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

WQCC 17-03 (R)

HEARING OFFICER REPORT

This matter comes before the New Mexico Water Quality Control Commission ("WQCC" or "Commission") upon request from the Ground Water Quality Bureau ("GWQB") of the New Mexico Environment Department ("NMED").

On May 9, 2017 the WQCC entered an order directing that a hearing be held and designating a hearing officer to conduct the hearing, handle related tasks and issue a report subject to the WQCC's instructions, after the public hearing. The hearing was held in Santa Fe, New Mexico on November 14, 15, 16, and 17th. Following the submission of findings of fact and conclusions of law, the hearing officer compiled the submissions into this report. As requested by the WQCC, at the public hearing, the Hearing Officer's Report does not include recommendations, proposed actions, or evidentiary rulings.

I. PREFACE

The hearing officer has used the parties' own findings but has sharply edited their submissions to highlight differences in interpretation and prevent redundancy. The hearing officer has not opined on the various positions advocated. The exhibits attached to the report, as well as the report itself, are intended to aid the Commissioners in structuring their deliberations, but not a substitute for the four-day hearing itself. The hearing officer requested that the parties format their proposed rule change to be added to the exhibit list, because that request was issued

on April 5, 2018 the hearing officer has allocated until April 11, 2018 for all the parties to format their proposed rule change. Some of the parties submitted a combination of rule language, finding of facts and conclusion of law one document. Ideally, after the comment period, the hearing officer report will be revised to include arguments, then exhibits as attachments. The compilation is not intended to supplant the administrative record itself which contains all the filings, motions, hearing transcripts, and post hearing submissions including closing arguments and findings of fact.

When Commissioners want a more in-depth view of a subject, they can consult each parties' proposal on the NMED website. The post hearing submissions alone total more than four hundred pages in length with some parties not filing findings of facts and conclusions of law as their positions were adequately addressed by NMED or addressed during the hearing itself.

Ideally, the report should flow in order of the rule itself, but some sections invoke more than one section of the proposed rule. Efforts have been made to identify the proposer in the heading. There are stylistic differences between the parties in tone, syntax, and general style which may make for a choppy read. To quote the late great Betty Davis, "Fasten your seatbelts, it's going to be a bumpy ride" All About Eve (1950).

Both prior to and after the hearing, the fourteen parties worked collaboratively, to arrive at compromise language for contentious sections. The hearing officer remains hopeful that the spirit of cooperation will continue during the post hearing process. NMED's briefing covers the proposed changes that occurred post hearing. When the parties could not agree about the specific rule language itself, their respective versions of language have been included so the Commission may deliberate between the positions. Some are lengthier than others and cover multiple points as opposed to two or three distinct proposed rule changes.

The parties will provide their exact rule language as an Exhibit's so the Commissioners can review each proposal separately. NMED's findings of fact have been used as a base line because they are comprehensive and NMED is proposing the rule change. When parties object to a specific section, their proposals have been included with substantial editing. In some cases, despite compromise language being achieved, the hearing officer has included the proposed language, so the Commission may review it, since it did not occur during the hearing.

III. Post Hearing Officer Report Exceptions and Order to Follow

The parties will be given thirty days (30) post filing of the hearing officer report to note any exceptions to the report. The hearing officer would kindly request that if the parties don't require the full thirty days, then they file their exceptions in two weeks, ideally in redlined word version, to enable the hearing officer to incorporate the suggested changes and to allow the WQCC adequate time to review the report, exceptions, and review the transcripts if necessary. An order will follow on Monday, April 9, 2018.

The goal is to give the Commissioners a hearing officer report that is comprehensive but does not rival the post hearing submissions in length. Since the hearing officer is not making recommendations, the exception period, is to catch any gross omissions or misstatements that could potentially weigh down the deliberative process for the Commission.

When reviewing the hearing officer report, the parties should be sure to check that their objections to a specific section have been included. Many eyes will make light work. In the future, the hearing officer would like to circulate a draft hearing officer report to the parties, well in advance of deliberations, so the report could be revised prior to submission. Best efforts were made to include all proposed revisions in key sections but omissions may have inadvertently occurred. Many parties' findings can be distilled to five or seven pages or less, but the hearing

officer did not want to abbreviate their findings so early in the process. Where NMED has stated the proposed rule change and there has been no objection or alternate phrasing, the proposed rule change is simply listed as the rule number.

