers, as opposed to the generic name, provides an unambiguous way to identify the pollutants listed in 20.6.2.3103 NMAC and ensures consistency throughout the ground and surface water regulations. *See* Direct Testimony of Bob Beers, Pleading Log No. 52 at 1:8-12; 3:17-4:17.

C. *Other Parties' Responses to LANS' Proposal*

NMED, through the rebuttal testimony of Dennis McQuillan, expressed support for inclusion of this proposed amendment. *McQuillan Rebuttal,* 4:1-2.

No other party took a position on this proposed change.

20.6.2.3103.A(1) NMAC (Numerical Standards)

1. NMED

A. *NMED's Proposed Language*

A. Human Health Standards[~~Ground water shall meet the standards of Subsection A and B of this section unless otherwise provided. If more than one water contaminant affecting human health is present, the toxic pollutant criteria as set forth in the definition of toxic pollutant in Section 20.6.2.1101 NMAC for the combination of contaminants, or the Human Health Standard of Subsection A of Section 20.6.2.3103 NMAC for each contaminant shall apply, whichever is more stringent. Non-aqueous phase liquid shall not be present floating atop of or immersed within ground water, as can be reasonably measured.~~]

(1) Numerical Standards

	(a)	Antimony (Sb) (CAS 7440-36-0).....0.006 mg/l
[~~(1)~~]	**(b)**	Arsenic (As) (CAS 7440-38-2).....[~~0.1~~]0.01 mg/l
[~~(2)~~]	**(c)**	Barium (Ba) (CAS 7440-39-3).....[~~1.0~~]2 mg/l
	(d)	Beryllium (be) (CAS 7440-41-7).....0.004 mg/l
[~~(3)~~]	**(e)**	Cadmium (Cd) (CAS 7440-43-9).....[~~0.01~~]0.005 mg/l
[~~(4)~~]	**(f)**	Chromium (Cr) (CAS 7440-47-3).....0.05 mg/l
[~~(5)~~]	**(g)**	Cyanide (CN) (CAS 57-12-5).....0.2 mg/l
[~~(6)~~]	**(h)**	Fluoride (F) (CAS 16984-48-8).....1.6 mg/l
[~~(7)~~]	**(i)**	Lead (Pb) (CAS 7439-92-1).....[~~0.05~~]0.015 mg/l
[~~(8)~~]	**(j)**	Total Mercury (Hg) (CAS 7439-97-6).....0.002 mg/l
[~~(9)~~]	**(k)**	Nitrate (NO_3 as N) (CAS 14797-55-8).....10.0 mg/l
	(l)	Nitrite (NO_2 as N) (CAS 10102-44-0).....1.0 mg/l
[~~(10)~~]	**(m)**	Selenium (Se) (CAS 7782-49-2).....0.05 mg/l
[~~(11)~~]	**(n)**	Silver (Ag) (CAS 7440-224).....0.05 mg/l
	(o)	Thallium (Tl) (CAS 7440-28-0).....0.002 mg/l
	(p)	Uranium (U) (CAS 7440-61-1).....0.03 mg/l
[~~(13)~~]	**(q)**	Radioactivity: Combined Radium-226 (CAS 13982-63-3) and Radium-228 (CAS 15262-20-1).....[~~30~~]5 pCi/l
[~~(14)~~]	**(r)**	Benzene (CAS 71-43-2).....[~~0.01~~]0.005 mg/l
[~~(15)~~]	**(s)**	Polychlorinated biphenyls (PCB's) (CAS 1336-36-3).[~~0.001~~]0.0005 mg/l
[~~(16)~~]	**(t)**	Toluene (CAS 108-88-3).....[~~0.75~~]1 mg/l
[~~(17)~~]	**(u)**	Carbon Tetrachloride (CAS 56-23-5).....[~~0.01~~]0.005 mg/l
[~~(18)~~]	**(v)**	1,2-dichloroethane (EDC) (CAS 107-06-2).....[~~0.01~~]0.005 mg/l
[~~(19)~~]	**(w)**	1,1-dichloroethylene (1,1-DCE) (CAS 75-35-4).....[~~0.005~~]0.007 mg/l
[~~(20)~~]	**(x)**	~~1,1,2,2-~~tetrachloroethylene (PCE) (CAS 127-18-4).....[~~0.02~~]0.005 mg/l
[~~(21)~~]	**(y)**	~~1,1,2-~~trichloroethylene (TCE) (CAS 79-01-6).....[~~0.1~~]0.005 mg/l
[~~(22)~~]	**(z)**	ethylbenzene (CAS 100-41-4).....[~~0.75~~]0.7 mg/l
[~~(23)~~]	**(aa)**	total xylenes (CAS 1330-20-7).....0.62 mg/l
[~~(24)~~]	**(bb)**	methylene chloride (CAS 75-09-2).....[~~0.1~~]0.005 mg/l
[~~(25)~~]	**(cc)**	chloroform (CAS 67-66-3).....0.1 mg/l
[~~(26)~~]	**(dd)**	1,1-dichloroethane (CAS 75-34-3).....0.025 mg/l
[~~(27)~~]	**(ee)**	ethylene dibromide (EDB) (CAS 106-93-4).....[~~0.0001~~]0.00005 mg/l
[~~(28)~~]	**(ff)**	1,1,1-trichloroethane (CAS 71-55-6).....[~~0.06~~]0.2 mg/l
[~~(29)~~]	**(gg)**	1,1,2-trichloroethane (CAS 79-00-5).....[~~0.01~~]0.005 mg/l
[~~(30)~~]	**(hh)**	1,1,2,2-tetrachloroethane (CAS 79-34-5).....0.01 mg/l
[~~(31)~~]	**(ii)**	vinyl chloride (CAS 75-01-4).....[~~0.001~~]0.002 mg/l
[~~(32)~~]	**(jj)**	PAHs: total naphthalene (CAS 91-20-3) plus monomethylnaphthalenes ...0.03 mg/l
[~~(33)~~]	**(kk)**	benzo-a-pyrene (CAS 50-32-8).....[~~0.0007~~]0.0002 mg/l
	(ll)	cis-1,2-dichloroethene (CAS 156-59-2).....0.07 mg/l
	(mm)	trans-1,2-dichloroethene (CAS 156-60-5).....0.1 mg/l
	(nn)	1,2-dichloropropane (PDC) (CAS 78-87-5).....0.005 mg/l
	(oo)	styrene (CAS 100-42-5).....0.1 mg/l

(pp)	1,2-dichlorobenzene (CAS 95-50-1)	0.6 mg/l
(qq)	1,4-dichlorobenzene (CAS 106-46-7)	0.075 mg/l
(rr)	1,2,4-trichlorobenzene (CAS 120-82-1)	0.07 mg/l
(ss)	pentachlorophenol (CAS 87-86-5)	0.001 mg/l
(tt)	atrazine (CAS 1912-24-9)	0.003 mg/l

B. NMED's Basis for Proposed Language

NMED proposed to add numerical groundwater health standards for 13 constituents at 20.6.2.3103.A(1) NMAC; to adjust the concentrations of existing WQCC groundwater human-health standards to be numerically equivalent to EPA National Primary-Drinking Water Standards for most constituents, with specific exceptions being chromium, fluoride, and xylenes; and to add groundwater human-health standards for chemical constituents that: have been detected in groundwater in New Mexico, or pose a reasonable threat of contaminating groundwater in New Mexico, are discharged at facilities subject to the authority of 20.6.2.3000 to 3114 NMAC, and have EPA National Primary Drinking Water Standards. Tr. Vol. 2, 362:9-389:23; *McQuillan Direct*, 4:9-18:13.

The Department noted that the Commission adopted numerical groundwater standards for toxic organic contaminants years before the United States Environmental Protection Agency ("EPA") set drinking water standards for the same constituents. Since some WQCC standards now differ from those of EPA, the Department proposed to adjust most standards to be equal to drinking water standards. The Department explained that protecting groundwater as a potential source of drinking water is a common goal of state programs, and EPA's Drinking Water Standards have often been adopted as state groundwater standards. Some WQCC standards will decrease in concentration, and others will increase. The Department proposed to not adjust several existing WQCC standards to be equal to those of EPA at this time for reasons explained in detail by Mr. McQuillan. Tr. Vol. 2, 362:9-389:23; *McQuillan Direct*, 4:9-18:13, 33:1-36:10; NMED Exhibit 9, 1985 Testimony of Victor Zalma, M.D.

Regarding NMED's proposal to retain the existing lower (i.e. more protective) standard for chromium previously adopted by the WQCC, Mr. McQuillan testified that the EPA is currently evaluating new scientific data regarding chromium toxicity and may propose to amend its National Primary Drinking-Water Standard in the future. Tr. Vol. 2, 371:20-373:4; *McQuillan Direct*, 33:14-17.

Regarding NMED's proposal to retain the existing lower, (i.e. more protective) standard for fluoride previously adopted by the WQCC, Mr. McQuillan testified that EPA has two different standards for flouride: one to protect against skeletal fluorosis, and another to protect against dental fluorosis. NMED argued that a single standard that is protective against both of these conditions is simpler, and the existing WQCC-adopted standard is protective against both conditions. Tr. Vol. 2, 373:5-375:12; *McQuillan Direct*, 33:18-34:10.

2. LANS

A. *LANS' Position on NMED's Proposed Language*

LANS supported the changes conforming to the MCLs, but did not take a position on the remaining proposed changes. LANS' Statement of Position at 2-3.

3. NMMA

A. *NMMA's Position on NMED's Proposed Language*

NMMA opposed NMED's proposal to retain the existing standards for chromium and fluoride.

B. NMMA's Proposed Alternative Language

		(1)	**Numerical Standards**
* * *			
	[~~(4)~~]	**(f)**	Chromium (Cr)..... .....0.05 mg/l
* * *			
	[~~(6)~~]	**(h)**	Fluoride (F).....1.6 mg/l

C. NMMA's Basis for Proposed Alternative Language

NMMA presented testimony and exhibits showing that EPA has adopted the changes proposed by NMMA as primary drinking water standards—both MCLs and MCLGs. NMMA presented testimony that it is appropriate to make these changes as part of a consistent Commission policy that its human health standards for groundwater should be consistent with human health standards adopted by EPA. Testimony of Michael Neumann, NMMA Exhibit A, pages 6-7 and referenced exhibits. NMMA contends that the uncertain possibility of future changes to the fluoride and chromium standards is not a valid reason for the Commission not to make the standards consistent with current EPA standards. With respect to fluoride, NMMA's presented evidence in its Exhibit D that EPA considered and decided that the condition involving tooth discoloration was not a health-based standard, and if NMED wanted to have a non-health-based standard for fluoride, it should have proposed a standard under 20.6.2.3103.B NMAC. See Tr. Vol 2 at 405-406.

D. Other Parties' Responses to NMMA's Position/Proposal

NMED

NMED opposed NMMA's proposed changes to the numerical standards for chromium and fluoride for the reasons set forth above.

4. NMML

A. *NMML's Position on NMED's Proposed Language*

NMMA supported NMED's proposal to retain the existing standard for chromium, but opposed NMED's proposal to retain the existing standards for fluoride and total xylenes.

B. NMML's Proposed Alternative Language

(1) Numeric Standards

* * *

~~(6)~~ (h) Fluoride (F).....~~[1.6]~~ 4.0 mg/l

* * *

~~(23)~~ (aa) total xylenes.....~~[0.62]~~ 10,000 mg/l

C. NMML's Basis for Proposed Alternative Language

With respect to the chromium standard, NMML asserted that the U.S. Environmental Protection Agency is considering the adoption of drinking water standards with regard to total chromium and/or hexavalent chromium, which are much stricter than the current MCL. Docket No. 55, NMML-4, pp.2-3, lns.72-82. NMML noted that there is no federal or state MCL specific to the hexavalent form of chromium. Hexavalent Chromium is regulated in drinking water through the establishment of a Total Chromium MCL (Hexavalent Chromium is one of the forms of chromium making up Total Chromium). In New Mexico, the Total Chromium standard referenced by NMED for revision is 50 ppb, while the federal MCL is 100 ppb. At the time Total Chromium MCLs were established, ingested Hexavalent Chromium associated with consumption of drinking water was not considered to pose a cancer risk, as is at this time, especially in light of the recent concern at both federal and state levels, and the need for regulation of hexavalent chromium. Therefore, NMML asserted that the total chromium standard has been in effect for decades and is reflective of proposed changes nationally. NMML argued that the standard should be left at 50 ppb and not changed since this provides assurance that Hexavalent Chromium cannot exceed 50 ppb as all or part of Total Chromium standard.

With respect to fluoride, NMML argued that since NMED testified that its primary standard was based on EPA's secondary standard, NMED should have proposed a secondary standard for fluoride. NMML also argued that NMED's proposed standard of 1.6 mg/l is vastly

different than EPA's secondary standard of 2.0 mg/l, especially since the recommended level of fluoridation for purposes of dental protection in public water supplies is 0.7 mg/l. NMML asserted that based on NMED's rationale, it should have proposed a standard of 2.0 mg/l for fluoride to be consistent with EPA's secondary standard. NMML further stated that secondary MCLs should not form the basis of a groundwater standard, and do not form the basis for EPA to prevent the use of water sources containing contaminant levels above a secondary level for drinking water purposes under the Safe Drinking Water Act. Docket No. 83, NMML Exhibit RT-1, pp. 2-3.

With respect to fluoride and total xylenes, NMML argued that NMED's arguments for maintaining the existing standard were unconvincing in light of NMED's proposals to adopt federal MCLs for other constituents. NMML asserted that NMED did not provide new toxicological evidence for its proposal, and stated that there is little toxicological basis for NMED's proposal. NMML thus maintained that NMED should adopt the MCL for total xylenes. NMML Exhibit RT1, p. 3. NMML also submitted that NMED had previously argued that standards should conform with federal MCLs, but that in the case of fluoride and total xylenes, NMED acted inconsistently with that position by proposing standards stricter than federal MCLs. Docket No. 55, NMML-4, pp. 2-3, lns. 55-62; 65-71.

NMML's full testimony can be found in the record at Docket Nos. 55 and 83.

D. *Other Parties' Responses to NMML's Position/Proposal*

NMED

NMED opposed NMML's proposed changes to the numerical standards for chromium and fluoride for the reasons set forth above.

5. William C. Olson

A. *William C. Olson's Position on Department's Proposed Language*

Mr. Olson supported NMED's proposed language. *Olson Closing Argument* pgs. 7-8 and *Olson Statement of Reasons* pg. 8.

20.6.2.3103.A(2) NMAC

1. NMED

A. *NMED's Proposed Language*

(2) **Standards for Toxic Pollutants.** A toxic pollutant shall not be present at a concentration shown by credible scientific data and other evidence appropriate under the Water Quality Act, currently available to the public, to have potential for causing one or more of the following effects upon exposure, ingestion, or assimilation either directly from the environment or indirectly by ingestion through food chains: (1) unreasonably threatens to injure human health, or the health of animals or plants which are commonly hatched, bred, cultivated or protected for use by man for food or economic benefit; as used in this definition injuries to health include death, histopathologic change, clinical symptoms of disease, behavioral abnormalities, genetic mutation, physiological malfunctions or physical deformations in such organisms or their offspring; or (2) creates a lifetime risk of more than one cancer per 100,000 exposed persons.

B. NMED's Basis for Proposed Language

NMED proposed to move the narrative standard for Toxic Pollutants from 20.6.2.7.WW to 20.6.2.3103.A(2) NMAC and proposed changes to the relocated language in response to submittals by USAF/DoD. *See* NMED Exhibit 28 at 3:20-21; 6:21-22; Second Corrected NMED Exhibit 43; *see also* Tr. Vol. 2 at 367:2-9. This amendment is proposed for regulatory clarity since the toxic pollutant definition is a narrative groundwater standard. Doing so will eliminate the need to refer to the Toxic Pollutant standard elsewhere in the regulations when reference is also made to the groundwater standards of 20.6.2.3103 NMAC. NMED's Closing Argument and Proposed Statement of Reasons, ¶¶ 25, 26; Tr. Vol. 2, 382:14-385:6; *McQuillan Direct*, 21:13-18.

2. LANS

A. LANS' Position on NMED's Proposed Langauge

LANS supported NMED's proposed language. LANS' Corrected Statement of Position at p. 2.

3. USAF/DoD

A. *USAF/DoD's Position on NMED's Proposed Language*

USAF/DoD argued that NMED's narrative standard decisions should be based on credible

science. *See* Exhibit USAF/DoD 2 at 2:22 – 3:6 & 6:21 – 7:1; *see also* Tr. Vol. 2, 478:8-9. USAF/DoD argued that NMED's narrative standard proposal offers no clarity into its process or the science used or how NMED makes its decisions under the narrative standard because NMED's proposal includes terms that are not defined in the WQA or the Rules. *See* USAF/DoD Exhibit 4 at 7. USAF/DoD also argued that NMED decisions on the narrative standard that are not based on sound science and processes could lead to unnecessary litigation, which could present a resource drain on the regulator and the regulated entity, especially considering that NMED proposes to add several controversial emerging contaminants to the list of toxic pollutants without a corresponding numerical standard in the Rules. *See* USAF/DoD Exhibit 4 at 5-6; 10-11; *see also* Tr. Vol 2, 479:10-16; 482:24 – 484:19.

To resolve its concerns, USAF/DoD proposed that the Commission include a regulatory definition for "credible science" for use by NMED when implementing the narrative standard. *See* Exhibit USAF/DoD 4 at 8 – 9; *see also* Tr. Vol. 2, 479:10 – 480:13. USAF/DoD stated its belief that such definition will help ensure the quality of the information considered in implementing the narrative standard and the transparency in how the decision-making process is accomplished, and provide for certainty and accountability in such decisions. *See* Tr. Vol. 2, at 483:2-4; 484:6-9.

B. USAF/DoD's Proposed Alternative Language

20.6.2.7 DEFINITIONS:

C. Definitions that begin with the letter "C"

* * *

(8) "credible science" means, science that is reliable and unbiased. Use of credible science involves the use of supporting studies conducted in accordance with sound and objective science practices, including, when available, peer reviewed science and supporting studies and data collected by accepted methods or best available methods (if the reliability of the method and the nature of the decision justifies use of the data). Additionally, NMED will consider as applicable: (1) The extent to which the scientific information, technical procedures, measures, methods, protocols, methodologies, or models employed to generate the information are reasonable for and consistent with the intended use of the information; (2) The extent to which the information is

relevant for NMED's use in making a decision about a toxic pollutant or combination of toxic pollutants; (3) The degree of clarity and completeness with which the data, assumptions, methods, quality assurance, and analyses employed to generate the information are documented; (4) The extent to which the variability and uncertainty in the information, or in the procedures, measures, methods, protocols, methodologies, or models, are evaluated and characterized; and (5) The extent of independent verification or peer review of the information or of the procedures, measures, methods, protocols, methodologies or models.

* * *

20.6.2.3103 STANDARDS FOR GROUND WATER OF 10,000 mg/l TDS CONCENTRATION OR LESS:

* * *

A. Human Health Standards

* * *

(2) Standards for Toxic Pollutants. A toxic pollutant shall not be present at a concentration shown by credible scientific data and other evidence appropriate under the Water Quality Act, currently available to the public, to have the potential for causing one or more of the following effects upon exposure, ingestion, or assimilation either directly from the environment or indirectly by ingestion through food chains: (1) unreasonably threatens to injure human health, or the health of animals or plants which are commonly hatched, bred, cultivated or protected for use by man for food or economic benefit; as used in this definition injuries to health include death, histopathologic change, clinical symptoms of disease, behavioral abnormalities, genetic mutation, physiological malfunctions or physical deformations in such organisms or their offspring; or (2) creates a lifetime risk of more than one cancer per 100,000 exposed persons.

C. USAF's Basis for Proposed Alternative Language

Dr. Brock testified that USAF/DoD's proposals seek a clear articulation of a process for implementing the Narrative Standard that gives consideration to the weight of scientific evidence through a systematic process as is standard practice in the scientific community. *See* Exhibit USAF/DoD 2 at 3:16-22; *see also* Tr. Vol. 2, 484:2-19. Dr. Brock testified that USAF/DoD's proposals address what USAF/DoD views as the vast discretion afforded to NMED under NMED's proposal, and seek greater certainty, transparency, accountability and accuracy in NMED's implementation of the narrative standard. *See* e.g. Tr. Vol. 2, 422:21-23; & 477:20 - 484:19.