II. AUTHORITY

1. Under the 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.*

2. 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.*

3. 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).

4. Since 1931, ground waters in New Mexico have been "declared to be public waters and to belong to the public." NMSA 1978, Section 72-12-1 & History. New Mexico's ground water is not owned by or does not belong to the owners of private property above ground water.

5. Individuals and entities may use the State's ground water for "beneficial use," subject to appropriate authorization from the State. *Id.* Ground water, in New Mexico, is a public resource. *Id.* Approximately ninety (90) percent of the people in New Mexico rely on ground water for drinking water, and approximately ten (10) percent of the population obtain their drinking water from private supply systems that are not subject to the federal drinking water standards. N.M. Mining Association v. N.M. Water Quality Control Comm'n, 2007-NMCA-10, ¶ 23, 141 N.M. 41, 49.

   a. Ground water, in New Mexico, is held in trust by the State for the benefit of the public. New Mexico v. G.E., 467 F.3d 1223 (10th Cir. 2006). Water is New Mexico's "most precious resource." NMSA 1978, Section 74-1-12(A).

6. The New Mexico Constitution declares that "water and other natural resources of this state" are "of fundamental importance to the public interest, health, safety and the

general welfare." N.M. Const. art. XX, § 21. The New Mexico Supreme Court has declared, "Our entire state has only enough water to supply its most urgent needs. Water conservation and preservation is of utmost importance. Its utilization for maximum benefits is a requirement second to none, not only for progress, but for survival." Kaiser Steel Corp. v. W.S. Ranch Co., 1970-NMSC-043, ¶ 15, 81, N.M. 414, 417.

III. PROCEDURAL BACKGROUND

7. The New Mexico Environment Department ("NMED") first filed its Petition to Amend the Ground and Surface Water Protection Regulations (20.6.2 NMAC) ("Petition") on March 22, 2017 with this Commission. After a procedural Motion to Dismiss filed by the New Mexico Environmental Law Center ("NMELC"), NMED withdrew its Petition on April 19, 2017.

8. NMED filed a second Petition on May 1, 2017. This Commission set a hearing on NMED's "Corrected Amended Petition" ("Petition") and appointed Erin Anderson as Hearing Officer on August 7, 2017. 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; Laun-Dry; Los Alamos National Security, LLC; Amigos Bravos and the Gila Resources Information Project (collectively, "AB/GRIP"); the New Mexico Environmental Law Center ("NMELC"); 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; United States Air Force, Department of Defense ("DoD"); the New Mexico

Energy, Minerals and Natural Resources Department ("EMNRD"); Rio Grande Resources Corporation; American Magnesium, LLC; New Mexico Copper Corporation.

9. Parties filed Statements of Position and Proposed Amendments on NMED's Petition on July 27, 2017.NMED filed an "Amended Petition" on July 27, 2017. NMED filed a "Corrected Amended Petition" on August 7, 2017.

10. 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.

11. Parties filed a Notice of Intent to Present Technical Testimony on September 11, 2017. Dairy industry filed a Response in Opposition to AB/GRIP's Expedited Motion to Stay All Filing Deadlines and Hearing on September 13, 2017.

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

13. 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.

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

15. 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.

16. AB/GRIP filed a Consolidated Reply to NMED, LANS and NMMA Responses on October 24, 2017. Parties filed a Notice of Intent to Present Rebuttal Testimony on October 27, 2017. 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.

17. 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.

18. The Commission denied AB/GRIP's Motion to Dismiss in Part on November 14, 2017. The Commission issued its Order Denying AB/GRIP's Motion to Dismiss in Part on November 21, 2017.

19. On May 1, 2017, the Department submitted its Petition to Amend the Ground and Surface Water Protection Regulations (20.6.2 NMAC) and Request for Hearing ("Petition"). 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.

20. 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. In May of 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.

21. 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.

22. 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.

23. 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 ("GRIP"), William C. Olson, and others to get their input on the proposed amendments. *Id.* at 4:18-22.

24. 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.

25. 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.

26. In its Order for Hearing, 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.

27. 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 attended any of the public meetings.

28. 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).