USAF/DoD explained that its proposals are derived from existing laws and regulations focusing on the use of science in agency decision-making and would not impose rigid rules constraining NMED's action. *See* Exhibit USAF/DoD 2 at 4:12 – 6:20; *see also* Tr. Vol. 2,

479:24 - 481:22; 490:9 – 491:12; 496:16 – 497:14. USAF/DoD argued that its proposals would result in the Commission, the citizens of New Mexico, and regulated parties having more certainty, a more clear understanding of the methodology, and understanding of the basis for NMED's decisions under the narrative standard. *See* Tr. Vol. 2, 484:6-13.

D. Other Parties' Responses to USAF's Position/Proposal

NMED

The Department argued that USAF/DoD's proposed language was overly restrictive in the type of information the Department could consider, and that it did not reflect the language in the Water Quality Act (which does not use the term "best available science", rather it uses the term "credible scientific data"). The Department's witness further testified that the Department would always evaluate the source of any information it uses in making determinations and would never use "junk science." NMED's Closing Argument and Proposed Statement of Reasons, ¶ 63; Tr. Vol. 2, 385:23-388:17.

NMML

NMML concurred with the positions taken by USAF/DoD regarding the standard for toxic pollutants. *See* Exhibit NMML-4 at 94-10; *See* Pleading Log No. 55, Municipal League Notice of Intent to Present Technical Testimony and Exhibits, Exhibit NMML-1, NMML Comments on NMED Petition, at 1:35–4; Exhibit NMML- RT-2, at 1:30–33; 4:2–7.

William C. Olson

William C. Olson testified that in the Department's proposal to move the existing language for determining toxic pollutants from the definitions section of the rule to the standards section preserved the long-standing language on how the Commission determines toxic pollutants. He testified that the USAF/DoD revised language omits portions of existing Commission language

about how an appropriate concentration of a toxic pollutant is determined. Mr. Olson also testified that the USAF/DoD proposed language for criteria on acceptable science when determining concentrations of toxic pollutants is reasonable, but is not consistent with the Commission statutory requirement that standards be "*based upon credible scientific data and other evidence appropriate under the Water Quality Act*" (see NMSA 1978 74-6-4.D). In addition, Mr. Olson testified that the Commission should not limit appropriate science, as proposed by USAF/DoD, to United States federal agency toxicology information due to the current politicization and suppression of science at the federal level. *See* Olson Statement of Reasons, p. 11-12; Olson Rebuttal Testimony, WCO Rebuttal Exhibit 1, pgs. 4-5; and Olson Testimony Tr. vol. 2, pg. 502, line 19 to pg. 505, line 9. As indicated below, Mr. Olson proposed compromise language consistent with the statutory language of the WQA to address USAF/DoD concerns.

4. William C. Olson

A. *William C. Olson's Position on NMED's Proposed Language*

William C. Olson supported the Department's proposal to move the standard for toxic pollutants from the definitions section to the standards section in 20.6.2.3103 NMAC, as well as the Department's proposed language.

B. William C. Olson's Proposed Alternative Language

20.6.2.3103. STANDARDS FOR GROUND WATER OF 10,000 mg/l TDS CONCENTRATION OR LESS:

A. Human Health Standards.

* * *

(2) **Standards for Toxic Pollutants.** A toxic pollutant shall not be present at a concentration shown by scientific information currently available to the public to have potential for causing one or more of the following effects upon exposure, ingestion, or assimilation either directly from the environment or indirectly by ingestion through food chains: (1) unreasonably threatens to injure human health, or the health of animals or plants which are commonly hatched, bred, cultivated or protected for use by man for food or economic benefit; as used in this definition injuries to health include death, histopathologic change, clinical symptoms of disease, behavioral abnormalities, genetic mutation, physiological malfunctions or physical deformations in such organisms or their offspring; or (2) creates a lifetime risk of more than one cancer per 100,000 exposed persons. Sources of scientific information for human health risk assessments should be based on credible science and supporting studies conducted in accordance with sound scientific practices as well as data collected by accepted methods. Examples of acceptable sources for scientific information for human health risk assessments include, but are not limited to, the Integrated Risk Information

System, EPA's Provisional Peer Reviewed Toxic Values, Agency for Toxic Substances and Disease Registry Minimal Risk Levels and Human Effects Assessment Summary Tables.

C. William C. Olson's Basis for Proposed Alternative Language

Mr. Olson proposed this compromise language to address the issues raised by USAF/DoD regarding sources of scientific information and for his reasons discussed above regarding USAF/DoD's proposal to amend this section. Olson Rebuttal Testimony, WCO Rebuttal Exhibit 1, pgs. 4-5; and Olson Testimony Tr. vol. 2, pg. 502, line 19 to pg. 505, line 9.

D. Other Parties' Responses to William C. Olson's Position/Proposal

NMED

NMED did not take a position on Mr. Olson's proposed language on the Record.

USAF/DoD

USAF/DoD claimed that while derived from the WQA, the terms "credible scientific data" included in Mr. Olson's proposed changes is not defined or explained in the WQA or the Rules. *See* Exhibit USAF/DoD 4 at 7. As such, USAF/DoD asserted that Mr. Olson's proposed changes did not address the lack of transparency, or clarity to the regulated community or discretion afforded to NMED in implementing the Narrative Standard. *See id.* USAF/DoD argued that those deficiencies should be remedied by adding a definition for "credible science" derived from the regulations for the federal Toxic Substances Control Act. *See* Exhibit USAF/DoD 4 at 8 -9.

20.6.2.3103.B(10) NMAC

1. NMED

A. *NMED's Proposed Language*

20.6.2.3103 STANDARDS FOR GROUND WATER OF 10,000 mg/l TDS CONCENTRATION OR LESS:

* * *

B. Other Standards for Domestic Water Supply

(1)	Chloride (Cl)	250.0 mg/l
(2)	Copper (Cu)	1.0 mg/l
(3)	Iron (Fe)	1.0 mg/l
(4)	Manganese (Mn)	0.2 mg/l
[~~(6)~~](5)	Phenols	0.005 mg/l
[~~(7)~~](6)	Sulfate (SO_4)	600.0 mg/l
[~~(8)~~](7)	Total Dissolved Solids (TDS)	1000.0 mg/l
[~~(9)~~](8)	Zinc (Zn)	10.0 mg/l
[~~(10)~~](9)	pH	between 6 and 9
(10)	Methyl tertiary-butyl ether (MTBE)	0.1 mg/l

B. *NMED's Basis for Proposed Language*

NMED proposed to add the numerical groundwater standard of 0.1 mg/L for methyl tertiary-butyl ether ("MTBE") that has been set by the Environmental Improvement Board (Petroleum Storage Tank Regulations, 20.5.12.42.A.2 NMAC), to the aesthetic groundwater standards of 20.6.2.3103.B NMAC. NMED supported the addition of this standard through the testimony of its Chief Scientist, Dennis McQuillan. *McQuillan Direct*, 6:17-19; 14:7-15.

C. *Other Parties' Responses to NMED's Proposal*

William C. Olson

Mr. Olson supported NMED's proposed language. *Olson Closing Argument* pgs. 7-8 and *Olson Statement of Reasons* pg. 8.

20.6.2.3103 [Note] NMAC

1. NMED

A. *NMED's Proposed Language*

[Note: For purposes of application of the amended numeric uranium standard to past and current water discharges (as of 9-26-04), the new standard will not become effective until June 1, 2007. [~~For any new water discharges, the uranium standard is effective 9-26-04.~~] For purposes of application of the amended numeric standards for arsenic, cadmium, lead, combined radium-226 & radium-228; benzene, PCBs, carbon tetrachloride, EDC, PCE, TCE, methylene chloride, EDB, 1,1,2-trichloroethane and benzo-a-pyrene, to past and current water discharges (as of July 1, 2017), the new standards will not become effective until July 1, 2020. With regard to sites for which the secretary has approved an abatement completion report as of the effective date of this rule pursuant to 20.6.2.4112 NMAC, the amended numeric standards for arsenic, cadmium, lead, combined radium-226 & radium-228; benzene, PCBs, carbon tetrachloride, EDC, PCE, TCE, methylene chloride, EDB, 1,1,2-trichloroethane and benzo-a-pyrene shall not apply unless the secretary notifies the responsible person that the site is a source of these contaminants in ground water that pose a hazard to public health.]

B. NMED's Basis for Proposed Language

The Department asserted that its proposed language provides assurance to sites under abatement for toxic pollutants for which the 20.6.2.3103 standards were proposed to be lowered that the new standards would not take effect until July 1, 2020, and that sites which had completed abatement for these constituents would not be reopened unless ordered by the Secretary. NMED Exhibit 28, Rebuttal Testimony of Dennis McQuillan ("*McQuillan Rebuttal*"), 8:21-9:6. Tr. Vol. 2, 392:7-396-10. NMED also agreed to use the phrase "hazard to public health" rather than "place of withdrawal of water for present or reasonably foreseeable use" based upon a comment and testimony from the NMMA, which was agreed to in Mr. McQuillan's written rebuttal testimony, NMED Exhibit 28 at pp. 8-9.

2. City of Roswell

A. *Roswell's Position on NMED's Proposed Language*

Roswell agreed with the inclusion and importance of NMED's proposed Note, but proposed that it be formally codified as follows in full as 20.6.2.3103.D NMAC.

B. Roswell's Proposed Alternative Language

D. For purposes of application of the amended numeric uranium standard to past and current water discharges (as of 9-26-04), the new standard will not become effective until June 1, 2007. For purposes of application of the amended numeric standards for arsenic, cadmium, lead, combined radium-226 & radium-228, benzene, PCBs, carbon tetrachloride, EDC, PCE, TCE, methylene chloride, EDB, 1,1,2-trichloroethane and benzo-a-pyrene, to past and current water discharges (as of July 1, 2017), the new standards will not become effective until July 1, 2020. With regard to sites for which the secretary has approved an abatement completion report pursuant to 20.6.2.4112 NMAC, the amended numeric standards for arsenic, cadmium, lead, combined radium-226 & radium-228, benzene, PCBs, carbon tetrachloride, EDC, PCE, TCE, methylene chloride, EDB, 1,1,2-trichloroethane and benzo-a-pyrene shall not apply unless the secretary notifies the responsible person that the site is a source of these contaminants in ground water at a place of withdrawal for present or reasonably foreseeable future use at concentrations in excess of the standards of this section.

C. Roswell's Basis for Proposed Alternative Language

Roswell argued that the intent of the Note is to give the regulated community time to comply within a reasonable grace period. Tr. Vol. 1, 51: 23-24. However, Roswell expressed concern about potential disagreement over the legal effect of the undisputed important grace period under the footnote in the event of a codification argument or lack thereof that may be used against Roswell as it enters abatement. Tr. Vol. 1, 51: 20.

Roswell's technical witness, Jay Snyder, PE ("Snyder"), testified and agreed that the Note advanced an appropriate grace period for responsible parties to collect information whether to close sites under previous Stage II approved abatement plans or to comply with the new regulations entering abatement. Tr. Vol. 2, 449. Snyder testified the grace period allowed Roswell to focus on characterizing source areas verses attenuated contamination with the goal of negotiating with the state for areas of ground water contamination under the current rule and to separate areas that do not need to enter into an abatement plan area. Tr. Vol. 2, 450. Snyder argued that the Note should be "elevated" and codified as section 20.6.2.3103.D NMAC from a regulatory perspective to provide specific citation to issue responsible party letters regarding re-opening of sites. Tr. Vol. 2, 451:5-11.

D. Other Parties' Responses to Roswell's Position/Proposal

NMED

NMED does not oppose Roswell's proposal. NMED witness Dennis McQuillan testified that, regardless of lack of formal codification as a subsection within the rule, the regulated community could rely on the language of the Note being legally effective. Tr. Vol. 2, 395: 10-16. Mr. McQuillan stated he had no objection to codification unless there was some reason advanced to not codify by Archives and Records Center. Tr. Vol. 2, 396: 1-7. Mr. McQuillan testified the NMED "want[s] the [footnote] to have teeth." *Id.*

3. NMML

A. *NMML's Position on Department's Proposed Language*

NMML argued that NMED's Note at the end of 20.6.2.3103 is insufficient to define the applicability of the new standards to past, current or future discharges. NMML asserted that language regarding the clarification of the applicability of new standards to past and current discharges, with approved discharge and/or abatement plans and application of new administrative standards with approved abatement plans should be included within 20.6.2.3103 and 20.6.2.4103, not respectively. *See* Exhibit NMML-6, lines 75-106. NMML argued alternatively, if the WQCC chooses to retain the original Regulations, it should make no changes.

NMML's full testimony can be found in the record at Docket Nos. 55 and 83.

B. *NMML's Proposed Alternative Language*

NMML did not provide proposed alternative language, because NMML only proposed striking the last sentence of the Note.

C. ***Other Parties' Responses to NMML's Position***

NMED

See NMED's response to Roswell's proposal above. Because NMML did not provide language for its proposal to delete the last sentence of the Note and add text to 20.6.2.4103.C NMAC, the Department did not respond to this proposal.

20.6.2.3105.A NMAC

1. NMED

A. *NMED's Proposed Language*

20.6.2.3105 EXEMPTIONS FROM DISCHARGE PERMIT REQUIREMENT: Sections 20.6.2.3104 and 20.6.2.3106 NMAC do not apply to the following:

A. Effluent or leachate which conforms to all the [~~listed numerical~~] standards in Subsections A, B, and C of Section 20.6.2.3103 NMAC and has a total nitrogen concentration of 10 mg/l or less [~~, and does not contain any toxic pollutant~~]. If treatment or blending is required to achieve these standards this exemption does not apply. To determine conformance, samples may be taken by the agency before the effluent or leachate is discharged so that it may move directly or indirectly into ground water; provided that if the discharge is by seepage through non-natural or altered natural materials, the agency may take samples of the solution before or after seepage. If for any reason the agency does not have access to obtain the appropriate samples, this exemption shall not apply;

B. NMED's Basis for Proposed Language

The Department stated that its proposed changes at 20.6.2.3105.A NMAC would clarify that if treatment or blending is required for a discharge to meet standards, that discharge does not qualify for an exemption from permitting requirements. Ms. Hunter testified that the exemption in 20.6.2.3105.A NMAC has always been intended to apply only when *untreated* effluent meets all water quality standards. The Department reasoned that because wastewater treatment is subject to failure, regulatory oversight of the operation, maintenance, and monitoring of wastewater treatment is necessary to protect water quality and public health. Tr. Vol. 3, 594:21-595:15.

2. NMML

A. *NMML's Position on NMED's Proposed Language*

NMML stated that its interest in this proposed change concerns Aquifer Storage and Recovery ("ASR") which is designed to maximize the use of New Mexico's water resources by storing water in underground aquifers for when it was needed during times of drought. Tr. Vol. 3 at 751-54; Docket No. 55, NMML-5 pp. 1-2. NMML opposed changes to Section 20.6.2.3105 NMAC because when the source water is drinking water, it is already highly regulated by the Safe Drinking Water Act. Tr. Vol. 3 at 762. NMML further argued that NMED's proposed changes to

20.6.2.3105 NMAC are unnecessary when the source water is drinking water and the chemical compatibility of the aquifer is compatible with the chemistry of the aquifer, because there is minimal or no risk of contamination. Ms. Hunter agreed that NMML's proposed language contemplated injection of geochemically compatible waters. Tr. Vol. 3 at 726:21-727:15. NMML asserted that the compatibility of injected drinking water can be addressed either through authorization-by-rule or another approach that does not require a groundwater discharge permit because the treatment requirements do not justify the burden of permitting. Tr. Vol. 2 at 764-65. NMML argued that for Aquifer Storage and Recovery ("ASR") projects, the owner/operator would only need to verify that the source water is compatible with the ground water, and without this exemption, the additional costs for permitting and monitoring are significant disincentives. Docket No. 55, NMML-5, p.3. NMML argued that in practice, NMED had allowed the Water Authority's two ASR programs – at Bear Canyon and the Large-Scale Demonstration Project – to proceed without permitting by NMED under two different Bureau Chiefs. Tr. Vol. 3 at 725; 766.

NMML's full testimony can be found in the record at Docket Nos. 55 and 83.

B. NMML's Proposed Alternative Language

20.6.2.3105 EXEMPTIONS FROM DISCHARGE PERMIT REQUIREMENT: Sections 20.6.2.3104 and 20.6.2.3106 NMAC do not apply to the following:

A. Effluent or leachate which conforms to all the listed [~~numerical~~] standards of Section 20.6.2.3103 NMAC and has a total nitrogen concentration of 10 mg/l or less[~~, and does not contain any toxic pollutant~~]. If treatment or blending is required to achieve these standards this exemption does not apply except for recharge projects used to replenish water in an aquifer where the source water is regulated by the Safe Drinking Water Act and meets all drinking water standards and the source water chemistry is shown to be compatible with the chemistry of the ground water. To determine conformance, samples may be taken by the agency before the effluent, [~~or~~] leachate or other surface water is discharged so that it may move directly or indirectly into ground water; provided that if the discharge is by seepage through non-natural or altered natural materials, the agency may take samples of the solution before or after seepage. If for any reason the agency does not have access to obtain the appropriate samples, this exemption shall not apply;

C. NMML's Basis for Proposed Alternative Language

See subsection "A" above.

D. Other Parties' Responses to NMML's Position/Proposal

NMED

NMED opposed NMML's proposed alternative language. Ms. Hunter testified that ASR projects, which may inject millions of gallons directly or indirectly into an aquifer, should not be exempt from the requirement to obtain a discharge permit even when the recharge water is the same drinking water that is served to utility customers. Ms. Hunter testified that the monitoring requirements for drinking water under the SWDA do not include monitoring the groundwater itself, and they do not contemplate aquifer conditions or potential geochemical interactions that could occur, or potential effects on contamination plumes. Ms. Hunter gave examples of possible geochemical interactions that could have adverse effects on an aquifer, and noted that several other states have recognized this issue and taken regulatory action to address it. Tr. Vol. 3, 711:8-713:1. Ms. Hunter asserted that because no other state or federal statutory framework requires groundwater monitoring and no other state or federal permitting program monitors potential impacts in the aquifer itself, it is important for NMED to retain its regulatory authority over ASR projects. *Hunter Rebuttal*, at p. 3-4. Ms. Hunter explained that, while NMED had previously allowed the Water Authority's two ASR programs to proceed without permitting, at that time NMED was not aware of the potential adverse effects on aquifers that ASR projects could have, and emerging science has since indicated that such effects are possible, requiring regulatory oversight. Tr. Vol. 3, 724:19-726:15.

3. RGR/NMCC/AmMg

A. *RGR/NMCC/AmMg's Position on NMED's Proposed Language*

RGR, NMCC, and AmMg filed a post-hearing submittal on February 16, 2018, in which they expressly stated their opposition to NMED's proposed language on exemptions found at

20.6.2.3105.A NMAC. The post-hearing submittal pointed out NMED's witness on the agency's newly proposed exemption language acknowledged that the 20.6.2.3105.A NMAC exemption has been in effect for at least 40 years, and also indicated that NMED plans to soon embark on a two- or three-year public rulemaking process on issues relating to secondary uses of treated water. Tr. Vol. 3, 603:10-21; 609:25-610:1-16. RGR, NMCC and AmMg urged that the proposed language offered by NMED is premature under those circumstances, and would dramatically and unnecessarily narrow the exemption, particularly in a state such as New Mexico, where fresh water resources are scarce, and treatment and blending to meet standards are commonplace and desirable from the standpoint of maximizing water resources and use. RGR/NMCC/AmMg Post-Hearing Submission, p. 6.

B. *RGR/NMCC/AmMg's Proposed Alternative Language*

RGR/NMCC/AmMg proposed to leave the language of 20.6.2.3105.A NMAC as it is in the existing rule.

C. *Other Parties' Responses to RGR/NMCC/AmMg's Position*

RGR/NMCC/AmMg did not submit pre-filed testimony or provide a witness at the hearing, Their positions were only stated in their post-hearing submittal. Therefore, responses to RGR/NMCC/AmMg's positions do not exist in the Record in this proceeding.

4. William C. Olson

A. *William C. Olson's Position on Department's Proposed Language*

Mr. Olson supported NMED's proposed language. *Olson Closing Argument* pgs. 7-8 and *Olson Statement of Reasons* pg. 8.