29. The following parties ultimately entered appearances in this proceeding: Amigos Bravos; the Gila Resources Information Project ("GRIP"); The New Mexico Mining Association ("NMMA"); Dairy Producers of New Mexico and Dairy Industry Group for a Clean Environment (collectively the "Dairy Groups"); the New Mexico Municipal League ("Municipal League"); the New Mexico Energy, Minerals and Natural Resources Department ("EMNRD"); The United States Air Force/Department of Defense ("USAF/DoD"); The City of Roswell; Laun-Dry; Los Alamos National Security, LLC ("LANS"); William C. Olson; Rio Grande Resources Corporation; American Magnesium, LLC; and New Mexico Copper Corporation (collectively, the "Non-Petitioning Parties").

30. In consultation with the Parties, the Hearing Officer issued procedural orders to govern the submission of testimony and conduct of the hearing. *See* Revised Procedural Order (June 2, 2017); Second Procedural Order (Oct. 31, 2017).

31. July 27, 2017, the non-petitioning parties to the rulemaking filed their proposed amendments to 20.6.2 NMAC that were not contained in NMED's Petition, but that were logical outgrowths of NMED's proposed amendments, along with a statement of reasons for their proposed changes.
32. On September 11, 2017, the Parties filed their Notices of Intent to Present Technical Testimony, including the pre-filed written direct testimony of their witnesses.
33. On October 27, 2017, the Parties filed their Notices of Intent to Present Technical Rebuttal Testimony, including the pre-filed written rebuttal testimony of their witnesses.
34. A public hearing was held in Santa Fe, New Mexico from November 14, 2017 through November 17, 2017.
35. The Commission heard technical testimony from NMED, Amigos Bravos; GRIP; NMMA; the Municipal League; the Dairy Groups; EMNRD; USAF/DoD; the City of Roswell; Laun-Dry, LANS, and Mr. Olson.
36. 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.
37. 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 statement of reasons in this matter. NMED's final proposed changes to 20.6.2 NMAC, including post-hearing edits, are included as NMED Exhibit 43 to this Proposed Statement of Reasons.

IV. PUBLIC COMMENT

A review of the transcripts in this case indicate there were twelve (12) public commenters. The hearing was also webcast, through the assistance of the staff in the building. The public could follow the hearing in real time and prepare their comments. During each day of the hearing, there were at least two opportunities for public comment. Normally, one in the morning, one before lunch, and one at the end of day. If members of the public arrived at a different time in the hearing, and if the testimony was in a natural stopping point, they were invited to give public comment.

The Commission will need to address the public comment of Mr. Domenici and Mr. Jay Snyder. NMED's briefing about their perception of the public comment coupled with Mr. Olson's historical perspective in his briefing outline some of the ways that public comment by attorneys participating in the rule making may be ill advised.

NMED, after reviewing Mr. Snyder's comments found them to be a helpful summation. That post hearing analysis did not apply to Mr. Domenici's comments. AB/GRIP also objected to attorneys and experts giving public comment. The hearing officer researched the issue and could not find any case law in New Mexico addressing the issue of parties to a hearing offering public comment in the same proceeding.

As a side note, the hearing officer in her rulings, left the decision to Commission to determine the weight allotted to their public comment, if any, erring on the side of caution and not wanting to chill public participation. Because

the public comment of an attorney participating in the rule making and an expert witness, was controversial at best, the hearing officer did not include a summary of the public comment in the report.

After the deliberations, if the Commission chooses to include a summary of the public comment, the hearing officer will add a revised summary. The Commission may review the comments themselves on pages 642 and 654 of the hearing transcripts. The hearing officer also omitted a summary of the paragraphs in Roswell and Laun-Dry's proposed findings for the same reasons.

Public commenters were Dan Lorimier TR 24, Maria Bejarano TR 26, Eliva Flores TR 31, Gloria Gameros TR 32, John Buchser TR 131, Madeleine Carey TR 357, Hon. Peggy Nelson (retired) TR 638, Jay Snyder TR 642, Peter Domenici Jr. TR 654, Teresa Seamster TR 664, John Buchser TR 888, Joni Arends TR 892. Gabriel Montoya TR 924. What follows is a summary of public comment as edited by the hearing officer.