20.6.2.3105.J, L, M, and N NMAC

1. NMED

A. *NMED's Proposed Language*

20.6.2.3105 EXEMPTIONS FROM DISCHARGE PERMIT REQUIREMENT: Sections 20.6.2.3104 and 20.6.2.3106 NMAC do not apply to the following:

* * *

[~~J. Leachate from materials disposed of in accordance with the Solid Waste Management Regulations (20 NMAC 9.1) adopted by the New Mexico Environmental Improvement Board;~~]

[~~K.~~] J. Natural ground water seeping or flowing into conventional mine workings which re-enters the ground by natural gravity flow prior to pumping or transporting out of the mine and without being used in any mining process; this exemption does not apply to solution mining;

[~~L.~~] K. Effluent or leachate discharges resulting from activities regulated by [~~a mining plan approved and~~] permit issued by the [~~New Mexico Coal~~] mining and minerals division of the energy, minerals and natural resources department pursuant to the Surface Mining [~~Commission,~~]Act, NMSA 1978, Sections 69-25A-1 to 36, provided that this exemption shall not be construed as limiting the application of appropriate ground water protection requirements by the mining and minerals division and the New Mexico Coal Surface Mining Commission; or

[~~M.~~] L. [~~Effluent or leachate discharges which are regulated by under the Oil Conservation Commission and Gas Act and the regulation of which by the Water Quality Control Commission would interfere with the exclusive authority granted under Section 70-2-12 NMSA 1978, or under other laws, to the Oil Conservation Commission and the oil conservation division.~~] Discharges resulting from activities regulated by the energy conservation and management division of the energy, minerals and natural resources department under the authority of the Geothermal Resources Development Act, NMSA 1978, Sections 71-9-1 to -11 (2016).

[2-18-77, 6-26-80, 7-2-81, 12-24-87, 12-1-95; 20.6.2.3105 NMAC - Rn, 20 NMAC 6.2.III.3105, 1-15-01; A, 12-1-01; A, 8-1-14; A, XX/XX/18]

B. *NMED's Basis for Proposed Language*

EMNRD proposed to amend 20.6.2.3105.L, and .M NMAC and to add a new subsection N to correct references to statutes and agencies. Direct Testimony of William Brancard, Pleading Log No. 50, EMNRD Exh. 1 pgs. 1-3. The Department supported the proposed changes submitted by EMNRD in 20.6.2.3105.L, M, and N NMAC. Tr. Vol. 3, 598:8-14. No other party took a position on these proposed changes.

LANS proposed to delete 20.6.2.3105.J NMAC (exempting from discharge permit requirements "Leachate from materials disposed of in accordance with the Solid Waste Management Regulations (20 NMAC 9.1) adopted by the New Mexico Environmental Improvement Board"). In support of this proposal, LANS submitted testimony that the proposed

20.6.2.10.A NMAC (exempting "Any activity or condition subject to the authority of the environmental improvement board pursuant to… the Solid Waste Act, NMSA 1978, Sections 74-9-1 to -25") renders the permit exemptions in 20.6.2.3105.J redundant, and therefore, unnecessary. *See* Direct Testimony of Bob Beers, Pleading Log No. 52 at 5:17-6:2.

Both NMED and William C. Olson agreed that subsection J is unnecessary if 20.6.2.10 NMAC is adopted. *See* Tr. Vol. 3 at 601:6-8 and 708:1-4. No other party took a position on this proposed change.

LANS also proposed to delete 20.6.2.3105.M NMAC (exempting from discharge permit requirements "Effluent or leachate discharges which are regulated by the Oil Conservation Commission and the regulation of which by the Water Quality Control Commission would interfere with the exclusive authority granted under Section 70-2-12 NMSA 1978, [or under other laws,] to the Oil Conservation Commission"). *See* Direct Testimony of Bob Beers, Pleading Log No. 52 at 5:17-6:2. In support of this proposal, LANS submitted testimony that the proposed 20.6.2.10.B NMAC (exempting "Any activity or condition subject to the authority of the oil conservation commission pursuant to the provisions of the Oil and Gas Act, NMSA 1978, Section 70-2-12 and other laws conferring power on the oil conservation commission and the oil conservation division of the energy, minerals and natural resources department to prevent or abate water pollution") renders the permit exemptions in 20.6.2.3105.M NMAC redundant, and therefore, unnecessary.

NMED supported this proposal. EMNRD did not oppose LANS' proposal to delete 20.6.2.3015.M NMAC if 20.6.2.10.B NMAC is adopted. The proposed 20.6.2.10.B NMAC incorporates the changes regarding the proper statutory and current agency references proposed by

EMNRD. *See* Direct Testimony of William Brancard, Pleading Log No. 50, EMNRD Exh. 1 pgs. 1-3. No other party took a position on these proposed changes.

LANS' Proposed New Subsection 20.6.2.3105.[--] NMAC

1. LANS

A. *LANS's Proposed Language*

20.6.2.3105 EXEMPTIONS FROM DISCHARGE PERMIT REQUIREMENT: Sections 20.6.2.3104 and 20.6.2.3106 NMAC do not apply to the following:

* * *

[--]. Any activity or condition regulated under the federal Solid Waste Disposal Act, including the federal Resource Conservation and Recovery Act, 42 U.S.C. §§6901 to 6992k.[3]

B. *LANS's Basis for Proposed Language*

LANS proposed adding a subsection to exempt discharges from facilities or conditions regulated under the Resource Conservation and Recovery Act ("RCRA") to (1) clarify that the exemptions for hazardous waste and solid waste extend to activities and conditions subject to federal authority under the federal Solid Waste Disposal Act, which includes RCRA, but not yet subject to regulation under the New Mexico Hazardous Waste Act or the Solid Waste Act and (2) avoid duplication.

Mr. Beers provided testimony in support of this proposal. *See generally* Pleading Log 52, 81, 103 and Tr. Vol. 3 at 686:7-688:8. Mr. Beers expressed concern that NMED's proposal to not include an exemption for activities regulated under RCRA leaves the potential for residual federal permitting under RCRA, and thus, potentially, dual permitting, for the same activity. Tr. Vol. 3 at 688:3-8. Mr. Beers testified that LANS' proposed exemption would clarify that activities regulated under the federal Solid Waste Disposal Act are exempt from the discharge permitting requirements because they are already subject to federal authority. Pleading Log No. 52 at 3-7. He further

[3] For reference, this proposed amendment was styled as 20.6.2.3105.N in LANS' Closing Legal Argument and Proposed Statement of Reasons. *See* Pleading Log 103, Exhibit A, Pg.1. LANS' prehearing proposal also included an exemption for "any removal or remedial action under the federal Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §0601 to 9675." *See* Pleading Log 35, Exhibit, Pg. 2. The CERCLA proposal was withdrawn at the hearing. Tr. Vol.3 at 688:3-8.

testified that inclusion of the proposed exemption was necessary to ensure the exemption sections are comprehensive. Tr. Vol. 3 at 687:20-688:2. LANS also noted that the existing exemptions in 20.6.2.3105 NMAC are not limited to the express language of the Water Quality Act. *See* LANS Closing Legal Argument and Statement of Reasons, Pleading Log 103, Pg. 12.

C. *Other Parties' Responses to LANS's Proposal*

NMED

NMED opposed LANS' proposal. NMED argued that the WQA sets limits on the authority of the Commission and the Department, and that it would be inappropriate to include additional limitations on such authority in the regulations that go beyond the scope of the WQA. Tr. Vol 3, 594:14-20, 595:20-596:20, 622:18-623:4. NMED pointed out that the limitations section of the WQA does not mention RCRA, and that RCRA does not cover certain constituents that affect water quality, such as TDS and nitrates. Tr. Vol. 3, 701:14-704:2.

William C. Olson

Mr. Olson opposed LANS' proposal. He testified that there is no statutory exemption in the WQA for these federal activities, that some RCRA sites have operational discharge permits issued under Commission rules, and that it is necessary for the state to protect its interests in preventing and abating water pollution in New Mexico pursuant to its statutory authority. Olson Rebuttal Testimony, WCO Rebuttal Exhibit 1, pg. 3; and pgs. 5-6; Olson Testimony Tr. vol. 3, pg. 706, line 21 to pg. 708, line 4; and *William C. Olson Statement of Reasons* pp. 16-17.

USAF/DoD's Proposed New Subsection 20.6.2.3105.[--] NMAC

1. USAF/DoD

A. *USAF/DoD's Position on NMED's Proposed Language*

USAF/DoD proposed a new subsection at the end of 20.6.2.3105 NMAC if the Commission adopts NMED's proposal for 20.6.2.10 NMAC. *See* Tr. Vol 3, 698:7-21. Mr. Clark suggested this alternative proposal in response to NMED's concerns that USAF/DoD's proposal for 20.6.2.10 NMAC may not account for requirements under relevant laws and Part V of the Rules concerning underground injection. *See* Tr. Vol. 3, 625:19-616:25; & 699:2-25. USAF/DoD stated that its proposal acknowledges NMED's concerns about underground injection and seeks to add an exception to the discharge permit requirements (as opposed to the entire Rules) for regulated entities engaged land discharge that are already subject to regulatory oversight pursuant to a permit or consent order under the Hazardous Waste Act. *See* Tr. Vol. 3, 698:7-700:3.

B. *USAF/DoD's Proposed Alternative Language*

20.6.2.3105 EXEMPTIONS FROM DISCHARGE PERMIT REQUIREMENT: Sections 20.6.2.3104 and 20.6.2.3106 NMAC do not apply to the following:

* * *

[--]. Effluent or leachate discharges for land application[4] regulated by the Hazardous Waste Bureau pursuant to a permit or consent order under the Hazardous Waste Act, NMSA 1978 Sections 74-4-1 to -14.

C. *USAF/DoD's Basis for Proposed Alternative Language*

USAF/DoD's argued that its proposals will streamline the process and ensure that activities undertaken by the regulated community are protective of human health and the environment, without adding unnecessary layers of confusing and duplicative requirements. *See* USAF/DoD

[4] Since the hearing, USAF/DoD came to understand that NMED had clarified that infiltration trenches are subject to Class V UIC permitting requirements. Accordingly, USAF/DoD revised its proposal for a new subsection to 20.6.2.3105 NMAC to omit the language "or infiltration trenches" and further limit the application of this exception.

Exhibit 6 at 6:9-12; *see also* Tr. Vol. 3 at 699:2-7. USAF/DoD stated that the Rules should consider the real-life scenario where the Rules need not apply because of NMED's direct oversight in other environmental programs." *See* Tr. Vol. 3 at 697:25-698:4. USAF/DoD also argued that if a regulated entity is engaged in water treatment to New Mexico water standards pursuant to a Hazardous Waste Act permit, and the treatment system fails, NMED would have recourse under that permit and has multiple and varied enforcement powers under the law to protect human health and the environment. *See* Transcript Vol. 3 at 614:24 – 615:20; *see also* USAF/DoD Exhibit 6 at 3:10-4:2.

USAF/DoD argued that this limited exception would address NMED's concerns about underground injection activities while also addressing USAF/DoD's concerns about two layers of permitting and oversight, and allow the Rules to "go beyond just reiterating the statute. … provide more detail and consider the real-life scenario where the rules need not apply because of the direct oversight in other environmental programs." *See* Tr. Vol. 3, 697:19 – 700:5.

D. Other Parties' Responses to USAF/DoD's Position/Proposal

NMED

NMED opposed USAF/DoD's proposal. NMED argued that the WQA sets limits on the authority of the Commission and the Department, and that it would be inappropriate to include additional limitations on such authority in the regulations that go beyond the scope of the WQA. Tr. Vol 3, 594:14-20, 595:20-596:20, 622:18-623:4.

William C. Olson

Mr. Olson opposed USAF/DoD's proposal. He testified that there is no statutory exemption in the WQA for federal activities, that some RCRA sites have operational discharge permits issued under Commission rules and that the state needs to protect its interests in preventing and abating

water pollution in New Mexico pursuant to its statutory authority. Olson Rebuttal Testimony, WCO Rebuttal Exhibit 1, pg. 3; and pgs. 5-6; and Olson Testimony Tr. vol. 3, pg. 706, line 21 to pg. 708, line 4 and *William C. Olson Statement of Reasons* pp. 16-17.

20.6.2.3106 NMAC

1. NMED

A. *NMED's Proposed Language*

20.6.2.3106 APPLICATION FOR DISCHARGE PERMITS, RENEWALS, AND MODIFICATIONS:

A. Any person who, before or on June 18, 1977, is discharging any of the water contaminants listed in 20.6.2.3103 NMAC or any toxic pollutant so that they may move directly or indirectly into ground water shall, within 120 days of receipt of written notice from the secretary that a discharge permit is required, or such longer time as the secretary shall for good cause allow, submit a discharge plan to the secretary for approval; such person may discharge without a discharge permit until 240 days after written notification by the secretary that a discharge permit is required or such longer time as the secretary shall for good cause allow.

B. Any person who intends to begin, after June 18, 1977, discharging any of the water contaminants listed in 20.6.2.3103 NMAC or any toxic pollutant so that they may move directly or indirectly into ground water shall notify the secretary giving the information enumerated in Subsection B of 20.6.2.1201 NMAC; the secretary shall, within 60 days, notify such person if a discharge permit is required; upon submission of a discharge plan, the secretary shall review the discharge plan pursuant to 20.6.2.3108 and 20.6.2.3109 NMAC. For good cause shown the secretary may allow such person to discharge without a discharge permit for a period not to exceed 120 days.

C. Any person who intends to modify the discharge of any of the water contaminants listed in 20.6.2.3103 NMAC or any toxic pollutant in a manner that is a discharge permit modification as defined in this part shall submit a discharge plan for modification that contains the information required in Subsection D of 20.6.2.3106 NMAC; upon submission of a discharge plan for modification, the secretary shall review the discharge plan for modification pursuant to 20.6.2.3108 and 20.6.2.3109 NMAC.

[~~C.~~]D. A proposed discharge plan shall set forth in detail the methods or techniques the discharger proposes to use or processes expected to naturally occur which will ensure compliance with this part. At least the following information shall be included in the plan:

(1) quantity, quality and flow characteristics of the discharge;

(2) location of the discharge and of any bodies of water, watercourses and ground water discharge sites within one mile of the outside perimeter of the discharge site, and existing or proposed wells to be used for monitoring;

(3) depth to and TDS concentration of the ground water most likely to be affected by the discharge;

(4) flooding potential of the site;

(5) location and design of site(s) and method(s) to be available for sampling, and for measurement or calculation of flow;

(6) depth to and lithological description of rock at base of alluvium below the discharge site if such information is available;

(7) any additional information that may be necessary to demonstrate that the discharge permit will not result in concentrations in excess of the standards of 20.6.2.3103 NMAC [~~or the presence of any toxic pollutant~~] at any place of withdrawal of water for present or reasonably foreseeable future use; detailed information on site geologic and hydrologic conditions may be required for a technical evaluation of the applicant's proposed discharge plan; and

(8) additional detailed information required for a technical evaluation of underground injection control wells as provided in 20.6.2.5000 through 20.6.2.5399 NMAC.

[~~D.~~]E. An applicant for a discharge permit shall pay fees as specified in 20.6.2.3114 and 20.6.2.5302 NMAC.

[~~E.~~]F. An applicant for a permit to dispose of or use septage or sludge, or within a source category designated by the commission, may be required by the secretary to file a disclosure statement as specified in 74-6-5.1 of the Water Quality Act.

[~~F.~~]G. If the holder of a discharge permit submits an application for discharge permit renewal at least 120 days before the discharge permit expires, and the discharger is not in violation of the discharge permit on the date of its expiration, then the existing discharge permit for the same activity shall not expire until the application for renewal has been approved or disapproved. A discharge permit continued under this provision remains fully effective and enforceable. An application for discharge permit renewal must include and adequately address all of the information

necessary for evaluation of a new discharge permit. Previously submitted materials may be included by reference provided they are current, readily available to the secretary and sufficiently identified to be retrieved.

B. *NMED's Basis for Proposed Language*

The Department proposed changes to 20.6.2.3106.C NMAC that would add "Modifications" to the title of that section. Department witness Kurt Vollbrecht testified that the existing rule does not indicate what information is required for submittal of an application for a discharge permit modification, and no mention of the process for Secretary review of such an application. The Department's proposed changes would address that issue. Tr. Vol. 4, 1007:25-1008:19.

C. *Other Parties' Responses to NMED's Proposal*

William C. Olson

Mr. Olson supported NMED's proposed language. *Olson Closing Argument* pgs. 7-8 and *Olson Statement of Reasons* pg. 8.

20.6.2.3108.A NMAC

1. NMED

A. *NMED's Proposed Language*

20.6.2.3108 PUBLIC NOTICE AND PARTICIPATION:

A. Within 15 days of receipt of an application for a discharge permit, modification or renewal, the department shall review the application for administrative completeness. To be deemed administratively complete, an application shall provide all of the information required by Paragraphs (1) through (5) of Subsection F of 20.6.2.3108 NMAC and shall indicate, for department approval, the proposed locations and newspaper for providing notice required by Paragraphs (1) and (4) of Subsection B or Paragraph (2) of Subsection C of 20.6.2.3108 NMAC. The department shall notify the applicant in writing when the application is deemed administratively complete. If the department determines that the application is not administratively complete, the department shall notify the applicant of the deficiencies in writing within [~~15~~]30 days of receipt of the application and state what additional information is necessary.

B. *NMED's Basis for Proposed Language*

The Department proposed changes to 20.6.2.3108.A NMAC that would extend the time period for the Department to determine that an application for a discharge permit is administratively incomplete and notify an applicant for a discharge permit that additional information is required from 15 days to 30 days. Tr. Vol. 551:19-552:20. No other party took a position these proposed changes.

C. *Other Parties' Responses to NMED's Proposal*

William C. Olson

Mr. Olson supported NMED's proposed language. *Olson Closing Argument* pgs. 7-8 and *Olson Statement of Reasons* pg. 8.

20.6.2.3108.H through N NMAC[5]

1. NMED

A. *NMED's Proposed Language*

20.6.2.3108 PUBLIC NOTICE AND PARTICIPATION:

* * *

H. Within 60 days after the department makes its administrative completeness determination and all required technical information is available, the department shall make available a ~~proposed approval or disapproval of the~~ draft permit or a notice of intent to deny an application for a discharge permit, modification or renewal~~, including conditions for approval proposed by the department or the reasons for disapproval~~. A draft permit for a permit modification shall only include those permit conditions proposed to be modified.

I. The department shall prepare a fact sheet for every draft permit for a discharge at a federal facility, except for discharges comprised solely of domestic liquid waste, and for other draft permits as determined by the Secretary. The fact sheet shall include:

(1) the information in Paragraphs 1 - 4 of Subsection F of 20.6.2.3108 NMAC;

(2) the information in Subsection J of 20.6.2.3108 NMAC; and

(3) a brief summary of the basis for the draft permit conditions, including references to applicable statutory or regulatory provisions and appropriate supporting references to the administrative record.

[~~(1)~~]J. The department shall mail by certified mail a copy of the ~~proposed approval~~ draft permit and fact sheet or notice of intent to deny ~~or notice of proposed disapproval~~ to the applicant and shall provide notice of the draft permit or the notice of intent to deny ~~proposed approval or disapproval of the application for a discharge permit, modification or renewal~~ by:

(1) posting on the department's website;

(2) publishing notice in a newspaper of general circulation in this state and a newspaper of general circulation in the location of the facility;

(3) mailing or e-mailing to those persons on a facility-specific mailing list;

(4) mailing to any affected local, state, or federal governmental agency, ditch associations and land grants, as identified by the department; and

(5) mailing to the governor, chairperson, or president of each Indian tribe, pueblo or nation within the state of New Mexico, as identified by the department.

[~~I.~~]K. The public notice issued under Subsection H shall include the information in Subsection F of 20.6.2.3108 NMAC and the following information:

(1) a brief description of the procedures to be followed by the secretary in making a final determination;

(2) a statement of the comment period and description of the procedures for a person to request a hearing on the application; and

(3) the address, ~~and~~ telephone number, and email address at which interested persons may obtain a copy of the draft permit and fact sheet or the notice of intent to deny ~~proposed approval or disapproval of an application for a discharge permit, modification or renewal~~.

[~~J.~~]L. In the event that the draft permit or notice of intent to deny ~~proposed approval or disapproval of an application for a discharge permit, modification or renewal~~ is available for review within 30 days of deeming the application administratively complete, the department may combine the public notice procedures of Subsections E and H of 20.6.2.3108 NMAC.

[~~K.~~]M. Following the public notice of the draft permit or notice of intent to deny ~~proposed approval or disapproval of an application for a discharge permit, modification or renewal~~, and prior to a final decision by the

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[5] NMED reorganized Section 20.6.2.3108 in its Second Corrected NMED Exhibit 43 for clarity and ease of reference. This reorganization broke up Subsection H into two subsections - Subsection H and new subsection I. References in the record to subsection 20.6.2.3108.H(1) now relate to Subsection 20.6.2.3108.H, and references to subsection 20.6.2.3108.H(2) NMAC now relate to new subsection 20.6.2.3108.I NMAC.

secretary, there shall be a period of at least 30 days during which written comments may be submitted to the department and/or a public hearing may be requested in writing. The 30-day comment period shall begin on the date of publication of notice in the newspaper. All comments will be considered by the department. Requests for a hearing shall be in writing and shall set forth the reasons why a hearing should be held. A public hearing shall be held if the secretary determines there is substantial public interest. The department shall notify the applicant and any person requesting a hearing of the decision whether to hold a hearing and the reasons therefore in writing.

[~~L.~~]N. If a hearing is held, pursuant to Subsection M of 20.6.2.3108 NMAC, notice of the hearing shall be given by the department at least 30 days prior to the hearing in accordance with Subsection H of 20.6.2.3108 NMAC. The notice shall include the information identified in Subsection F of 20.6.2.3108 NMAC in addition to the time and place of the hearing and a brief description of the hearing procedures. The hearing shall be held pursuant to 20.6.2.3110 NMAC.

B. NMED's Basis for Proposed Language

The Department proposed changes in response to LANS' proposal that would limit the requirement for the Department to issue fact sheets to draft permits for discharges at federal facilities, except for discharges comprised solely of domestic liquid waste, and for other facilities as determined by the Secretary. These changes were included in NMED Exhibit 43. Tr. Vol. 3, 549:10-550:7.

2. LANS

A. *LANS' Position on NMED's Proposed Language*

LANS did not oppose NMED's proposed amendments to the introductory paragraph of 20.6.2.3108(H), including NMED's proposal to move a portion of the introductory paragraph to a newly proposed subsection I (formerly proposed section H(2)) (included in LANS proposed amendments as H(3) to account for LANS' proposed amendment to add a subsection confining imposed effluent limitations and other conditions to pollutants with a reasonable potential to cause or contribute to concentrations in excess of applicable standards). *See* discussion below addressing LANS' proposed amendments to 20.6.2.3108.H.

LANS did not oppose NMED's proposed subsection H(1), but asserted that an additional requirement to include with the fact sheet calculations or other necessary explanation of the derivation of specific effluent limitations and other conditions with citations to the regulations

demonstrating why those conditions or limitations are necessary, was necessary and should be added. *See* discussion below addressing LANS' proposed amendment to include 20.6.2.3108.H(2)(d).

B. LANS' Proposed Alternative Language

H. Within 60 days after the department makes its administrative completeness determination and all required technical information is available, the department shall make available a ~~proposed approval or disapproval of the~~ draft permit or a notice of intent to deny an application for a discharge permit, modification or renewal~~, including conditions for approval proposed by the department or the reasons for disapproval~~. The draft permit shall include all proposed effluent limitations or other conditions on the proposed discharge, and all proposed monitoring, recordkeeping and reporting requirements. The proposed effluent limitations or conditions on the proposed discharge, and proposed monitoring conditions shall apply only to those pollutants that the department determines are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any standard of 20.6.2.3103 NMAC.

I. The department shall prepare a fact sheet for every draft permit for a discharge at a federal facility, except for discharges comprised solely of domestic liquid waste, and for other draft permits as determined by the Secretary. The fact sheet shall include:

(1) the information in Paragraphs 1 - 4 of Subsection F of 20.6.2.3108 NMAC;

(2) the information in Subsection J of 20.6.2.3108 NMAC; and

(3) a brief summary of the basis for the draft permit conditions, including references to applicable statutory or regulatory provisions and appropriate supporting references to the administrative record.

(4) Any calculations or other necessary explanation of the derivation of specific effluent limitations and other conditions, including a citation to the applicable regulations or standards and reasons why they are applicable.

C. LANS' Basis for Proposed Alternative Language

Section H

LANS explained that in its experience, even after submission of detailed process information and data showing the type and quantity of constituents within a proposed discharge demonstrates the absence or de minimis presence of many of the listed contaminants, the Department includes conditions in discharge permits and requires broad sampling and analysis for all contaminants listed in 20.6.2.3103 and all toxic pollutants. *See* Tr. Vol. 3 at 552-554.

LANS argued that tailoring permit requirements for monitoring, recordkeeping, and reporting requirements to contaminants that have been identified as having a reasonable potential of being present in the effluent and could cause or contribute to concentrations in excess of applicable standards is consistent with the provisions in the Water Quality Act, NMSA 1978, §

74-6-5.D (2009), that permit conditions must be "reasonable and necessary to ensure compliance with the Water Quality Act and applicable regulations, considering site-specific conditions" and efficient for the permittee and the Department. *See* Tr. Vol. 3 at 553-554; Written Direct Testimony of Robert S. Beers, Pleading Log No. 52 at 10. It would also eliminate unnecessary sampling and analysis of results without any increased threat to the environment. *See* Written Direct Testimony of Robert S. Beers, Pleading Log No. 52 at 10.

LANS asserted that using reasonable potential to constrain effluent limitations is consistent with EPA's approach to NPDES permits under the federal Clean Water Act ("CWA"). LANS Closing Argument at 19-20.

Section I

LANS asserted that including calculations and other information in fact sheets for draft permits increases transparency and helps applicants, permitees, and the public understand the source or derivation of effluent limits and other conditions set forth in a proposed discharge permits. *See* Tr. Vol. 3 at 559: 2-5. LANS submitted that including this information in fact sheets for draft permits also ensures that knowledge transfers with personnel turnover at NMED or permitted facility and creates a more defensible administrative record in the event a discharge permit is challenged. *See* Written Direct Testimony of Robert S. Beers, Pleading Log No. 52 at 11; Tr. Vol. 3 at 560: 6-10.

LANS further asserted that because NMED is required to consider the basis for approval or disapproval, the conditions included in the permit and the reasons for the conditions, and/or the quantity and quality of the effluent before granting or denying any discharge permit application, requiring this information to be provided to the permittee and public would not impose any undue

additional burden on NMED. *See* Written Direct Testimony of Robert S. Beers, Pleading Log No. 52 at 12; Tr. Vol. 3 at 562: 5-7.

Finally, LANS asserted that inclusion of this information in fact sheets for draft permits is consistent with EPA's approach to draft NPDES permits. 40 CFR 124.56(a).

D. Other Parties' Responses to LANS' Position/Proposal

NMED

Ms. Hunter testified that, while the Department supported LANS' reasoning behind its proposed changes, those changes were too broad, and would significantly increase the time needed to process permit applications and issue draft permits. NMED's Closing Argument and Proposed Statement of Reasons, ¶¶ 71-74; Tr. Vol. 3, 549:13-550:7. On cross examination, Mr. Beers acknowledged that he was not familiar with the budget of the Department's Pollution Prevention Section, and that in the case of hearings on discharge permits applicants are able to question the Department regarding the basis of the proposed permit conditions. Tr. Vol. 3, 561:5-563:19.

3. William C. Olson

A. *William C. Olson's Position on Department's Proposed Language*

Mr. Olson supported NMED's proposed language. *Olson Closing Argument* pgs. 7-8 and *Olson Statement of Reasons* pg. 8.

20.6.2.3109 NMAC

1. NMED

A. *NMED's Proposed Language*

20.6.2.3109 SECRETARY APPROVAL, DISAPPROVAL, MODIFICATION OR TERMINATION OF DISCHARGE PERMITS, AND REQUIREMENT FOR ABATEMENT PLANS:

* * *

B. The secretary shall, within 30 days after the administrative record is complete and all required information is available, approve, approve with conditions or disapprove the proposed discharge permit, modification or renewal based on the administrative record. The Secretary shall issue a response to comments which shall specify which provisions, if any, in the draft permit were changed and the reasons for the change, and shall briefly describe and respond to all significant comments on the draft permit raised during the public comment period or at any hearing. The secretary shall notify ~~give written notice of the action taken to~~ the applicant or permittee by certified mail of the action taken and the reasons for such action and shall include a copy of the response to comments. ~~and any other person~~ Notice shall also be given by mail or email to persons who participated in the permitting action ~~who requests a copy in writing~~.

* * *

E. If data submitted pursuant to any monitoring requirements specified in the discharge permit or other information available to the secretary indicates that this part is being or may be violated or that the standards of 20.6.2.3103 NMAC are being or will be exceeded[~~, or a toxic pollutant as defined in 20.6.2.7 NMAC is present,~~] in ground water at any place of withdrawal for present or reasonably foreseeable future use, or that the water quality standards for interstate and intrastate streams in New Mexico are being or may be violated in surface water, due to the discharge, except as provided in Subsection D of 20.6.2.3109 NMAC.

* * *

(4) If a discharge permit is terminated, the secretary shall notify the permittee by certified mail of the action taken and the reasons for that action. Notice of the termination shall also be given by mail or electronic mail to persons who participated in the permitting action and to those persons on the facility-specific list maintained by the department.

B. *NMED's Basis for Proposed Language*

In response to a proposal by LANS, the Department proposed language, to be codified at 20.6.2.3109.B NMAC, providing for a response to comments received by the Department within 30 days of the issuance of draft permits. Ms. Hunter testified that the Department agreed with the reasoning of LANS' proposal regarding a response to comments, but was proposing its own language. Tr. Vol. 3, 570:13-24; NMED Exhibit 43, p. 29. LANS agreed with the Department's language and did not offer additional testimony on it at the hearing. Tr. Vol. 3, 571:10-14.

William C. Olson testified that the Department's proposal incorporated a proposal he had previously submitted, and that he now concurs with the revisions to 20.6.2.3109 NMAC as proposed by the Department. Tr. Vol. 3, 572:8-14.

The Department also proposed language, to be codified as 20.6.2.3109.E(4) NMAC, clarifying the notice provided with respect to termination of discharge permits to track more closely with the Water Quality Act. Tr. Vol. 3, 570:6-12; *Hunter Direct*, 6:17-23.

20.6.2.3112 NMAC

1. NMED

A. *NMED's Proposed Language*

20.6.2.3112 APPEALS OF SECRETARY'S DECISIONS:

* * *

B. If the secretary determines that a discharger is not exempt from obtaining a discharge permit, or that the material to be discharged contains any toxic pollutant [~~as defined~~]listed in 20.6.2.7 NMAC, which is not included in the numerical standards of Subsection A(1) of 20.6.2.3103 NMAC, then the discharger may appeal such determination by filing with the commission's secretary a notice of appeal to the commission within thirty days after receiving the secretary's written determination, and the appeal therefrom and any action of the commission thereon shall be in accordance with the provisions of Sections 74-6-5(O), (P), (Q), (R) and (S) NMSA 1978.

B. *NMED's Basis for Proposed Language*

The Department proposed clerical changes to 20.6.2.3112.B NMAC to align with the Department's proposal to move the narrative standard for toxic pollutants from 20.6.2.7 NMAC to 20.6.2.3103.A(2) NMAC. *See* NMED Exhibit 43. No other party took a position on these proposed changes.

20.6.2.3114 NMAC

1. NMED

A. *NMED's Proposed Language*

20.6.2.3114 TABLE 1 (gpd=gallons per day)	**Permit Fee**
Agriculture <10,000 gpd	$ 1,150
Agriculture 10,000 to 49,999 gpd	$ 2,300
Agriculture 50,000 to 99,999 gpd	$ 3,450
Agriculture 100,000 gpd or greater	$ 4,600
Domestic Waste <10,000 gpd	$ 1,150
Domestic Waste 10,000 to 49,999 gpd	$ 2,300
Domestic Waste 50,000 to 99,999 gpd	$ 3,450
Domestic Waste 100,000 to 999,999 gpd	$ 4,600
Domestic Waste 1,000,000 to 9,999,999 gpd	$ 7,000
Domestic Waste 10,000,000 gpd or greater	$ 9,200
Food Processing <10,000 gpd	$ 1,150
Food Processing 10,000 to 49,999 gpd	$ 2,300
Food Processing 50,000 to 99,999 gpd	$ 3,450
Food Processing 100,000 to 999,999 gpd	$ 4,600
Food Processing 1,000,000 or greater	$ 7,000
Grease/Septage surface disposal <10,000 gpd	$ 1,725
Grease/Septage surface disposal 10,000 gpd or greater	$ 3,450
Industrial <10,000 gpd; or <10,000 yd^3 of contaminated solids	$ 1,725
Industrial 10,000 to 99,999 gpd; or 10,000 to 99,999 yd^3 of contaminated solids	$ 3,450
Industrial 100,000 to 999,999 gpd; or 100,000 to 999,999 yd^3 of contaminated solids or greater	$ 6,900
Industrial 1,000,000 gpd or greater; or 1,000,000 yd^3 of contaminated solids or greater	$10,350
Discharge of remediation system effluent - remediation plan approved under separate regulatory authority	$ 1,600
Mining dewatering	$ 3,250
Mining leach dump	$13,000
Mining tailings	$13,000
Mining waste rock	$13,000
Mining in-situ leach (except salt) and old stope leaching	$13,000
Mining other (mines with minimal environmental impact, post closure operation and maintenance, evaporation lagoons and land application at uranium mines)	$ 4,750
Gas Compressor Stations 0 to 1000 Horsepower	$ 400
Gas Compressor Stations >1001 Horsepower	$ 1,700
Gas Processing Plants	$ 4,000
Injection Wells: Class I (non-hazardous)	$ 4,500
Injection Wells: Class III and Geothermal	$ 1,700
Oil and Gas Service Companies	$ 1,700
Refineries	$ 8,400

Crude Pump Station	$ 1,200
Underground Gas Storage	$ 1,700
Abatement of ground water and vadose zone contamination [~~at oil and gas Sites~~]	$ 2,600
General permit	$ 600

B. ***NMED's Basis for Proposed Language***

The Department proposed clerical changes to 20.6.2.3114, Table 1 NMAC, to align with the Department's proposed changes to the abatement regulations at 20.6.2.4103.A NMAC. *See* Corrected NMED Exhibit 43. No other party took a position on these proposed changes.

20.6.2.4103.A and B NMAC

1. NMED

A. *NMED's Proposed Language*

20.6.2.4103 ABATEMENT STANDARDS AND REQUIREMENTS:

A. The vadose zone shall be abated as follows:

(1) [~~so that~~]water contaminants in the vadose zone shall not be capable of contaminating ground water or surface water, in excess of the standards in Subsections B and C below, through leaching, percolation or as the water table elevation fluctuates; and

(2) any constituent listed in 20.6.2.3103 NMAC or any toxic pollutant in the vadose zone shall be abated so that it is not capable of endangering human health due to inhalation of vapors that may accumulate in structures, utility infrastructure, or construction excavations.

B. Ground water pollution at any place of withdrawal for present or reasonably foreseeable future use, where the TDS concentration is 10,000 mg/L or less, shall be abated to meet the standards of Subsections A, B, and C of Section 20.6.2.3103 NMAC:[~~conform to the following standards:~~

~~(1) toxic pollutant(s) as defined in Section 20.6.2.1101 NMAC shall not be present; and~~

~~(2) the standards of Section 20.6.2.3103 NMAC shall be met.~~]

B. *NMED's Basis for Proposed Language*

NMED proposed to add a new subsection dealing with abatement of subsurface water contaminants, to be codified as 20.6.2.4103.B NMAC. Amended NMED Exhibit 36, p. 35. NMED supported this amendment through the testimony of its Chief Scientist, Dennis McQuillan; Ground Water Bureau Chief, Michelle Hunter; and Expert Witness, Dr. Blayne Hartman. Tr. Vol. 4, 901:15-922:22. NMED Exhibit 5, Written Direct Testimony of Dennis McQuillan *McQuillan Direct*, 39:3-46:20; *Hunter Direct*, 3:13-4:2, 7:3-8:8; NMED Exhibit 11, Written Direct Testimony – Blayne Hartman, Ph.D ("*Hartman Direct*").

The testimony of Dr. Hartman defined vapor intrusion, discussed the current state of the science on vapor intrusion, noted that 29 states have policies regarding regulation of the vapor intrusion pathway, and concluded by stating "[R]egulatory agencies with the authority to require environmental cleanup should have the regulatory authority to require cleanup of this environmental pathway that impacts human health so readily." *Hartman Direct*. Dr. Hartman was unable to attend the public hearing due to a family medical emergency, but no party objected to

the admission of his resume (NMED Exhibit 10) and written direct testimony (NMED Exhibit 11). Tr. Vol. 4, 900:10-22.

Ms. Hunter testified that NMED's proposal expressly included oversight of volatilization of vapor-phase pollution from subsurface impacts, and that the protection of subsurface waters as proposed by NMED included all subsurface water in the vadose zone. Ms. Hunter testified that the Commission's abatement regulations had been adopted in 1995, prior to the general understanding of vapor intrusion as a pathway requiring oversight, and had not been substantially updated since, therefore the need now to re-establish New Mexico as a leader in the regulatory protection of groundwater via the adoption of specific regulatory authority over the vapor intrusion pathway. Tr. Vol. 4, 920:11-922:2. *Hunter Direct*, 3:13-4:2, 7:3-8:8.

Mr. McQuillan testified as to the definitions of water, including groundwater and subsurface water, as defined in the WQA; the authority in the WQA to "injure human health, animal or plant life or property, or unreasonably interfere with the public welfare or the use of property" upon which NMED's proposal was based; provided multiple examples of such occurrences which had taken place in New Mexico in the preceding 30 years; and addressed a number of points in NMMA's written testimony regarding the impacts of subsurface water contaminants on crops and animals. Tr. Vol. 4, 901:19-919:23; *McQuillan Direct*, 39:3-46:20.

NMMA was the only party to present testimony opposing NMED's proposal. Tr. Vol. 4, 970:17-985:12; NMMA Rebuttal Exhibit H, Rebuttal Testimony of Daniel Stephens/Neil Blandford. NMMA also cross-examined the Department's witnesses. TR Vol 4, 928-961. After the public hearing, NMED and NMMA agreed to an amendment of 20.6.2.4103.A NMAC, in place of NMED's proposed 20.6.2.4103.B NMAC. In their respective proposed Statements of Reasons, each party included this amended 20.6.2.4103.A NMAC, which added the phrase "[A]ny

constituent listed in 20.6.2.3103 NMAC or any toxic pollutant in the vadose zone shall be abated so that it is not capable of endangering human health due to inhalation of vapors that may accumulate in structures, utility infrastructure, or construction excavations." Second Corrected NMED Exhibit 43.

2. Laun-Dry

A. Laun-Dry Position on NMED's Proposed Language

Laun-Dry proposed an additional provision at 20.6.2.4103.B(2) NMAC.

B. Laun-Dry's Proposed Alternative Language

B. Ground water pollution at any place of withdrawal for present or reasonably foreseeable future use, where the TDS concentration is 10,000 mg/L or less, shall be abated to meet the standards of Subsections A, B, or C of Section 20.6.2.3103 NMAC or background concentration as set forth in 20.6.2.4101.B shall be met. The existing conditions including existing ph as set forth in 20.6.2.3101 and 3103 shall not be used for purposes of abatement pursuant to 20.6.2.4103 NMAC.

C. Laun-Dry's Basis for Proposed Alternative Language

Laun-Dry argued that the term "existing condition" has been interpreted as synonymous with "background" from a regulatory standpoint to date, and that "existing condition" is a phrase that principally applies to discharge plans pursuant to 20.6.2.3103 NMAC. Tr. Vol. 3, 792. Laun-Dry posited a hypothetical where background is assumed at 300 parts/ billion TCE, but a downstream responsible party leaching into groundwater at 200 parts/billion TCE can continue indefinitely polluting. Laun-Dry argued that because such unauthorized discharge is deemed an "existing condition," that party only has to clean to background, and that party can thus close its site. Tr. Vol. 1, 61:12-64:25.

Laun-Dry submitted that the application of 20.6.2.4103.B NMAC as currently applied is problematic where multiple sources of contamination are involved because another responsible party downstream does not necessarily clean up man-made, non-natural conditions. *Id.* As a result, Laun-Dry argued that background should be used as the remediation standard rather than "existing

condition," because a path to exit abatement as expeditiously as possible is a goal of the regulations *see* 20.6.2.4106.C NMAC, as opposed to a scenario where 90 % abatement is achieved but sampling goes on indefinitely, which Laun-Dry claimed is a significant possibility where an upstream responsible party is cleaning to background synonymous with existing condition, and given migration, fate and transport of other multiple sources of contamination at other relevant sites deemed closed by NMED. *Id.*

Laun-Dry's full argument and basis for its proposed changes to this section appear in the Record in the following places: Laun-Dry NOI, *Summary of Jay Snyder's Technical Testimony*, at p. 4; Tr. Vol. 1, 59:22-65:1; Tr. Vol. 3:790-799:19.