Dan Lorimer

An employee of the Rio Grande Chapter of the Sierra Club. He thanked the Commission for its work and requested that the Commission consider the voice of the public, offered through public participation, throughout its deliberations and proposed rule making changes. He wanted the public to be included in every stage of the deliberative process. He did not want NMED to lower its state standards to that of federal standards.

Maria Bejarano

Ms. Bejarano lives in the City of Anthony, New Mexico. She was particularly concerned about the dairy industry and its contamination of ground water. She reminded the commission that the decisions they make will have impact for years to come for the communities. She wanted the public to be notified of changes and its input valued. She stated, "We the communities, are New Mexico; and in public hearings, public input, transparency, and extended public notice is in line with your mission". She did not want any changes that would be in perpetuity, as the public has an ongoing right to know about changes. She thanked the Commission and reminded them of their mission to protect ground water.

Eliva Flores

Ms. Flores is a Trustee for the City of Anthony. She has personally met with many angry citizens who are frustrated by their water quality. She stressed that she would not have travelled all the way to Santa Fe to address the Commission, if these issues were not important to her personally, and her community. She didn't want the health of the community in Anthony to be adversely affected by contamination of groundwater.

Gloria Gameros

Ms. Gameros, is Mayor Pro Tem, of the City of Anthony. Mayor Gameros, thanked the Commission for their time. She represented the City and herself as a private citizen. She pointed out that many of the counsel in the hearing did not live in a community with dairies and did not have to personally, worry about the contamination of their ground water. She wanted the Commission to know that they were not opposed to dairies or having a business, because they give jobs to

the residents and generate revenue. She wanted the diaries to follow a 5-year variance rule, to stay responsible, and to allow for public participation. She believed that the Commission is comprised of good people, who want to do what is right by protecting New Mexicans.

John Buchser

Is a volunteer with the Sierra Club. He wanted to thank the New Mexico Environment Department for extensive outreach and working with its members to get them up to speed on the proposed revisions, as some of them were quite technical. He wanted to see fees increased to help aid regulators, but that proposal was withdrawn. He appreciated the fact that New Mexico has kept its levels low for toxic pollutants as opposed federal standards that are sometimes higher. He was sympathetic to industry, which wanted a life time variance, but felt it was important to keep pressure on the regulated entities so they continue to improve their practices. He also noted that our understanding of ground water is evolving over time due to technology. He stressed that if variances are extended over a very long time the public begins to have questions. He thanked the Commission for their efforts to protect New Mexico ground water.

Madeleine Carey

Ms. Carey grew up in the Mountain View community, of the South Valley, of Albuquerque. In the 1960's it was found that the ground water had been contaminated with nitrates. The citizens were told to dig deeper wells. It wasn't until an infant died of blue baby syndrome that the community was connected to the municipal water authority in 1984. She discussed different polluting industries

and worked primarily in Catron and Grant County. She has seen cancer in families. She opposes variances for the lifetime of a facility, not increasing fees, and she opposes removing a 90-day filing requirement. She supports the additions of several toxic pollutants to the standards and maintaining standards for chromium, fluoride, total mercury, nitrates, and xylenes. She wanted that technical infeasibility determination to remain with the Commission in a public meeting and not allow the Secretary to make those determinations.

Hon. Peggy Nelson

Ms. Nelson is a retired Judge who has lived in Taos county for over 35 years. She has been active in the San Cristobal ditch association, and has been the secretary of the organization for eight years. She mentioned that it is a chaotic time in regard to water, with less snowpack. In her view the time was now, to put in place as many protections as possible while balancing interests. She approved of NMED's new additions to toxic pollutants. She was worried about an attack on science nationally and did not want New Mexico to succumb to that. She believes that public participation is critical. She disapproves of NMED's proposal to allow a lifetime variance as opposed to the 5-year limit in place now. She believes that it dilutes the regulatory authority of the Commission. She also wanted to know why industry was not paying for its own fees and being subsidized by the public. She approved of many of NMED's proposals but wanted to make sure that ongoing public notice, participation, and involvement was a continuing part of the process.