D. Other Parties' Responses to Laun-Dry's Position/Proposal

NMED

NMED did not necessarily disagree with the concepts articulated by Laun-Dry, but maintained that those changes were unnecessary due to the Department's proposed language in 20.6.2.4103.B NMAC stating that ground water pollution shall be abated to meet the standards of Subsections A, B, and C of Section 20.6.2.3103 NMAC, thereby excluding the reference to "existing concentrations" in the preamble to that section. In addition, NMED argued that 20.6.2.4101.B NMAC establishes that background is the appropriate standard for abatement purposes in the event background exceeds the standards of 20.6.2.4103. A and B NMAC. *Vollbrecht Rebuttal*, p. 17.

NMMA

NMMA opposed Laun-Dry's proposal to eliminate the "existing conditions" language because it has always been an integral part of the standards in 20.6.2.3103 NMAC and is intended to clarify that a discharger is not responsible for contamination that existed when that discharger's

activities commenced. Testimony of Michael Neumann, NMMA Exhibit E, pp. 9-10. See Tr. Vol 3 pp. 800-801 (cross-examination of Jay Snyder).

3. William C. Olson

A. *William C. Olson's Position on Department's Proposed Language*

Mr. Olson supported NMED's proposed language. *Olson Closing Argument* pgs. 7-8 and *Olson Statement of Reasons* pg. 8.

20.6.2.4103.D and E(1)(d) NMAC[6]

1. NMED

A. *NMED's Proposed Language*

20.6.2.4103 ABATEMENT STANDARDS AND REQUIREMENTS:

* * *

D. Subsurface water and surface water abatement shall not be considered complete until a minimum of eight (8) consecutive [~~quarterly samples~~] sampling events collected from all compliance sampling stations approved by the secretary, with a minimum of ninety (90) days between sampling events spanning a time period no greater than four (4) years, meet the abatement standards of Subsections A, B, and C of this section. Abatement of water contaminants measured in solid-matrix samples of the vadose zone shall be considered complete after one-time sampling from compliance stations approved by the secretary.

* * *

E. Alternative Abatement Standards: If the person abating water pollution pursuant to an approved abatement plan, or pursuant to the exemptions of 20.6.2.4105 NMAC, is unable to fully meet an abatement standard set forth in Subsections A and C of this section, the person may file a petition with the commission seeking approval of an alternative abatement standard.

(1) A petition for an alternative abatement standard shall demonstrate at least one of the following criteria:

* * *

(d) compliance with the standard set forth in Subsections A and B of this section is technically infeasible following the maximum use of commercially accepted abatement technology, as demonstrated by a statistically valid extrapolation of the decrease in concentration of any water contaminant over a twenty (20) year period, such that projected future reductions during that time would be less than 20 percent of the concentration at the time technical infeasibility is proposed. Technical infeasibility proposals that involved the use of experimental abatement technology shall be considered at the discretion of the commission. A statistically valid decrease cannot be demonstrated by fewer than eight (8) consecutive sampling events. Sampling events demonstrating a statistically valid decrease shall be collected with a minimum of ninety (90) days between sampling events, and shall not span a time period greater than four (4) years.

B. NMED's Basis for Proposed Language

The Department proposed changes to 20.6.2.4103.D and E(1)(d) NMAC regarding the sampling frequency required for demonstrating completion of abatement and technical infeasibility. Mr. Vollbrecht testified that at many sites under abatement, the frequency of

[6] The subsection lettering in 20.6.2.4103 NMAC has changed from what was referred to in testimony and at the hearing, based on the compromise language reached by NMED and NMMA in the earlier subsections that eliminated a proposed new subsection B. Thus, what is referred to as "20.6.2.4103.D" in this report was referred to in testimony and at the hearing as "20.6.2.4013.E," and what is referred to in this report as "20.6.2.4013.E" was referred to in testimony and at the hearing as "20.6.2.4103.F," and on down the remaining subsections.

sampling has been reduced over time because of a lack of change in the analytical data over time. A site nearing the end of abatement has typically been under abatement for many years and there is often no shortage of data available. However, the requirement for eight consecutive quarterly samples of data for closing out the site can mean that the applicant must go back and sample for an additional two years on a quarterly basis not because such additional data is needed, but simply to meet the technical requirement of the rule. Tr. Vol. 4, 834:9-835:4; *Vollbrecht Direct*, 18:11-17. The Department asserted that its proposed changes to 20.6.2.4103.D and E(1)(d) NMAC address this issue by still requiring eight consecutive samples, but expanding the time period over which those samples may be collected. Tr. Vol. 4, 835:5-8.

2. AB/GRIP

A. *AB/GRIP Position on Department's Proposed Language*

AB/GRIP opposed the Department's proposed changes to 20.6.2.4103.D and E(1)(d) NMAC.

B. *A/B GRIP Proposed Alternative Language*

20.6.2.4103 ABATEMENT STANDARDS AND REQUIREMENTS:

* * *

F. Alternative Abatement Standards. If a responsible person abating water pollution pursuant to an approved abatement plan is unable to fully meet the abatement standards set forth in Subsections A, B and C of this section the responsible person may propose alternative abatement standards.

(1) At any time [~~during or~~] after the [~~submission~~] implementation of a Stage 2 abatement plan, the responsible person may file a petition seeking approval of alternative abatement standard[~~(s) for the~~] based on compliance with the standard[s] set forth in Subsections A, [~~and~~] B, and C of this section is technically infeasible, as demonstrated by a statistically valid extrapolation of the decrease in concentration of any water contaminant over the remainder of a twenty (20) year period, such that projected future reductions during that time would be less than 20 percent of the concentration at the time technical infeasibility is proposed. A statistically valid decrease cannot be demonstrated by fewer than ten (10) consecutive sampling events. Sampling events demonstrating a statistically valid decrease shall be collected with a minimum of ninety (90) days between sampling events, and shall not span a time period greater than four (4) years and at least one of the following criteria [~~The commission may approve alternative abatement standard(s) if the petitioner demonstrates that~~]:

(a) compliance with the standard set forth in Subsections A, B and C of this section is not feasible by the maximum use of commercially available abatement technology [~~compliance with the abatement standard(s) is/are not feasible, by the maximum use of technology within the economic capability of the responsible person; OR there is no reasonable relationship between the economic and social costs and benefits (including attainment of the standard(s) set forth in Section 20.6.2.4103 NMAC) to be obtained~~];

(b) compliance with the standard set forth in Subsections A, B and C of this section is not feasible by the maximum use of technology within the economic capability of the responsible person [~~the proposed alternative abatement standard(s) is/are technically achievable and cost-benefit justifiable~~]; or [~~and~~]

(c) there is no reasonable relationship between the economic and social costs and benefits of attainment of the standard set forth in Subsections A, B and C of this section [~~compliance with the proposed alternative abatement standard(s) will not create a present or future hazard to public health or undue damage to property~~].

[~~(2) The petition shall be in writing, filed with the secretary. The petition shall specify, in addition to the information required by Subsection A of Section 20.6.2.1210 NMAC, the water contaminant(s) for which alternative standard(s) is/are proposed, the alternative standard(s) proposed, the three-dimensional body of water pollution for which approval is sought, and the extent to which the abatement standard(s) set forth in Section 20.6.2.4103 NMAC is/are now, and will in the future be, violated. The petition may include a transport, fate and risk assessment in accordance with accepted methods, and other information as the petitioner deems necessary to support the petition.~~

~~(3) The commission shall review a petition for alternative abatement standards in accordance with the procedures for review of a variance petition provided in the commission's adjudicatory procedures, 20.1.3 NMAC.~~]

(2) A petition for alternative abatement standards shall specify, in addition to the information required by Subsection A of 20.6.2.1210 NMAC the following:

(a) the water contaminant for which the alternative abatement standard is proposed;

(b) the alternative abatement standard proposed;

(c) the three-dimensional body of water pollution for which approval is sought;

(d) a summary of all actions taken to abate water pollution to standards; and

(e) other information as deemed necessary, which may include a transport, fate and risk assessment in accordance with accepted methods.

(3) The commission may approve an alternative abatement standard if the petitioner demonstrates that:

(a) at least one of the criteria set forth in Paragraph 1 of Subsection E of this Section has been met;

(b) the proposed alternative abatement standard is technically achievable and cost benefit justifiable; and

(c) compliance with the proposed alternative abatement standard will not create a present or future hazard to public health or undue damage to property.

(4) An alternative abatement standard shall only be granted after a public hearing, as required by NMSA 1978, Section 74-6-4(H) of the water Quality Act.

(5) The commission shall review petitions for alternative abatement standards in accordance with the procedures for review of variance petitions provided in the commission's adjudicatory procedures, 20.1.3 NMAC.

[12-1-95, 11-15-96; 20.6.2.4103 NMAC - Rn, 20 NMAC 6.2.IV.4103, 1-15-01]

C. *AB/GRIP Basis for Proposed Alternative Language*

AB/GRIP did not participate in the Joint Proposed Report. Their arguments and testimony regarding the proposed changes to 20.6.2.4103.D and E(1)(d) NMAC and their proposed alternative language can be found in the following parts of the Record:

- AB/GRIP's Proposed Statement of Reasons, p. 38-45, 63-69

- AB/GRIP Notice of Intent to Present Technical Rebuttal Testimony, Exhibit A, Pre-Filed Written Rebuttal Testimony of Kathy J. Martin, PE, at 13-18
- Tr. Vol. 4: 864-875 (testimony of Ms. Martin)

D. ***Other Parties' Responses to AB/GRIP's Proposed Alternative Language***

NMED

The Department opposed AB/GRIP's proposed language for 20.6.2.4103.F(1) and argued in favor of the Department's proposed language for this section for the reasons set forth above.

3. City of Roswell

A. ***Roswell's Position on NMED's Proposed Language***

Roswell stated that it did not necessarily disagree that eight (8) consecutive quarterly samples from all compliance sampling stations could be a precondition to completing abatement, but submitted that the regulation should be revised and amended to allow discretion to the Secretary.

B. Roswell's Proposed Alternative Language

20.6.2.4103 ABATEMENT STANDARDS AND REQUIREMENTS:

* * *

D. Subsurface-water and surface-water abatement shall not be considered complete [~~until a minimum of eight (8) consecutive quarterly samples from all compliance sampling stations approved~~] until sufficient samples from compliance sampling stations as determined by the Ground Water Quality Bureau approved by the secretary meet the abatement standards of Subsections A, B, C and [~~C~~] D of this section. Abatement of water contaminants measured in solid-matrix samples of the vadose zone shall be considered complete after one-time sampling from compliance stations approved by the secretary.

* * *

E. Alternative Abatement Standards: If the person abating water pollution pursuant to an approved abatement plan, or pursuant to the exemptions of 20.6.2.4105 NMAC, is unable to fully meet an abatement standard set forth in Subsections A and C of this section, the person may file a petition with the commission seeking approval of an alternative abatement standard.

(1) A petition for an alternative abatement standard shall demonstrate at least one of the following criteria:

* * *

(d) compliance with the standard set forth in Subsections A and B of this section is technically infeasible, as demonstrated by a statistically valid extrapolation of the decrease in concentration of

any water contaminant over the remainder of a twenty (20) year period, such that projected future reductions during that time would not be substantially less as determined by the Secretary than the concentration at the time technical infeasibility is proposed. A statistically valid decrease can be demonstrated by fewer than eight (8) consecutive sampling events or sufficient sampling as set forth in 20.6.2.4103 (E) subject to the approval of the Secretary in accordance with the provisions of 20.6.2.4103 (E). Sampling events demonstrating a statistically valid decrease shall be collected with a minimum of ninety (90) days between sampling events, and shall not span a time period greater than four (4) years.

C. Roswell's Basis for Proposed Alternative Language

Roswell argued that situations where wells show ground water is clean with no trend above standard should not require additional eight quarters of sampling which is a remnant of discharge permit requirements. Tr. Vol. 1, 52:19-53:4. Roswell's technical witness Jay Snyder, PE ("Snyder"), testified Roswell's proposed language to 20.6.2.4103.D and 20.6.2.4103.F(1)(d) NMAC provided additional alternatives to the NMED in the situation, but not limited to, release after substantial natural attenuation and that additional discretion given to the Department and Secretary would be an overall benefit for the goals of abatement because it would put the hydrology, the release history, the site conceptual model and related factors into a unified context. Tr. Vol. 4, 796: 8-15; 797:4-5.

Snyder also provided public comment and stated that the purpose of 20.6.2.4106.C is to select a remedy in Stage I abatement to proceed expeditiously to Stage II to clean ground water contamination. Tr. Vol. 3, 643:6. Snyder commented that extracted water returned to the aquifer is more desirable because it minimizes consumptive uses, and pointed to permitted class V injection wells as an example, which must comply with discharge permit requirements and are subject to separate hearing and public comment process Tr. Vol. 3, 644-645. Snyder concluded that the expeditious intent to clean ground water contamination under 20.6.24106.C NMAC could be stream lined in one public comment and hearing process regarding class V injection wells. Tr. Vol. 3 646-647.

Upon examination by the Commission, Snyder testified that optimization software allowed for setting appropriate sampling schedules on the basis of statistics to delineate plume dynamics which could mean more or less sampling in a given situation. Tr. Vol. 4, 815-817. Snyder testified 8 consecutive quarters of sampling over a four-year period at a minimum of 90 day intervals as proposed by NMED is an improvement to the current regulations. Tr. Vol. 4, 795.

Mr. Domenici also provided public comment at hearing and stated he had 31 years' experience with abatement on behalf of his clients and commented that the current regulations are not flexible, which negatively impacts real people in diverse situations. Tr. Vol. 3, 654-655. Domenici commented after 1987, the insurance industry does not subsidize clean up upon reliance of the "absolute pollution exclusion" which supports flexibility and discretion needed on the part of the Secretary in appropriate situations. *Id.* Domenici noted technical infeasibility was in fact in the regulations but knew of only two determinations in the last 15 years and was personally involved in the only known alternative abatement standard issued by the Department where a middle-capitalized retiree spent as much as $2 million before that decision regarding previous fruitless attempts to get nitrates below 20 parts per million Tr. Vol. 3, 657-658.

Roswell's full arguments and testimony in support of its proposal can be found in the following parts of the Record: City of Roswell's NOI, *Summary of Jay Snyder's Direct Technical Testimony*, at p. 4-5; Tr. Vol. 3, 642-661; Tr. Vol. 3, 789-799.

D. Other Parties' Responses to Roswell's Position/Proposal

NMED

NMED submitted closing argument requesting the Commission disregard the "public comment" provided by Mr. Domenici at the hearing. *The New Mexico Environment Department's Closing Argument and Proposed Statement of Reasons*, pp. 1-5.

Mr. Vollbrecht testified that he did not necessarily disagree with leaving it to the Secretary's discretion to decide the number of samples that could be used to demonstrate technical infeasibility. Mr. Vollbrecht further testified that the requirement in the current regulations that a demonstration of technical infeasibility must show less than a 20% reduction over 20 years is effective and appropriate. Tr. Vol. 4, 840:20-841:21.

Dairies

Dairies opposed the changes to 20.6.2.4103.D offered by the City of Roswell because the change would allow too much discretion to the Department. Testimony of Eric Palla, Dairies' Exhibit C, page 4.

William C. Olson

Mr. Olson opposed Roswell's proposal. Mr. Olson testified that Roswell has proposed deleting existing 20.6.2.4103.F(1)(d) NMAC language requiring that an alternate standard for technical infeasibility is only applicable at sites where the reduction in the concentration of water contaminants "*would be less than 20 percent of the concentration at the time technical infeasibility is proposed*" and instead replace this with language that allows technical infeasibility in cases where the reduction in the concentration of water contamination is "*substantially*" less. Roswell's proposal also deletes other existing Commission language requiring that a statistically valid decrease "*cannot*" be demonstrated by fewer than 8 consecutive sampling events and instead allows less frequent "*sufficient sampling as set forth in 20.6.2.4103(E)…*". Mr. Olson argued that the language proposed by Roswell is vague and subjective, allows wide variation in criteria for considering technical infeasibility, will lead to disputes over what is "*substantial*", and that there would be no explicit consistent requirement applied from site to site, such that different criteria will be applied to different parties and sites. Mr. Olson also testified about the need for eight

consecutive quarters of sampling in making decisions on abatement closure and that the same arguments he made regarding Roswell's proposed amendments to 20.6.2.4103.E sampling requirements also apply here regarding decisions on technical infeasibility. Olson Rebuttal Testimony, WCO Rebuttal Exhibit 1, pgs. 14-15; and Olson Testimony Tr. vol. 4, pg. 879, line 25 to pg. 881, line 15.

Mr. Olson also submitted closing argument requesting the Commission disregard the "public comment" provided by Mr. Domenici at the hearing. *William C. Olson Closing Argument*, pp. 24-25.

4. William C. Olson

A. *William C. Olson's Position on Department's Proposed Language*

Mr. Olson supported NMED's proposed language. *Olson Closing Argument* pgs. 7-8 and *Olson Statement of Reasons* pg. 8.

20.6.2.4103.E NMAC

1. NMED

A. *NMED's Proposed Language*

[~~E. Technical Infeasibility.~~

~~(1) If any responsible person is unable to fully meet the abatement standards set forth in Subsections A and B of this section using commercially accepted abatement technology pursuant to an approved abatement plan, he may propose that abatement standards compliance is technically infeasible. Technical infeasibility proposals involving the use of experimental abatement technology shall be considered at the discretion of the secretary. Technical infeasibility may be demonstrated by a statistically valid extrapolation of the decrease in concentration(s) of any water contaminant(s) over the remainder of a twenty (20) year period, such that projected future reductions during that time would be less than 20 percent of the concentration(s) at the time technical infeasibility is proposed. A statistically valid decrease cannot be demonstrated by fewer than eight (8) consecutive quarters. The technical infeasibility proposal shall include a substitute abatement standard(s) for those contaminants that is/are technically feasible. Abatement standards for all other water contaminants not demonstrated to be technically infeasible shall be met.~~

~~(2) In no event shall a proposed technical infeasibility demonstration be approved by the secretary for any water contaminant if its concentration is greater than 200 percent of the abatement standard for that contaminant.~~

~~(3) If the secretary cannot approve any or all portions of a proposed technical infeasibility demonstration because the water contaminant concentration(s) is/are greater than 200 percent of the abatement standard(s) for each contaminant, the responsible person may further pursue the issue of technical infeasibility by filing a petition with the commission seeking:~~

~~(a) approval of alternate abatement standard(s) pursuant to Subsection F of this section; or~~

~~(b) granting of a variance pursuant to Section 20.6.2.1210 NMAC.~~

~~F. Alternative Abatement Standards.~~

~~(1) At any time during or after the submission of a Stage 2 abatement plan, the responsible person may file a petition seeking approval of alternative abatement standard(s) for the standards set forth in Subsections A and B of this section. The commission may approve alternative abatement standard(s) if the petitioner demonstrates that:~~

~~(a) compliance with the abatement standard(s) is/are not feasible, by the maximum use of technology within the economic capability of the responsible person; OR there is no reasonable relationship between the economic and social costs and benefits (including attainment of the standard(s) set forth in Section 20.6.2.4103 NMAC) to be obtained;~~

~~(b) the proposed alternative abatement standard(s) is/are technically achievable and cost-benefit justifiable; and~~

~~(c) compliance with the proposed alternative abatement standard(s) will not create a present or future hazard to public health or undue damage to property.~~

~~(2) The petition shall be in writing, filed with the secretary. The petition shall specify, in addition to the information required by Subsection A of Section 20.6.2.1210 NMAC, the water contaminant(s) for which alternative standard(s) is/are proposed, the alternative standard(s) proposed, the three-dimensional body of water pollution for which approval is sought, and the extent to which the abatement standard(s) set forth in Section 20.6.2.4103 NMAC is/are now, and will in the future be, violated. The petition may include a transport, fate and risk assessment in accordance with accepted methods, and other information as the petitioner deems necessary to support the petition.~~

~~(3) The commission shall review a petition for alternative abatement standards in accordance with the procedures for review of a variance petition provided in the commission's adjudicatory procedures, 20.1.3 NMAC.~~]

E. Alternative Abatement Standards: If the person abating water pollution pursuant to an approved abatement plan, or pursuant to the exemptions of 20.6.2.4105 NMAC, is unable to fully meet an abatement standard set forth in Subsections A and C of this section, the person may file a petition with the commission seeking approval of an alternative abatement standard.