Jay Snyder (summary omitted)

Pete Domenici Jr. (summary omitted)

Teresa Seamster

Ms. Seamster is a retired school administrator and volunteers with the Water Sentinels Club. They collect water samples throughout New Mexico. They have found hormones in the Santa Fe drinking water. She named several lakes including: Abiquiu, Bluewater, Cochiti, Farmington, and Navajo, that all have elevated levels of mercury. She mentioned Game and Fish rules that limit the amount of fish that is safe to eat due to contamination. She also mentioned livestock that consume water and feed that contain antibiotics that end up in the river. There are high mercury and lead levels in lakes to the south which impact the ability to eat fish. She mentioned how expensive water monitoring is, and wanted to see industry shoulder its share of the burden of water testing. She wanted to make sure that increased costs associated with water monitoring were shared equally and did not fall on the backs of the public.

John Buchser

Mr. Buchser spoke in the afternoon and mentioned that he was the Chair for the River Commission in Santa Fe. He graduated from New Mexico Tech and his major was mathematics and computer science. He was interested in the modeling for the Aquifer Store and Recovery. He mentioned several projects like Alamogordo, Bear Canyon, and direct injection in Albuquerque. He mentioned that John Stomp, of the Albuquerque Bernalillo Water Authority, was facing a moving target when it came to water regulation. He also noted that injecting water into an aquifer was not without risk and there was an emerging body of knowledge about injection systems. He thought that allowing NMED to use a case

by case system was practical. He mentioned his experience working on the River Commission. He noted that ASR may only affect a small group of people in Santa Fe but has the potential to impact thousands of wells in Albuquerque. He supports the concept of trying to evaluate what happens to an aquifer, depending on the quality of the water you inject it with. He mentioned that Santa Fe has not seen part of its river flowing since 1940 when all the water was used up.

Gabriel Montoya

Mr. Montoya is on the Council for the Pueblo of Pojoaque. He also is a special projects director for the Pueblo. He emphasized that the Pueblo used its water for drinking and ceremonial purposes. He wanted strong standards to protect the drinking water for the four pueblos in this region and was looking at the regional watershed, as a whole. He also wanted the Commission to think about the water issues that are affecting sister tribes from the national labs. He requested that the Commission consider the multi generation consequences of water quality for the people who will live here in the future.

V. PARTIES PROVIDING TECHNICAL COMMENT

New Mexico Environment Department

Michelle Hunter, Bureu Chief

Dennis McQuillan

Kurt Vollbrecht,

Dairy

Eric Palla

AB/GRIP

Kathy Martin

LANS

Robert S. Beers

New Mexico Mining Association

Michael Neumann

Dr. Dan Stephens

New Mexico Energy & Minerals

William Brancard

New Mexico Municipal

Mark Kelly

Alex Pugliesi prepared written comments

but had to leave due to death in the family

John Stomp

William Olson

Roswell and Laun-Dry

Jay Snyder

USAF/DoD

Dr. Samuel Brock

Scott Clark

VI. POST HEARING SUBMISSIONS

38. NMED has made many post-hearing changes and edits to its proposed amendments to 20.6.2 NMAC, which are explained herein. These edits and changes are summarized as follows:

a. A typographical error was corrected in the list of Toxic Pollutants at proposed 20.6.2.7.T(2) NMAC, changing "ethylene dibromide, EDB" to "ethylene dichloride, EDC".

b. Language that had been mistakenly removed from 20.6.2.1201.A(1) NMAC was reinserted.

c. Language specifying the type of information to be included in a variance compliance report was included in proposed 20.6.2.1210.E NMAC.

d. Language consistent with the Water Quality Act ("WQA") and the testimony of Department witness Dennis McQuillan was added to the narrative standard for Toxic Pollutants at proposed 20.6.2.3103.A.2 NMAC.

e. A new Subsection "N" was added to 20.6.2.3105 NMAC based on the testimony of William Brancard, witness for EMNRD.

f. References in 20.6.2.4101.B NMAC were modified to align with NMED's proposed changes to 20.6.2.4103 NMAC.

g. NMED's proposed language at 20.6.2.4103.B NMAC addressing "subsurface water contaminants" was modified pursuant to an agreement between NMED and NMMA following the hearing. NMED and NMMA were the only two parties to provide testimony at the hearing regarding NMED's proposed new section 20.6.2.4103.B, which NMMA had originally opposed. After the hearing, the two parties could agree on an amendment to Subsection 20.6.2.4103.A NMAC in the existing rule. The two parties have jointly proposed the new language for 20.6.2.4103.A NMAC, and NMED has withdrawn its previously proposed new Subsection 20.6.2.4103.B NMAC. Clerical changes were made to the lettered

subsections in 20.6.2.4103 and to references in 20.6.2.4103, 4105, and 4106 NMAC to account for this modification.

h. Changes to references and timeframes were made in 20.6.2.4109 NMAC to align with other changes proposed by the Department.

i. Mr. Olson Opposed changes to 20.6.2.4103.