(1) A petition for an alternative abatement standard shall demonstrate at least one of the following criteria:

(a) compliance with the standard set forth in Subsections A and B of this section would not be feasible by the maximum use of commercially accepted abatement technology;

(b) compliance with the standard set forth in Subsections A and B of this section would not be feasible by the maximum use of technology within the economic capability of the person;

(c) there is no reasonable relationship between the economic and social costs and benefits of attainment of the standard set forth in Subsections A and B of this section; or

(d) compliance with the standard set forth in Subsections A and B of this section is technically infeasible following the maximum use of commercially accepted abatement technology, as demonstrated by a statistically valid extrapolation of the decrease in concentration of any water contaminant over a twenty (20) year period, such that projected future reductions during that time would be less than 20 percent of the concentration at the time technical infeasibility is proposed. Technical infeasibility proposals that involved the use of experimental abatement technology shall be considered at the discretion of the commission. A statistically valid decrease cannot be demonstrated by fewer than eight (8) consecutive sampling events. Sampling events demonstrating a statistically valid decrease shall be collected with a minimum of ninety (90) days between sampling events, and shall not span a time period greater than four (4) years.

(2) A petition for alternative abatement standards shall specify, in addition to the information required by Subsection A of 20.6.2.1210 NMAC the following:

(a) the water contaminant for which the alternative abatement standard is proposed;

(b) the alternative abatement standard proposed;

(c) the three-dimensional body of water pollution for which approval is sought;

(d) a summary of all actions taken to abate water pollution to standards; and

(e) other information as deemed necessary, which may include a transport, fate and risk assessment in accordance with accepted methods.

(3) The commission may approve an alternative abatement standard if the petitioner demonstrates that:

(a) at least one of the criteria set forth in Paragraph 1 of Subsection E of this Section has been met;

(b) the proposed alternative abatement standard is technically achievable and cost benefit justifiable; and

(c) compliance with the proposed alternative abatement standard will not create a present or future hazard to public health or undue damage to property.

(4) An alternative abatement standard shall only be granted after a public hearing, as required by NMSA 1978, Section 74-6-4(H) of the water Quality Act.

(5) The commission shall review petitions for alternative abatement standards in accordance with the procedures for review of variance petitions provided in the commission's adjudicatory procedures, 20.1.3 NMAC.

B. NMED's Basis for Proposed Language

The Department proposed changes to Subsections 20.6.2.4103.E and F NMAC regarding petitions for alternative abatement standards. Mr. Vollbrecht testified that the current rule allows the Secretary of the Department to grant alternative standards based on technical infeasibility for contaminant concentrations that are less than or equal to 200 percent of the standard, while proposed alternative standards allowing contaminant concentrations above 200 percent of the standard must be considered by the Commission following a public hearing. Tr. Vol. 4, 831:14-

22; *Vollbrecht Direct*, 16:12-16. The Department's proposed changes would eliminate the provisions allowing the Secretary to approve alternative standards based on technical infeasibility where the proposed standard is less than or equal to 200 percent of the existing standard. Instead, all requests for alternative abatement standards would be required to go before the Commission. Tr. Vol. 4, 831:23-832:5; 832:13-25; *Vollbrecht Direct*, 16:5-9.

The Department's proposed changes at 20.6.2.4103.F NMAC would also restructure the four criteria that can be used as the basis for alternative abatement standards so that they are laid out more clearly, and to expressly define technical infeasibility as one of the four possible bases for obtaining an alternative abatement standard. Tr. Vol. 4, 833:1-24. The proposed criteria are set forth in proposed 20.6.2.4103.F(1)(a) through (d) NMAC in NMED Exhibit 43. Tr. Vol. 4, 833:1-24; *Vollbrecht Direct*, 17:3-18:10.

The Department argued that these changes align the Commission's regulations with the WQA, which requires that all requests for variances be decided by the Commission following public notice and a public hearing, and provide greater public notification and opportunity for public participation. The Department further maintained that these changes provide greater clarity while maintaining the existing criteria that must be demonstrated in order to obtain alternative abatement standards. Tr. Vol. 4, 833:25-834:8; *Vollbrecht Direct*, 16:2-17:5.

2. Dairies

A. *Dairies' Position on Department's Proposed Language*

Dairies oppose NMED's proposal to repeal 20.6.2.4103.E of the existing rules, which Dairies claim allow NMED under limited circumstances to make a "technical infeasibility" determination without the need for the Commission to adopt alternative abatement standards.

B. *Dairies Proposed Alternative Language*

Dairies proposed to leave Subsection E of 20.6.2.4103 as is in the existing rule and renumber the other subsections and cross-references as appropriate.

C. *Dairies' Basis for Proposed Alternative Language*

Dairies explained that when the Commission adopted the existing rule, it relied on testimony presented on behalf of the Department distinguishing between a technical infeasibility determination and a variance. Dairies' Written Closing Argument, pages 7-9 (quoting NMED testimony in the 1995 hearing). Dairies argued that NMED has not explained why its position in support of the Commission's adoption of the existing rule is incorrect, how its proposed repeal of the current rule would affect prior determinations made under that rule, or any problems that have been encountered with the existing rule. Dairies provided testimony in support of retaining the existing rule. Testimony of Erica Palla, Dairies Exhibit C, p. 4.

D. *Other Parties' Responses to Dairies' Position/Proposal*

Because Dairies provided their legal argument regarding the existing rule only in their post-hearing submittal, there is no direct response to this argument from NMED or the other parties in the Record. NMED argued that the WQA requires that all variances require a hearing before the commission. NMED stated that its proposal will ensure that there is public notice and a public hearing on all petitions for alternative standards. Tr. Vol. 4, 832:20-25.

3. NMMA

A. *NMMA's Position on NMED's Proposed Language*

NMMA opposed NMED's proposal to repeal 20.6.2.4103.E of the existing rules, which allow NMED under limited circumstances to make a "technical infeasibility" determination without the need for the Commission to adopt alternative abatement standards.

B. NMMA's Proposed Alternative Language

NMMA proposes to leave Subsection E of 20.6.2.4103 as is in the existing rule and renumber the other subsections and cross-references as appropriate.

C. NMMA's Basis for Proposed Alternative Language

NMMA explained that when the Commission adopted the existing rule, it relied on testimony presented on behalf of the Department distinguishing between a technical infeasibility determination and a variance. Dairies' Written Closing Argument, pages 7-9 (quoting NMED testimony in the 1995 hearing). NMMA argued that NMED has not explained why its position in support of the Commission's adoption of the existing rule is incorrect, how its proposed repeal of the current rule would affect prior determinations made under that rule, or any problems that have been encountered with the existing rule. NMMA provided testimony in support of retaining technical infeasibility determinations. Testimony of Michael Neumann, NMMA Exhibit E, p. 9.

D. Other Parties' Responses to NMMA's Position/Proposal

NMED

Because NMMA provided their legal argument regarding the existing rule only in their post-hearing submittal, NMED did not have an opportunity to directly respond to this argument on the record. NMED argued that the WQA requires that all variances require a hearing before the commission. NMED stated that its proposal will ensure that there is public notice and a public hearing on all petitions for alternative standards. Tr. Vol. 4, 832:20-25.

4. William C. Olson

A. *William C. Olson's Position on Department's Proposed Language*

Mr. Olson supported NMED's proposed language. *Olson Closing Argument* pgs. 7-8 and *Olson Statement of Reasons* pg. 8.

20.6.2.4103.E(2)(d) NMAC

1. NMED

A. *NMED's* Proposed Language

20.6.2.4103 ABATEMENT STANDARDS AND REQUIREMENTS:

* * *

E. Alternative Abatement Standards: If the person abating water pollution pursuant to an approved abatement plan, or pursuant to the exemptions of 20.6.2.4105 NMAC, is unable to fully meet an abatement standard set forth in Subsections A and C of this section, the person may file a petition with the commission seeking approval of an alternative abatement standard.

* * *

(2) A petition for alternative abatement standards shall specify, in addition to the information required by Subsection A of 20.6.2.1210 NMAC the following:

(a) the water contaminant for which the alternative abatement standard is proposed;
(b) the alternative abatement standard proposed;
(c) the three-dimensional body of water pollution for which approval is sought;
(d) a summary of all actions taken to abate water pollution to standards; and
(e) other information as deemed necessary, which may include a transport, fate and risk assessment in accordance with accepted methods.

B. *NMED's Basis for Proposed Language*

The Department proposed changes to 20.6.2.4103.E(2)(d) NMAC in response to proposed changes submitted by the Dairies that would allow a person who is abating pursuant to an exemption as set forth in 20.6.2.4105 NMAC to petition for alternative abatement standards without being required to submit a Stage 1 and Stage 2 abatement plan. The Department opposed the specific language proposed by the Dairies, but offered alternative language, which the Dairies indicated that they supported. Tr. Vol. 3, 576:21 to 577:21. The revised language is included in Second Corrected NMED Exhibit 43, in the first paragraph of Subsection E, as subsection F of the current rule would be renumbered to Subsection E as shown in Second Corrected NMED Exhibit 43. Tr. Vol. 4, 836:17-837:14; NMED Exhibit 30, Written Rebuttal Testimony of Kurt Vollbrecht ("*Vollbrecht Rebuttal*"), 16:4-18.

20.6.2.4103.F NMAC

1. NMED

A. *NMED's Proposed Language*

20.6.2.4103 ABATEMENT STANDARDS AND REQUIREMENTS:

* * *

F. For a site where abatement activities include post-completion monitoring, maintenance of engineering controls, remediation systems, affirmation of non-residential use, or port-closure care, institutional controls such as well drilling restrictions under 19.27.5 NMAC, deed restrictions, easements or other legal restrictions binding on successors in interest to the site may be required by the secretary.
[12-1-95, 11-15-96; 20.6.2.4103 NMAC - Rn, 20 NMAC 6.2.IV.4103, 1-15-01; A, XX/XX/18]

B. *NMED's Basis for Proposed Language*

The Department proposed changes to 20.6.2.4103.F NMAC[7] providing for post-closure requirements after remediation is complete. Ms. Hunter testified that New Mexico is the only state in the country without an institutional controls program governing land or property restrictions on parcels of land that have undergone environmental remediation but have not been able to achieve residential standards or risk-based screening levels. Administrative and legal controls can be important tools in helping to minimize the potential for human exposure to contamination or to protect the integrity of the remedy. Tr. Vol. 4, 1001:19-1002:24.

C. *Other Parties' Responses to NMED's Proposal*

William C. Olson

Mr. Olson supported NMED's proposed language. *Olson Closing Argument* pgs. 7-8 and *Olson Statement of Reasons* pg. 8.

[7] This change is referred to in the testimony as occurring at 20.6.2.4103.G, instead of F. Due to renumbering based on other changes, the change now appears at 20.6.2.4103.F.

20.6.2.4104.C NMAC

1. NMED

A. *NMED's Proposed Language*

20.6.2.4104 ABATEMENT PLAN REQUIRED:

A. Unless otherwise provided by this Part, all responsible persons who are abating, or who are required to abate, water pollution in excess of the standards and requirements set forth in Section 20.6.2.4103 NMAC of this Part shall do so pursuant to an abatement plan approved by the secretary. When an abatement plan has been approved, all actions leading to and including abatement shall be consistent with the terms and conditions of the abatement plan.

B. In the event of a transfer of the ownership, control or possession of a facility for which an abatement plan is required or approved, where the transferor is a responsible person, the transferee also shall be considered a responsible person for the duration of the abatement plan, and may jointly share the responsibility to conduct the actions required by this Part with other responsible persons. The transferor shall notify the transferee in writing, at least thirty (30) days prior to the transfer, that an abatement plan has been required or approved for the facility, and shall deliver or send by certified mail to the secretary a copy of such notification together with a certificate or other proof that such notification has in fact been received by the transferee. The transferor and transferee may agree to a designated responsible person who shall assume the responsibility to conduct the actions required by this Part. The responsible persons shall notify the secretary in writing if a designated responsible person is agreed upon. If the secretary determines that the designated responsible person has failed to conduct the actions required by this Part, the secretary shall notify all responsible persons of this failure in writing and allow them thirty (30) days, or longer for good cause shown, to conduct the required actions before issuing a compliance order pursuant to Section 20.6.2.1220 NMAC.

C. [~~If the source of the water pollution to be abated is a facility that operated under a discharge plan, the~~]The secretary may require the responsible person(s) to submit a financial assurance plan which covers the estimated costs to conduct the actions required by the abatement plan. Such a financial assurance plan shall be consistent with any financial assurance requirements adopted by the commission.

D. The Secretary may require an oversight funding agreement with the responsible person for abatement plans which compensates the department for reasonable costs associated with the oversight of activities.

B. NMED's Basis for Proposed Language

The Department proposed changes to 20.6.2.4104.C NMAC that would remove the qualifying language restricting the Department's ability to require financial assurance for abatement. Ms. Hunter testified that the current language only allows the Department to require financial assurance for those sites that operate under a discharge permit. By removing the qualifying language, Ms. Hunter explained that the Department would have the ability to require financial assurance regardless of whether there is a discharge permit associated with a particular site. Tr. Vol. 4, 996:11-20; *Hunter Direct*, 8:18-9:6.

Regarding the basis for these changes, Ms. Hunter testified that the Department has the responsibility to oversee abatement of all impacted groundwater in the state and, regardless of

whether a permit is associated with a site under abatement, the responsible party may become financially insolvent or walk away from sites where there are active monitoring wells or remediation systems. The Department asserted that financial assurance may be necessary so that the State of New Mexico is not saddled with the cost of either abating a site or plugging and abandoning the monitoring or other wells left at those sites. Tr. Vol. 4, 996:9-997:22.

2. Laun-Dry

A. Laun-Dry's Position on NMED's Proposed Language

Laun-Dry opposed the Department's proposed changes to 20.6.2.4104.C NMAC.

B. Laun-Dry's Proposed Alternative Language

Laun-Dry proposed to leave the existing language in place.

C. Laun-Dry's Basis for Proposed Alternative Language

Laun-Dry argued that the requirement of financial assurance on small family type businesses poses a risk that ground water contamination will continue unabated and exacts an unnecessary economic drag on New Mexico and its people. Laun-Dry's technical witness Jay Snyder, PE ("Snyder") testified that requirement of financial assurance would inhibit timely implementation of abatement if applied to low to middle capitalized parties. Tr. Vol. 4 818; Snyder NOI, p. 3. Snyder noted cleanup costs can vary substantially by method of cleanup, and cleanup technologies can change in actions and in increased costs over time. Thus, estimating cleanup costs over time is variable.

Laun-Dry's counsel, Pete. V. Domenici, Jr., Esq. ("Domenici") also provided public comment that he has 31 years of experience with abatement cases and personal knowledge of low capitalized clients that unfortunately bought properties associated with previous contamination of

ground water. Tr. Vol. 3 654-655. Mr. Domenici stated that these clients gave up retirement and savings because the abatement regulations were inflexible and closure was not in sight. *Id.*

Laun-Dry's full argument on this issue can be found in the following parts of the Record: Tr. Vol. 3, 790:12-792:17.

D. Other Parties' Responses to Laun-Dry's Position/Proposal

NMED

NMED argued that the concerns raised by Laun-Dry regarding financial assurance for abatement were unwarranted. Ms. Hunter testified that the Department would not require financial assurance for all sites but rather would determine whether or not the requirement of financial assurance would impede remediation progress on a site-by-site basis, as it currently does for financial assurance associated with discharge permits. Tr. Vol. 4, 998:16-999:16.

NMED submitted closing argument requesting the Commission disregard the "public comment" provided by Mr. Domenici at the hearing. *The New Mexico Environment Department's Closing Argument and Proposed Statement of Reasons*, pp. 1-5.

William C. Olson

Mr. Olson submitted closing argument requesting the Commission disregard the "public comment" provided by Mr. Domenici at the hearing. *William C. Olson Closing Arguments*, pp. 24-25.

3. NMMA

A. *NMMA's Position on NMED's Proposed Language*

NMMA opposes the Department's amendment of 20.6.2.4104.C NMAC.

B. NMMA's Proposed Alternative Language

None.

C. NMMA's Basis for Proposed Alternative Language

NMMA contended that NMED had not identified any legal basis to require financial assurance from a person conducting abatement that does not hold a discharge permit. NMMA's witness testified that requiring financial assurance could impose a burden that a person conducting abatement cannot meet and that the Commission has not adopted financial assurance rules. Testimony of Michael Neumann, NMMA Exhibit E, pp. 10-11.

D. Other Parties' Responses to NMMA's Position/Proposal

NMED

Ms. Hunter testified regarding the Commission's statutory authority to require financial assurance for abatement, noting that the Commission has authority to promulgate regulations to abate water pollution, and that the entirety of the Commission's abatement regulations at 20.6.2.4000 were promulgated pursuant to that authority. Ms. Hunter testified that the Department would not require financial assurance for all sites but rather would determine whether or not the requirement of financial assurance would impede remediation progress on a site-by-site basis, as it currently does for financial assurance associated with discharge permits. Tr. Vol. 4, 997:23-999:16.

4. William C. Olson

A. *William C. Olson's Position on Department's Proposed Language*

Mr. Olson supported NMED's proposed language. *Olson Closing Argument* pgs. 7-8 and *Olson Statement of Reasons* pg. 8.

20.6.2.4104.D NMAC

1. NMED

A. *NMED's Proposed Language*

20.6.2.4104 ABATEMENT PLAN REQUIRED:

* * *

D. The Secretary may require an oversight funding agreement with the responsible person for abatement plans which compensates the department for reasonable costs associated with the oversight of activities.

B. *NMED's Basis for Proposed Language*

The Department proposed changes to 20.6.2.4104.D NMAC that would give the Secretary discretion to require oversight funding agreements at abatement sites. Ms. Hunter testified that the abatement regulations have no mechanism for fees, and oversight of abatement activities requires specific expertise and can be very time-consuming. The only mechanism for funding staff time is the General Fund or the Corrective Action Fund, both of which have been substantially cut in recent years. Funding agreements with responsible parties can help ameliorate the untenable situation for the Department created by the lack of a fee mechanism for abatement sites. NMED's Closing Argument and Proposed Statement of Reasons, ¶¶ 110-116; Tr. Vol. 4, 999:22-1000:9; *Hunter Direct*, 9:7-12.

C. *Other Parties' Responses to NMED's Proposal*

William C. Olson

Mr. Olson supported NMED's proposed language. *Olson Closing Argument* pgs. 7-8 and *Olson Statement of Reasons* pg. 8.

20.6.2.4105 NMAC

1. NMED

A. *NMED's Proposed Language*

20.6.2.4105 EXEMPTIONS FROM ABATEMENT PLAN REQUIREMENTS:

* * *

C. Sections 20.6.2.4104 and 20.6.2.4106 NMAC do not apply to the following activities:

(1) Discharges subject to an effective and enforceable National Pollutant Discharge Elimination System (NPDES) permit;

(2) Land application of ground water contaminated with nitrogen originating from human or animal waste and not otherwise exceeding the standards of Subsection A of Section 20.6.2.3103 NMAC [~~and not containing a toxic pollutant as defined in Section 20.6.2.1101 NMAC~~], provided that it is done in compliance with a discharge plan approved by the secretary;

B. *NMED's Basis for Proposed Language*

NMED proposed to add the narrative subsurface water standard (originally proposed as new section 20.6.2.4103.B NMAC) to the list of standards for which lack of compliance could authorize the NMED cabinet secretary to require an Abatement Plan for an otherwise exempted abatement activity in 20.6.2.4105.B NMAC. *McQuillan Direct*, 47:1-15. NMED and NMMA jointly proposed a new 20.6.2.4103.A(2) NMAC which replaces NMED's prior proposal to create a new 20.6.2.4103.B NMAC addressing subsurface water contaminants, however NMED's proposal to amend 20.6.2.4105.B NMAC is still applicable based on this amended proposal. NMED Exhibit 43, NMED's Final Proposed Changes to 20.6.2 NMAC.

C. *Other Parties' Responses to NMED's Proposal*

William C. Olson

Mr. Olson supported NMED's proposed language. *Olson Closing Argument* pgs. 7-8 and *Olson Statement of Reasons* pg. 8.

20.6.2.4106 NMAC

1. NMED

A. *NMED's Proposed Language*

20.6.2.4106 ABATEMENT PLAN PROPOSAL:

* * *

D. Stage 2 Abatement Plan: Any responsible person shall submit a Stage 2 abatement plan proposal to the secretary for approval within sixty (60) days[~~, or up to one hundred and twenty (120) days for good cause shown,~~] after approval by the secretary of the final site investigation report prepared pursuant to Stage 1 of the abatement plan. The secretary may grant approval for an extension of time to submit a State 2 abatement plan for good cause shown.

B. *NMED's Basis for Proposed Language*

The Department proposed changes at 20.6.2.4106.D NMAC relating to extensions of time to submit abatement plans. Tr. Vol. 4, 835:9-836:14; *Vollbrecht Rebuttal*, 18:18-19:13. Under the existing rule, a Stage 2 abatement plan is required to be submitted within 60 days after Department approval of the Stage 1 final site investigation report, and allows the time frame to be extended to 120 days. As part of the Stage 2 abatement plan, the responsible person is required to submit results of a feasibility study and select and propose an abatement option. Tr. Vol. 4, 835:20-24; *Vollbrecht Rebuttal*, 18:19-19:5. Mr. Vollbrecht testified that for complex sites, the time to conduct the feasibility study can be lengthy and can require public and stakeholder involvement as part of the process. In those cases, it may be more appropriate for the responsible person to provide a proposed schedule for completing Stage 2 activities, which the Department would approve, and if an extension of time is necessary the length of that extension should be based on the reasons for which it is being sought, not the set time frame provided in the existing rule. Tr. Vol. 4. 835:25-836:14; *Vollbrecht Rebuttal*, 19:2-10.

The Department's proposed change addresses this issue by eliminating the specific time period for extensions of time, and instead providing simply that the Secretary may grant approval

for an extension of time to submit a Stage 2 abatement plan for good cause shown. Tr. Vol. 4, 836:7-14; *Vollbrecht Rebuttal*, 19:10-13.

C. *Other Parties' Responses to NMED's Proposal*

William C. Olson

Mr. Olson supported NMED's proposed language. *Olson Closing Argument* pgs. 7-8 and *Olson Statement of Reasons* pg. 8.

2. Dairies

A. *Dairies' Proposed Language*

20.6.2.4106 ABATEMENT PLAN PROPOSAL:

* * *

C. The purpose of Stage 1 of the abatement plan shall be to design and conduct a site investigation that will adequately define site conditions, and provide the date necessary to select and design an effective abatement option. Stage 1 of the abatement plan may include, but not be limited to, the following information depending on the media affected, and as reasonably needed to select and implement an expeditious abatement option:

* * *

(7) Any additional information that may reasonably be required to design and perform an adequate site investigation.

B. *Dairies' Basis for Proposed Language*

The Dairies requested minor changes to 20.6.2.4106.C NMAC regarding the information that may be required by the Department for an abatement plan, as supported by Mr. Palla's direct written testimony, Dairies' Exhibit A.

C. *Other Parties' Responses to Dairies' Proposed Language*

NMED opposed this addition. Mr. Vollbrecht testified in his written rebuttal testimony that the Dairies' proposal was unnecessary because the "reasonableness" requirement already is implicit in the rule. *Vollbrecht* Rebuttal, p, 16:20-24.

20.6.2.4108 NMAC - General

1. William C. Olson

A. *William C. Olson's Proposed Language*

20.6.2.4108 PUBLIC NOTICE AND PARTICIPATION:

A. Within thirty (30) days of filing of a Stage 1 abatement plan proposal, the secretary shall issue a news release summarizing:

(1) the source, extent, magnitude and significance of water pollution, as known at that time;

(2) the proposed Stage 1 abatement plan investigation; and

(3) the name and telephone number of an agency contact who can provide additional information.

B. [~~Within thirty (30) days of filing of~~] Any person proposing a Stage 2 abatement plan [~~proposal, or proposed~~] a significant modification [~~of~~]to a Stage 2 [~~of the~~] abatement plan, or an alternative abatement standard[~~any responsible person~~] shall provide [~~to the secretary proof of public~~] notice of the [~~abatement plan~~]proposal to the following persons:

(1) the public, who shall be notified through publication of a notice in newspapers of general circulation in this state and in the county where the abatement will occur or where the water body that would be affected by a proposed alternative abatement standard is located, and, in areas with large percentages of non-English speaking people, through the mailing of the public notice in English to a bilingual radio station serving the area where the abatement will occur with a request that it be aired as a public service announcement in the predominant non-English language of the area;

(2) those persons, as identified by the secretary, who have requested notification, who shall be notified by mail or email;

(3) the New Mexico Trustee for Natural Resources, and any other local, state or federal governmental agency affected, as identified by the secretary, which shall be notified by certified mail;

(4) owners and residents of surface property located inside, and within one (1) mile from, the perimeter of the geographic area where the standards and requirements set forth in Section 20.6.2.4103 NMAC are exceeded who shall be notified by a means approved by the secretary; and

(5) the Governor or President of each Indian Tribe, Pueblo or Nation within the state of New Mexico, as identified by the secretary, who shall be notified by mail or email.

C. The public notice proposal for a Stage 2 abatement plan proposal or significant modification of a Stage 2 abatement plan shall [~~include, as approved in advance by~~] be submitted to the secretary for approval with a proposed Stage 2 abatement plan, or significant modification of a Stage 2 abatement plan, and shall include:

(1) name and address of the responsible person;

(2) location of the proposed abatement;

(3) brief description of the nature of the water pollution and of the proposed abatement action;

(4) brief description of the procedures followed by the secretary in making a final determination;

(5) statement on the comment period;

(6) statement that a copy of the abatement plan can be viewed by the public at the department's main office or at the department field office for the area in which the discharge occurred;

(7) statement that written comments on the abatement plan, and requests for a public meeting or hearing that include the reasons why a meeting or hearing should be held, will be accepted for consideration if sent to the secretary within sixty (60) days after the [~~determination of administrative completeness; and~~] date of public notice; and

(8) address and phone number at which interested persons may obtain further information.

D. The public notice proposal for a proposed alternative abatement standard shall be submitted to the secretary for approval thirty (30) days prior to the filing of a petition for alternative abatement standards, and shall include:

(1) name and address of the responsible person;

(2) location of the proposed alternative abatement standards;

(3) brief description of the nature of the water pollution and of the proposed alternative abatement standards;

(4) brief description of the procedures followed by the commission in making a final determination on a petition for alternate abatement standards;

(5) statement that a copy of the petition for alternate abatement standards petition can be viewed by the public at the department's main office or at the department field office for the area in which the affected water body is occurring;

(6) statement on how the public can request to be placed on a facility-specific mailing list for notification of any hearing conducted on the petition for alternate abatement standards pursuant to 20.1.3 NMAC; and

(7) address and phone number at which interested persons may obtain further information.

[~~D~~]E. Within thirty (30) days of the secretary's approval of a public notice for a proposed Stage 2 abatement plan, significant modification of a Stage 2 abatement plan or alternative abatement standard, any responsible person shall provide to the secretary proof of public notice to the persons listed in Subsection B of 20.6.2.4108 NMAC.

[~~E~~]F. For a proposed Stage 2 abatement plan or significant modification of a Stage 2 abatement plan, a [~~A~~] public meeting or hearing may be held if the secretary determines there is significant public interest. Notice of the time and place of the meeting or hearing shall be given at least thirty (30) days prior to the meeting or hearing pursuant to Subsections A and B above. The secretary may appoint a meeting facilitator or hearing officer. The secretary may require the responsible person to prepare for approval by the secretary a fact sheet, to be distributed at the public meeting or hearing and afterwards upon request, written in English and Spanish, describing site history, the nature and extent of water pollution, and the proposed abatement. The record of the meeting or hearing, requested under this Section, consists of a tape recorded or transcribed session, provided that the cost of a court recorder shall be paid by the person requesting the transcript. If requested by the secretary, the responsible person will provide a translator approved by the secretary at a public meeting or hearing conducted in a locale where testimony from non-English speaking people can reasonably be expected. At the meeting or hearing, all interested persons shall be given a reasonable chance to submit data, views or arguments orally or in writing, and to ask questions of the secretary or the secretary's designee and of the responsible person, or their authorized representatives.

G. An alternative abatement standard shall only be granted after a public hearing before the commission, as required by NMSA 1978, Section 74-6-4(H) of the Water Quality Act. The commission shall review petitions for alternative abatement standards in accordance with the procedures for review of variance petitions provided in the commission's adjudicatory procedures, 20.1.3 NMAC.

B. William C. Olson's Basis for Proposed Language

Mr. Olson testified that existing rule language in 20.6.2.4108 NMAC does not address initial public notice of submission of alternate abatement standards petitions and that alternate abatement standards may be petitioned at any time, and could be submitted outside submission of a Stage 2 abatement plan. Mr. Olson explained that in such instances, adjacent landowners, tribes, pueblos and Natural Resource Trustee and other local, state or federal agencies would not receive initial notice of submission of alternate abatement standards petitions, as occurs for a Stage 2 abatement plan. These public and governmental parties would subsequently not have the opportunity to provide input on whether it may affect them during the Department's review of the

petition prior to a Commission hearing on the matter. Mr. Olson testified that receiving information from the public and other governmental agencies upfront in the review process is critical and useful to the Department in evaluating alternate abatement standard petitions, especially knowledge of area water wells and present and future water and land uses that may be affected, as well as other site specific information. He asserted information contained in an alternate abatement standard petition is highly technical and extensive in nature and that the public should be provided with adequate time to review and assess the petition's effects prior to the Commission's 30-day hearing notice issued pursuant to the Commission's adjudicatory procedures.

Mr. Olson proposed new amended language to address these discrepancies and provide initial public notice of submission of a petition for alternate standards, similar to that required for submission of a Stage 2 abatement plan. His proposed amendments to this section also clarified that hearings on alternate abatement standards are before the Commission and not the Secretary of the Department.

In response to NMMA cross-examination, Mr. Olson also testified that public notice of abatement plan modifications do not cover public notice of alternate abatement standards petitions. Mr. Olson explained that alternate abatement standards petitions are not approved by the Department under the modification process but are a form of variance from the Rules subject to a Commission hearing and approval, and, if approved by the Commission, alternate abatement standards and the means of achieving them must be later incorporated into an abatement plan modification which is administratively approved by the Department.

No Party presented technical evidence contrary to Mr. Olson's testimony. The full testimony and arguments related to this issue appear in the following parts of the record: William

C. Olson Statement of Reasons, p. 12-16; Olson Direct, Exhibit 1, p. 13-15; Tr. Vol. 4, 1010:16-1013:3; 1014:25-1016:23.

C. Other Parties' Responses to William C. Olson's Proposed Language

NMED

The Department supported Mr. Olson's proposed language. *Vollbrecht Rebuttal*, p. 20-22; Tr. Vol. 4, 1006:21-1007:13.

20.6.2.4108.B NMAC

1. NMED

A. *NMED's Proposed Language*

20.6.2.4108 PUBLIC NOTICE AND PARTICIPATION:

* * *

B. [~~Within thirty (30) days of filing of~~]Any person proposing a Stage 2 abatement plan [~~proposal, or proposed~~]or a significant modification of a Stage 2 abatement plan, [~~any responsible person~~]shall provide [~~to the secretary proof of public~~]notice of the [~~abatement plan~~]proposal to the following persons:

(1) the public, who shall be notified through publication of a notice in newspapers of general circulation in this state and in the county where the abatement will occur and, in areas with large percentages of non-English speaking people, through the mailing of the public notice in English to a bilingual radio station serving the area where the abatement will occur with a request that it be aired as a public service announcement in the predominant non-English language of the area;

(2) those persons, as identified by the secretary, who have requested notification, who shall be notified by mail or email;

(3) the New Mexico Trustee for Natural Resources, and any other local, state or federal governmental agency affected, as identified by the secretary, which shall be notified by certified mail;

(4) owners and residents of surface property located inside, and within one (1) mile from, the perimeter of the geographic area where the standards and requirements set forth in Section 20.6.2.4103 NMAC are exceeded who shall be notified by a means approved by the secretary; and

(5) the Governor or President of each Indian Tribe, Pueblo or Nation within the state of New Mexico, as identified by the secretary, who shall be notified by mail or email.

C. The public notice proposal shall [~~include, as approved in advance by~~]be submitted to the secretary for approval with a Stage 2 abatement plan proposal, and shall include:

(1) name and address of the responsible person;

(2) location of the proposed abatement;

(3) brief description of the nature of the water pollution and of the proposed abatement action;

(4) brief description of the procedures followed by the secretary in making a final determination;

(5) statement on the comment period;

(6) statement that a copy of the abatement plan can be viewed by the public at the department's main office or at the department field office for the area in which the discharge occurred;

(7) statement that written comments on the abatement plan, and requests for a public meeting or hearing that include the reasons why a meeting or hearing should be held, will be accepted for consideration if sent to the secretary within sixty (60) days after the [~~determination of administrative completeness; and~~]date of public notice; and

(8) address and phone number at which interested persons may obtain further information.

D. Within thirty (30) days of the secretary's approval of a Stage 2 abatement plan public notice proposal, any responsible person shall provide to the secretary proof of public notice to the persons listed in Subsection B of 20.6.2.4108 NMAC.

B. NMED's Basis for Proposed Language

The Department proposed changes to 20.6.2.4108.B, C, and D NMAC regarding the timing for submittal of public notice for Stage 2 abatement plans. Tr. Vol. 4, 1005:6 -1006:1; *Vollbrecht*

Direct, 19:14-21. Mr. Vollbrecht testified that under the current rules, the process and timelines for submitting a proposed public notice to the Department for approval is unclear. The proposed revisions provide clarity regarding when the public notice proposal must be submitted, and set out a time frame for Secretary approval of a public notice prior to a final agency determination on the Stage 2 abatement plan itself. Tr. Vol. 4, 1005:11-1006:1; NMED Exhibit 13, Written Direct Testimony of Kurt Vollbrecht ("*Vollbrecht Direct*"), 19:14-21.

2. City of Roswell

A. *Roswell's Position on NMED's Proposed Language*

Roswell did not take a position on NMED's proposed language, but submitted its own proposed change to 20.6.2.4108.B(4) that would reduce the radius within which notice regarding Stage 2 abatement plans would be required.

B. Roswell's Proposed Language

(4) owners and residents of surface property located inside, and within [~~one (1)~~] 1/3 of a mile from, the perimeter of the geographic area where the standards and requirements set forth in Section 20.6.2.4103 NMAC are exceeded who shall be notified by a means approved by the secretary; and

C. Roswell's Basis for Proposed Alternative Language

Roswell argued that its amendment is consistent with the public notice and participation requirements regarding discharge permits under 20.6.2.3108 NMAC and that additional public notice is unnecessary, and burdensome. Roswell's technical witness, Jay Snyder ("Snyder"), provided testimony that notice to the public is given by mail regarding Stage 2 abatement within a one-mile radius. Tr. Vol. 3, 798. As a result, Snyder testified he was recently required to send 7,500 mailings on behalf of a client in the City of Albuquerque to comply with the current notice provision. Tr. Vol. 3, 799.

Mr. Snyder opined that public notice requirements could be accomplished more efficiently and cost effectively by publication in newspapers, neighborhood postings or radio advertising and

suggested NMED Voluntary Remediation public notice provisions were less cumbersome and should be incorporated in the abatement regulations. Tr. Vol. 3 799:6-19("[T]h goal is to get the public notified, not necessarily do 7,500 mailings."). Roswell asserted that its proposed revision to notify the public within a 1/3 mile radius instead of a one-mile radius is sufficient to provide for meaningful public notice and participation and is consistent with participation requirements regarding discharge permits under the Department's own regulations at 20.6.2.3108 NMAC.

D. Other Parties' Responses to Roswell's Position/Proposal

NMED

The Department opposed Roswell's proposed language The Department argued that Roswell had not provided evidence to support the claim that the current requirement is ineffective, unnecessary, and overly expensive. Ms. Hunter testified that the Department recognized that this public notice requirement can mean that a responsible party whose facility is located in a dense urban area must notify a large number of people. Ms. Hunter noted that in more sparsely populated areas, the current requirement may only result in notification of a few people. The Department asserted that because abatement plans are for contamination that has already occurred, as opposed to permits which are generally issued to prevent contamination, it is important to err on the side of providing broad public notice for abatement plans. Tr. Vol. 4, 1000:15-1001:10.

William C. Olson

Mr. Olson opposed Roswell's proposed language. Mr. Olson testified that it is inappropriate to compare lesser discharge permit public notice radius requirements with those for abatement of water pollution. He explained that the purpose of a discharge permit is to prevent water pollution at a facility and a shorter radius for discharge permits is appropriate because water pollution is not allowed and should not occur. Mr. Olson testified that, if water pollution does

occur, the effects of contamination can extend for large distances and a larger landowner public notification radius is warranted under an abatement plan to notify persons who could potentially be affected by pollution. Mr. Olson also testified that this issue was addressed at the original Commission abatement hearings in 1995 and that the Commission has been presented technical evidence at adjudicatory hearings (Dona Ana Dairies and Tyrone mine), alternate abatement standards hearings (LAC Minerals, L-Bar uranium mine) and other rule-making hearings (Dairy Rule and Copper Mine Rule) regarding the extent of water pollution at facilities and how the effects of that pollution can extend over 1 mile in distance. Mr. Olson testified that during his 25 years of experience in working on water pollution abatement with both NMED and the Oil Conservation Division there were numerous examples of extensive water pollution that in some cases extended over 1 mile. Olson Rebuttal Testimony, WCO Rebuttal Exhibit 1, pgs. 15-16; and Olson Testimony Tr. vol. 4, pg. 1013, line 4 to pg. 1014, line 24.

3. William C. Olson

A. *William C. Olson's Position on Department's Proposed Language*

Mr. Olson supported NMED's proposed language regarding timing of submittals. *Olson Closing Argument* pgs. 7-8 and *Olson Statement of Reasons* pg. 8.

20.6.2.4109 NMAC

1. NMED

A. *NMED's Proposed Language*

20.6.2.4109 SECRETARY APPROVAL OR NOTICE OF DEFICIENCY OF SUBMITTALS:

* * *

C. If no public meeting or hearing is held pursuant to Subsection [~~D~~] E of Section 20.6.2.4108 NMAC, then the secretary shall, within ninety [~~(90)~~] 120 days of receiving a Stage 2 abatement plan proposal, approve the plan, or notify the responsible person of the plan's deficiency, based upon the information available.

B. *NMED's Basis for Proposed Language*

Mr. Vollbrecht testified regarding an inconsistency in 20.6.2.4109.C NMAC created by other changes proposed by the Department. To address this inconsistency, the Department proposed to change the number of days between when the Department receives a Stage 2 abatement plan proposal and when the Secretary must approve the plan or notify the responsible person of the plan's deficiency from 90 to 120. Tr. Vol. 4, 1006:2-17.

C. *Other Parties' Responses to NMED's Proposal*

William C. Olson

Mr. Olson supported NMED's proposed language. *Olson Closing Argument* pgs. 7-8 and *Olson Statement of Reasons* pg. 8.

20.6.2.4113 NMAC

1. Dairies

A. *Dairies Proposed Language*

20.6.2.4113 DISPUTE RESOLUTION: In the event of any technical dispute regarding the requirements of Paragraph (9) of Subsection A and Subsection E of Section 20.6.2.1203, Sections 20.6.2.4103, 20.6.2.4105, 20.6.2.4106, 20.6.2.4111 or 20.6.2.4112 NMAC, including notices of deficiency, the responsible person may notify the secretary by certified mail that a dispute has arisen, and desires to invoke the dispute resolution provisions of this Section, provided that such notification must be made within thirty (30) days after receipt by the responsible person of the decision of the secretary that causes the dispute. Upon such notification, all deadlines affected by the technical dispute shall be extended for a thirty (30) day negotiation period, or for a maximum of sixty (60) days if approved by the secretary for good cause shown. During this negotiation period, the secretary or his/her designee and the responsible person shall meet at least once. Such meeting(s) may be facilitated by a mutually agreed upon third party, but the third party shall assume no power or authority granted or delegated to the secretary by the Water Quality Act or by the commission. If the dispute remains unresolved after the negotiation period, the decision of secretary shall be final and subject to appeal.

C. *Dairies' Basis for Proposed Alternative Language*

Dairies requested this change to clarify that there is a right to appeal following dispute resolution. Testimony of Eric Palla, Dairies' Exhibit A, pp. 9-10.

D. *Other Parties' Positions on Dairies' Proposal*

NMED

NMED opposed this change and the related change to 20.6.2.4114 NMAC. Mr. Vollbrecht testified that the outcome of a dispute resolution under 20.6.2.4114 NMAC for a particular issue is not a final agency action that can be taken up by the Commission. Rather, the outcome of the dispute resolution would be incorporated into a broader decision or document or approval that could then be appealed to the Commission. Tr. Vol. 3, 582:7-583:17.