NMED's proposed findings have been used as a baseline and other parties' objections are noted under specific sections. The Commission is not required to give any special deference to the proposed rule change as presented by NMED. When objections are noted, they are labeled and included, subject to editing.

NMEDS' PROPOSAL

20.6.2.7 NMAC

39. The Department proposed to reformat the definitions numbering system at 20.6.2.7 NMAC to simplify future edits. *See Hunter Direct*, 5:14-15. There was no objection to this proposal.

40. The Department had originally proposed to add a definition of "discharge permit amendment," with corresponding changes to the definition of "discharge permit modification," as well as other changes throughout 20.6.2 NMAC. However, this proposal was withdrawn prior to the hearing and is no longer before the Commission. *See* Notice of Withdrawal of the New Mexico Environment Department's Proposed Definition of Discharge Permit Amendment and Related Changes to 20.6.2 NMAC (filed Nov. 7, 2017).

41. NMED proposed to move the narrative standard for toxic pollutant from the 5, Written Direct Testimony of Dennis McQuillan ("*McQuillan Direct*"), 21:13-18.

definitions section to the groundwater standards section at 20.6.2.3103 NMAC. Tr. Vol. 2, 382:14-385:6; NMED Exhibit

42. NMED presented testimony in support of moving the narrative standard for toxic pollutants from the definitions section to the groundwater standards section at 20.6.2.3103 NMAC. 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. Tr. Vol. 2, 382:14-385:6; *McQuillan Direct*, 21:13-18.

43. NMED 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). Tr. Vol. 2, 362:9-389:23; *McQuillan Direct*, 4:9-18:13.

44. NMED supported the addition of these constituents through the testimony of its Chief Scientist, Dennis McQuillan. Tr. Vol. 2, 362:9-389:23; *McQuillan Direct*, 4:9-18:13.

45. 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. LANS initially proposed a new Section 10, exempting certain activities from the WQCC regulations under 20.6.2 NMAC.

46. 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 provides 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.

47. Ms. Hunter testified that the Department opposed LANS' proposal to exempt entities being regulated pursuant to the federal Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") because the EPA, in certain cases, incorporated state requirements issued under the authority of WQCC regulations into its regulation of specific sites in New Mexico. In addition, CERCLA itself contains an express exemption from state regulation, therefore no such duplicative exemption should be in the WQCC regulations. Tr. Vol. 3, 595:20-597:20; NMED Exhibit 26, Written Rebuttal Testimony of Michelle Hunter ("*Hunter Rebuttal*"), 4:10-5:3. William C. Olson testified that he supported the Department's language for the proposed new Section 10. Tr. Vol. 3, 706:1-8.

Mr. Olson original position

Section 20.6.2.10 NMAC

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 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.

48. LANS and the USAF/DoD proposed to adopt a new section 20.6.2.10 NMAC to incorporate specific statutory exemptions in a separate section for the purpose of conforming with the language of the Water Quality Act and to better inform the

regulated community and public on the scope of the regulations. However, the proposed language set forth by LANS and USAF/DoD did not conform with the language of the Water Quality Act and omitted portions of the statutory language. The Department and William C. Olson proposed that LANS' and USAF/DoD's language be amended as set out above to conform with the Water Quality Act including the above typographical correction noted by William C. Olson [Olson Rebuttal Testimony, WCO Rebuttal Exhibit 1, pgs. 2-3 and pg.5; Olson Testimony Tr. vol. 3, pg. 705, line 19 to pg. 706, line 13; and Amended NMED Exhibit 36, pg. 9].The above-proposed Department and William C. Olson amendment was supported by LANS. [Beers Testimony Tr. vol. 3, pg. 686, lines 3-6].

49. The Department, through rebuttal testimony of Ms. Hunter, objected to LANS' proposal to add an exemption for CERLCA. Pleading Log No. 81, Ex. 26 (Hunter Rebuttal).

LANS Proposal,

Section 20.6.2.10

50. LANS, in an effort to reach a compromise, agreed at hearing to withdraw its request to include an exemption for facilities and activities subject to CERLCA, but maintained its proposal to exempt facilities and activities subject to RCRA. Tr. Vol. 3 at 688:3-8.

i. The proposed exemption for RCRA

51. As noted above, RCRA establishes programs for the regulation of hazardous waste, solid waste, and underground storage tanks, and covers the same areas as the New Mexico Hazardous Waste Act, Solid Waste Act, and Groundwater Protection Act.

Generally, New Mexico regulates these activities under delegation/program approval from EPA under RCRA. Regulations adopted by EPA are enforceable by EPA under the federal acts until New Mexico adopts them under state law. Thus, in some circumstances, there may be a delay in state regulation of hazardous waste, solid waste, and underground storage tanks. It is this gap that LANS seeks to address by its proposed exemption.

52. It would be inconsistent with the exclusions in Section 74-6-12 to only exempt regulation of hazardous waste, solid waste, and underground storage tanks upon formal adoption of these regulations by the Environmental Improvement Board. LANS believes that the better approach is to exempt these activities once regulation has been initiated under RCRA.

53. Ms. Hunter testified on cross examination that the Department's amended petition removed the proposed Section 20.6.2.3105.O NMAC in its entirety, including the proposed exemption for RCRA. Tr. Vol. 3 at 601:23-24. Ms. Hunter characterized LANS' proposal as different from, and arguably broader than, the language of the Water Quality Act. Tr. Vol. 3 at 596:11-14. Ms. Hunter supported the Department's position to not include that proposal, stating that "[t]he Water Quality Act sets forth the regulatory authority of the commission and the Department and sets the limits on that authority. The Department believes that it would be inappropriate to include limitations on such authority in the regulations that go beyond the scope of the Water Quality Act." *Id.* at 596:15-20.

54. On cross examination by counsel for LANS, Ms. Hunter testified that the Department did not intend to subject "facilities that had certain discharges subject to [federal] permits...under [RCRA] to state jurisdiction. Tr. Vol. 3 at 601:18-602:10.

55. Mr. Beers testified on behalf of LANS in favor of including an exemption for RCRA, stating that inclusion of the proposed exemption was necessary to ensure that the exemption sections are comprehensive. Tr. Vol. 3 at 687:20-688:2.

56. Mr. Beers expressed concern that the Department's proposal 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. Clark, on behalf of the DoD, also testified regarding the proposed exemption for RCRA.

57. Mr. Clark, in favor of the exemption, stated that the regulations should go beyond just reiterating the statute to "provide more detail and consider the real-life scenario where the rules need not apply because of the direct oversight in other environmental programs." Tr. Vol. 3 at 697:25-698:4.

58. Mr. Olson testified in support of the Department's position stating that the Water Quality Act agreeing that the exemption for RCRA should not be included where there is no statutory exemption in the Water Quality Act for these activities. Tr. Vol. 3 at 706:21-707:7. Mr. Olson also agreed with the Department's testimony that some RCRA sites have operational discharge permits issued under Commission rules. *Id.* at 707:7-9. Mr. Olson further stated that the Commission "needs...to protect public interests which may or may not be aligned through the federal statutes."

59. LANS' testimony explains why activities that are already subject to federal authority under RCRA should be exempted under the Regulations. Moreover, the

Department's argument in opposition, that exemptions must be limited to the express language of the Water Quality Act, is inconsistent with the existing exemptions in 20.6.2.3105 NMAC and creates the potential for dual regulation. As such, the Commission should reject the Department's position and instead adopt an exemption for "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." *See* Ex. A, ¶ 4.

20.6.2.1201 NMAC

60. 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.

61. 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.