William C. Olson

Mr. Olson opposed the Dairies proposal for 20.6.2. 4113 NMAC and its related change to 20.6.2.4114 NMAC. Mr. Olson testified that he was a member of the Commission during the rulemaking hearings adopting the abatement rules and implemented and enforced Commission abatement rules with both NMED and the Oil Conservation Division for 16 years. Mr. Olson

testified that the intent of dispute resolution was to allow a responsible party to contest technical decisions of NMED staff by disputing staff requirements to the NMED Secretary for a Secretary decision on a specific technical issue. He also testified that agency actions based on the Secretary's decision are incorporated into an abatement plan approval with conditions (subject to a public hearing for final action) or a notice of deficiency regarding the overall abatement plan and that these final agency actions are explicitly appealable to the Commission under 20.6.2.4114 NMAC. Mr. Olson maintained that the Rule would be unwieldy for both NMED and the Commission if disputes of each individual technical rule requirement are appealed to the Commission outside either approval of an overall abatement plan or agency issuance of a notice of deficiency. In addition, Mr. Olson testified that dispute resolution is a non-public process between the agency and the responsible party for achieving compromise on technical issues and that there is no public participation in this process. He maintained that private resolution of technical issues between the agency and responsible person does not mean that the public may not object to the Secretary's technical resolution decision during a public hearing on the abatement plan where agency actions become final. Olson Rebuttal Testimony, WCO Rebuttal Exhibit 1, pgs. 10-11; and Olson Testimony Tr. vol. 3, pg. 584, line 11 to pg. 586, line 15.

20.6.2.4114.C NMAC

1. NMED

A. *NMED's Proposed Language*

20.6.2.4114 APPEALS FROM SECRETARY'S DECISIONS:

A. If the secretary determines that an abatement plan is required pursuant to Paragraph (9) of Subsection A of 20.6.2.1203, Paragraph (4) of Subsection [~~E~~]F of 20.6.2.3109, or Subsection B of 20.6.2.4105 NMAC, approves or provides notice of deficiency of a proposed abatement plan, [~~technical infeasibility demonstration~~]or abatement completion report, or modifies or terminates an approved abatement plan, he shall provide written notice of such action by certified mail to the responsible person and any person who participated in the action.

B. NMED's Basis for Proposed Language

The Department proposed a conforming change to 20.6.2.4114.A NMAC to strike the reference to "technical infeasibility demonstration," in line with the proposed changes to 20.6.2.4103.E NMAC.

2. Dairies

A. *Dairies' Position on NMED's Proposed Language*

Based on their opposition to the Department's proposed changes at 20.6.2.4103.E NMAC, the Dairies argue that this change should not be made if the Commission accepts the Dairies' position not to repeal the technical infeasibility provision.

B. *Dairies' Proposed Alternative Language*

20.6.2.4114 APPEALS FROM SECRETARY'S DECISIONS:

A. If the secretary determines that an abatement plan is required pursuant to Paragraph (9) of Subsection A of 20.6.2.1203, Paragraph (4) of Subsection [~~E~~]F of 20.6.2.3109, or Subsection B of 20.6.2.4105 NMAC, approves or provides notice of deficiency of a proposed abatement plan, technical infeasibility demonstration or abatement completion report, or modifies or terminates an approved abatement plan or takes final action on dispute resolution under 20.6.4.4113 NMAC, he shall provide written notice of such action by certified mail to the responsible person and any person who participated in the action.

C. *Dairies' Basis for Proposed Alternative Language*

Dairies proposed a separate change to clarify that there is a right to appeal following dispute resolution, consistent with Dairies' proposed change to 20.6.2.4113 NMAC. Testimony of Eric Palla, Dairies' Exhibit A, pp. 9-10.

D. *Other Parties' Responses to Dairies' Position/Proposal*

NMED

NMED opposed this change and the related change to 20.6.2.4113 NMAC. Mr. Vollbrecht testified that the outcome of a dispute resolution under 20.6.2.4114 NMAC for a particular issue is not a final agency action that can be taken up by the Commission. Rather, the outcome of the dispute resolution would be incorporated into a broader decision or document or approval that could then be appealed to the Commission. Tr. Vol. 3, 582:7-583:17.

William C. Olson

Mr. Olson opposed Dairies proposal for the same reasons that he testified to in the related proposed Dairies change to 20.6.2.4113 NMAC above. Mr. Olson testified that agency actions based on a Secretary's dispute resolution decision are incorporated into an abatement plan approval with conditions (subject to a public hearing for final action) or a notice of deficiency regarding the overall abatement plan. He also testified that these final agency actions are explicitly appealable to the Commission under 20.6.2.4114 NMAC. Mr. Olson maintains the Rule would be unwieldy if disputes of each individual technical rule requirement are appealed to the Commission outside NMED approval of an overall abatement plan or issuance of a notice of deficiency. In addition, Mr. Olson testified that dispute resolution is a private, non-public process between the agency and the responsible party for achieving compromise on technical issues. He maintained that private resolution of technical issues between NMED and responsible person does not mean that the public may not object to the Secretary's technical resolution decision during a public hearing on the abatement plan where agency actions become final. Olson Rebuttal Testimony, WCO Rebuttal Exhibit 1, pgs. 10-11; and Olson Testimony Tr. vol. 3, pg. 584, line 11 to pg. 586, line 15.

3. William C. Olson

A. *William C. Olson's Position on Department's Proposed Language*

Mr. Olson supported NMED's proposed language. *Olson Closing Argument* pgs. 7-8 and *Olson Statement of Reasons* pg. 8.

20.6.2.5003 NMAC

1. NMED

A. *NMED's Proposed Language*

20.6.2.5003 NOTIFICATION AND GENERAL OPERATION REQUIREMENTS FOR ALL UNDERGROUND INJECTION CONTROL WELLS: All operators of underground injection control wells, except those wells regulated under the Oil and Gas Act, the Geothermal Resources [~~Conservation~~] Development Act, and the Surface Mining Act, shall:

B. *NMED's Basis for Proposed Language*

The Department proposed to add language to include the new Geothermal Resources Development Act, NMSA 1978, §§ 71-9-1 to -11, in the Underground Injection Control ("UIC") regulations contained at 20.6.2.5003 NMAC. *Hunter Direct*, 9:15-17; NMED Exhibit 43, p. 44. EMNRD provided testimony in support of the Department's proposed amendments in response to the Geothermal Resources Development Act through its witness, William Brancard. Tr. Vol. 3, 678:11-680:6.

C. *Other Parties' Responses to NMED's Proposal*

William C. Olson

Mr. Olson supported NMED's proposed language. *Olson Closing Argument* pgs. 7-8 and *Olson Statement of Reasons* pg. 8.

20.6.2.5004 NMAC

1. NMED

A. *NMED's Proposed Language*

20.6.2.5004 PROHIBITED UNDERGROUND INJECTION CONTROL ACTIVITIES AND WELLS:

A. No person shall perform the following underground injection activities nor operate the following underground injection control wells.

(1) The injection of fluids into a motor vehicle waste disposal well is prohibited. Motor vehicle waste disposal wells are prohibited. Any person operating a new motor vehicle waste disposal well (for which construction began after April 5, 2000) must close the well immediately. Any person operating an existing motor vehicle waste disposal well must cease injection immediately and must close the well by December 31, 2002, except as provided in this subsection.

(2) The injection of fluids into a large capacity cesspool is prohibited. Large capacity cesspools are prohibited. Any person operating a new large capacity cesspool (for which construction began after April 5, 2000) must close the cesspool immediately. Any person operating an existing large capacity cesspool must cease injection immediately and must close the cesspool by December 31, 2002.

(3) The injection of any hazardous or radioactive waste into a well is prohibited, except as provided in 20.6.2.5300 through 20.6.2.5399 NMAC or this subsection.

(a) Class I radioactive waste injection wells are prohibited, except naturally-occurring radioactive material (NORM) regulated under 20.3.1.1407 NMAC is allowed as a Class I non-hazardous waste injection well pursuant to Paragraph (1) of Subsection B of 20.6.2.5002 NMAC.

(b) Class IV wells are prohibited, except for wells re-injecting treated ground water into the same formation from which it was drawn as part of a removal or remedial action if the injection has prior approval from the environmental protection agency (EPA) or the department under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) or the Resource Conservation and Recovery Act (RCRA).

(4) Barrier wells, drainage wells, recharge wells, return flow wells, and motor vehicle waste disposal wells are prohibited, except when the discharger can demonstrate that the discharge will not adversely affect the health of persons, and

(a) the injection fluid does not contain a [~~contaminant~~]constituent or exhibit a physical parameter (which could include pH, redox condition or temperature) which may cause an exceedance at any place of present or reasonable foreseeable future use of any primary state drinking water maximum contaminant level as specified in the water supply regulations, "Drinking Water" (20.7.10 NMAC), adopted by the environmental improvement board under the Environmental Improvement Act or the standard of 20.6.2.3103 NMAC, whichever is more stringent;

(b) the discharger can demonstrate that the injection will result in an overall or net improvement in water quality as determined by the secretary.

B. *NMED's Basis for Proposed Language*

The Department proposed to add language at 20.6.2.5004.A(4)(a) NMAC of the Underground Injection Control ("UIC") regulations to include geochemical and geophysical parameters in the requirements that must be met to allow operation of certain types of UIC wells, including aquifer storage and recover ("ASR") projects. Tr. Vol. 3, 710:7-20; *Hunter Direct*, 9:20-10:5. Ms. Hunter testified that physical and geochemical parameters are important components of

water quality that must be reviewed and likely modeled prior to injection into an underground source of drinking water. Injecting water that meets standards into an existing aquifer can adversely impact water by causing unforeseen reactions in the subsurface, such as mobilization of toxic metals that were adhered to soil particles. Ms. Hunter testified that it is important to look at the physical and geochemical parameters of the whole aquifer system, not just contaminants in the source water, in order to address potential contamination that could be created simply by combining two incompatible waters that, on their own, meet all Safe Drinking Water Act standards. Tr. Vol. 3, 710:21-712:8. Ms. Hunter testified that other states such as California have recognized this issue with ASR projects, and have taken regulatory action to address it. Tr. Vol. 3, 712:9-713:1.

C. *Other Parties' Responses to NMED's Proposal*

William C. Olson

Mr. Olson supported NMED's proposed language. *Olson Closing Argument* pgs. 7-8 and *Olson Statement of Reasons* pg. 8.

20.6.2.5005 NMAC

1. NMED

A. *NMED's Proposed Language*

20.6.2.5005 PRE-CLOSURE NOTIFICATION AND CLOSURE REQUIREMENTS:

A. Any person proposing to close a Class I, III, IV or V underground injection control well must submit pre-closure notification to the department at least 30 days prior to closure. Pre-closure notification must include the following information:

(1) Name of facility.
(2) Address of facility.
(3) Name of Owner/Operator.
(4) Address of Owner/Operator.
(5) Contact Person.
(6) Phone Number.
(7) Type of Well(s).
(8) Number of Well(s).
(9) Well Construction (e.g. drywell, improved sinkhole, septic tank, leachfield, cesspool, other…).
(10) Type of Discharge.
(11) Average Flow (gallons per day).
(12) Year of Well Construction.
(13) Proposed Well Closure Activities (e.g. sample fluids/sediment, appropriate disposal of remaining fluids/sediments, remove well and any contaminated soil, clean out well, install permanent plug, conversion to other type well, ground water and vadose zone investigation, other).
(14) Proposed Date of Well Closure.
(15) Name of Preparer.
(16) Date.
(17) Well plugging plan as submitte4d to the Office of the State Engineer pursuant to 19.27.4 NMAC.

B. *NMED's Basis for Proposed Language*

The Department proposed to include a provision in 20.6.2.5005.A NMAC that requires permittees and responsible parties to provide a copy of their well plugging and abandonment plan. These plans are provided to and approved by the Office of the State Engineer ("OSE"). The proposed change would require that a copy of the OSE submission be provided to the Department. *Hunter Direct*, 10:5-8; NMED Exhibit 43, p. 46.

C. *Other Parties' Responses to NMED's Proposal*

William C. Olson

Mr. Olson supported NMED's proposed language. *Olson Closing Argument* pgs. 7-8 and *Olson Statement of Reasons* pg. 8.

20.6.2.5006 NMAC

1. NMED

A. *NMED's Proposed Language*

20.6.2.5006 DISCHARGE PERMIT REQUIREMENTS FOR CLASS V INJECTION WELLS: Class V injection wells must meet the requirements of Sections 20.6.2.3000 through 20.6.2.3999 NMAC and Sections 20.6.2.5000 through 20.6.2.5006 NMAC. Class V injection wells or surface impoundments constructed as recharge basins used to replenish the water in an aquifer, including use to reclaim or improve the quality of existing water must additionally provide documentation of compliance with 19.25.8 NMAC (Underground Storage and Recovery) and shall not be subject to the exemptions of 20.6.2.3105 NMAC.
[20.6.2.5006 NMAC - N, 12-1-01; A, XX/XX/18]

B. NMED's Basis for Proposed Language

The Department proposed changes to 20.6.2.5006 NMAC that would include clarifying language to eliminate any perceived exemptions from the UIC permitting regulations for ASR projects. Tr. Vol. 3, 713:11-716:7; *Hunter Direct*, 10:11-17; *Hunter Rebuttal*, 6:14-7:21. Ms. Hunter testified that the federal UIC regulations, for which New Mexico has primacy to administer, do not exempt aquifers designated as underground sources of drinking water. Because ASR projects, by definition, inject into such aquifers, those projects cannot be exempt from the UIC regulations as a matter of federal law. Tr. Vol. 3, 713:19-24.

2. NMML

A. *NMML's Position on NMED's Proposed Language*

NMML stated that its interest in this proposed change concerns ASR which is designed to maximize the use of New Mexico's water resources by storing water in underground aquifers for when it was needed during times of drought. Tr. Vol. 3 at 751-54; Docket No. 55, NMML-5, pp. 1-2. NMML opposed changes to Section 20.6.2.5006 NMAC as unnecessary because underground sources of drinking water only need to be protected from constituents that violate the primary drinking water regulations and that is unnecessary when the source water is drinking water. Tr. Vol. 3 at 768-69; 782-83. NMML proposed changes to Section 20.6.2.5006 NMAC to narrow the

scope of monitoring requirements to only contaminants contained in the source water. NMML argued that because ASR projects are drinking water, the stringent SDWA requirements are already met, similar to the NPDES system. Docket No. 55, NMML-5, p.3.

Rather than eliminate the exemption for drinking water, Ms. Hunter agreed that NMED could utilize "permit-by-rule" under its primacy to administer the UIC program instead of a discharge permit requirement. Tr. Vol. 3 at 747. Mr. Kelly affirmed this in his testimony. Tr. Vol. 3 at 764. UIC allows "permit-by-rule." Tr. Vol. 3 at 723. This exemption is allowed when there is no exceedance of any groundwater standard or drinking water standard under the Safe Drinking Water Act. Tr. Vol. 3 at 724. In practice, NMED has allowed the Water Authority's two ASR programs – at Bear Canyon and the Large-Scale Demonstration Project – to proceed without permitting by NMED under two different Bureau Chiefs. Tr. Vol. 3 at 725; 766.

NMML's full testimony can be found in the record at Docket Nos. 55 and 83.

B. NMML's Proposed Alternative Language

20.6.2.5006 DISCHARGE PERMIT REQUIREMENTS FOR CLASS V INJECTION WELLS: Class V injection wells must meet the requirements of Sections 20.6.2.3000 through 20.6.2.3999 NMAC and Sections 20.6.2.5000 through 20.6.2.5006 NMAC. Class V injection wells or surface impoundments constructed as recharge basins used to replenish the water in an aquifer, including use to reclaim or improve the quality of existing water, must additionally provide documentation of compliance with 19.25.5 NMAC (Underground Storage and Recovery) ~~and shall not be subject to the exemptions of 20.6.2.3105 NMAC.~~ If the exemption in Section 20.6.2.3105.A. does not apply for a recharge basin project, a discharge permit shall be required as follows:

A. Monitoring will be required for only those contaminants shown to be present in the source water or which have the potential to be mobilized during injection or infiltration; and

B. The permittee shall have the opportunity to petition or eliminate or reduce sampling requirements after two years or four rounds of sampling whichever comes first.

C. NMML's Basis for Proposed Alternative Language

See subsection "A" above.

D. Other Parties' Responses to NMML's Position/Proposal

NMED

NMED opposed NMML's proposed alternative language. The Department disagreed that the exemptions in 20.6.2.3105 NMAC are in any way applicable to the Department's UIC primacy program. Ms. Hunter explained that the UIC program is a federal program with respect to which New Mexico has gained primacy to administer, and that program does not allow for state exemptions to apply. Ms. Hunter testified that NMED is the only regulatory agency that evaluates and regulates water quality issues in aquifers associated with ASR projects, including possible geochemical interactions and effects on contamination plumes. Tr. Vol. 3, 713:11-716:6. Ms. Hunter testified that NMED opposes exempting any ASR projects from the requirement to obtain a discharge permit (as discussed above with respect to 20.6.2.3105.A NMAC), and that the Department opposes putting specific restrictions in the regulations on the type of monitoring that may be contemplated. Ms. Hunter stated that the commission's regulations are intentionally flexible and should remain so in order to accommodate site-specific and project-specific issues that may arise. With respect to NMML's proposal regarding a permittee's ability to petition for reduced monitoring, Ms. Hunter testified that this is unnecessary because permittee's already have this ability. Tr. Vol. 3, 716:8-717:7. Ms. Hunter explained that, while NMED had previously allowed the Water Authority's two ASR programs to proceed without permitting, at that time NMED was not aware of the potential adverse effects on aquifers that ASR projects could have, and emerging science has since indicated that such effects are possible, requiring regulatory oversight. Tr. Vol. 3, 724:19-726:15.

3. William C. Olson

A. *William C. Olson's Position on Department's Proposed Language*

Mr. Olson supported NMED's proposed language. *Olson Closing Argument* pgs. 7-8 and *Olson Statement of Reasons* pg. 8.

20.6.2.5101 NMAC

1. NMED

A. NMED's Proposed Language

20.6.2.5101 DISCHARGE PERMIT AND OTHER REQUIREMENTS FOR CLASS I WELLS AND CLASS III WELLS:

* * *

D. The exemptions from the discharge permit requirement listed in 20.6.2.3105 NMAC do not apply to underground injection control wells except as provided below:

~~(1) wells regulated by the oil conservation division of the energy, minerals and natural resources department under the exclusive authority granted under Section 70-2-12 NMSA 1978 or under other sections of the "Oil and Gas Act";~~

[~~(2)~~](1) wells regulated by the [~~oil conservation division~~] energy conservation management division of the energy, minerals and natural resources department under the "Geothermal Resources Development Act";

[~~(3)~~](2) wells regulated by the [~~New Mexico coal surface mining bureau~~] mining and minerals division of the energy, minerals and natural resources department under the "Surface Mining Act";

[~~(4)~~](3) wells for the disposal of effluent from systems which are regulated under the "Liquid Waste Disposal and Treatment" regulations (20.7.3 NMAC) adopted by the environmental improvement board under the "Environmental Improvement Act".

B. NMED's Basis for Proposed Language

The Department proposed to remove subsection 20.6.2.5101.D(1) NMAC, because it would be redundant with new Section 20.6.2.10 NMAC. The Department proposed to add language at 20.6.2.5101 NMAC to include correct references to the Surface Mining Act, NMSA 1978, §§ 69-25A-1 to -36; the Oil and Gas Act, NMSA 1978, §§ 70-2-1 to -38; and the new Geothermal Resources Development Act, NMSA 1978, §§ 71-9-1 to -11, in the UIC regulations for permit applications that should be sent to the Energy Minerals and Natural Resources Department. *Hunter Direct*, 10:17-21; NMED Exhibit 43, pp. 46-47. EMNRD provided testimony in support of the Department's proposed amendments through its witness, William Brancard. Tr. Vol. 3, 678:11-680:6. Both the Department and EMNRD stated that they do not object to deleting the current 20.6.2.5101.D(1) NMAC if the proposed 20.6.2.10.B NMAC is adopted. Tr. Vol. 3, 676:3-15.

C. *Other Parties' Responses to NMED's Proposal*

William C. Olson

Mr. Olson supported NMED's proposed language. *Olson Closing Argument* pgs. 7-8 and *Olson Statement of Reasons* pg. 8.