AB/GRIP focused considerable attention to Variances in their briefing. Attached is a summary of their position. AB/GRIP wishes to preserve the 5-year limit on variances that

has been in place since 1981. Other parties weighed in on the *variance issue which was one of the most contested issues in the hearing. Dairies and NMMA supported the proposed rule change proposed by NMED. AB/GRIPS' position is set out in pages 19-. Mr. Olson stated no position.*

AB/GRIP POSITION

STATUTORY AND REGULATORY VARIANCE REQUIREMENTS

SEE 20.6.2.1210.A(9), A (10), C, D, and E

62. The Water Quality Act ("WQA" or "Act") is the primary statutory mechanism by which ground water in our state is protected and by which the public can participate in the permitting process for the State's most precious public resource. AB/GRIP's Motion to Dismiss in Part, page 2.

63. The objective of the Act is to prevent and abate water pollution. Bokum Res. Corp. v. N.M. Water Quality Control Comm'n, 1979-NMSC-090, ¶ 59, 93 N.M. 546.

64. The Commission's statutory authority and mandate comes from the Act, NMSA 1978, Sections 74-6-1 through 74-6-17 (1967, as amended through 2013) ("WQA" or "Act").

65. To carry out the Act's broad remedial purpose, the Act requires the Commission to "adopt, promulgate and publish regulations to *prevent or abate water pollution* in the state." NMSA 1978, Section 74-6-4(E) (2009) (emphasis added).

66. The Act authorizes the Commission to promulgate regulations "specifying the procedure under which variances may be sought" and to grant variances from Commission regulations only under the following circumstances:

67. The Commission] may grant an individual variance from any regulation of the commission whenever it is found that compliance with the regulation will impose an unreasonable burden upon any lawful business, occupation or activity. *The commission may only grant a variance conditioned upon a person effecting a particular abatement of water pollution within a reasonable period of time.* Any variance shall be granted for the period of time specified by the commission. The commission shall adopt regulations specifying the procedure under which variances may be sought, which regulations shall provide for the holding of a public hearing before any variance may be granted. NMSA 1978, Section 74-6-4(H) (emphasis added).

68. Section 74-6-4(H) of the Act authorizes the Commission to permit *temporary* pollution only on a case-by-case basis through the issuance of a variance, and only after the Commission has conducted a public hearing at which the petitioner meets a specific statutory burden. *Id.*

69. The Legislature also placed a limit on the duration of variances. The Act states that, "The commission may only grant a variance conditioned upon a person effecting a particular abatement of water pollution *within a reasonable period of time.*" *Id.* (emphasis added).

70. Both the face of the Act and its express purpose make clear that the Legislature never intended the issuance of variances "for the life of a facility" so that industry could pollute New Mexico's most precious public resource in perpetuity. Water Quality Act, NMSA 1978, §§ 74-6-1 through 74-6-17 (1967, as amended through 2013).

71. The Commission first promulgated implementing regulations for the Act in 1967. AB/GRIP's Motion to Dismiss in Part, page 5.

72. In 1968, Regulation No. 5, "Procedure for Requesting a Variance," was promulgated, providing the variance mechanism to regulated entities. *Id.*

73. A few years later, the Commission amended Regulation No. 5 to limit variances to one year. *Id.*

74. In 1981, the Commission aligned the duration of variances with the duration of discharge permits by extending the variance limit from one year to five years. 1-210(D)(9) NMAC (1981). *Id.*

75. The five-year variance limit has remained in effect since 1981. *Id.* at page 6.

76. The purpose of a variance is *only* to *temporarily* allow water pollution and to facilitate abatement of water pollution. § 74-6-4(H).

77. The Act only authorizes the Commission to grant variances "conditioned upon a person *effecting a particular abatement of water pollution within a reasonable period of time*". *Id.* (emphasis added).

78. Under the plain language of § 74-6-4(H), variances can *only* be granted to regulated entities that are polluting ground water above standards and are striving to become compliant with Commission regulations within a reasonable period of time. *Id.*; Martin Testimony, transcript volume II, page 245, lines 1-7.

79. Under the plain language of § 74-6-4(H), the purpose of a variance is not to grant regulated facilities permanent variances from the prescriptive requirements of the Dairy and Copper Rules that do not result in water pollution, such as for variances

"from the number or location of monitoring wells, to certain design specifications of a facility." Martin Testimony transcript, pages 195-199.

80. A variance from the prescriptive requirements of the Dairy Rule already exists within the Dairy Rule itself. Vollbrecht Testimony, transcript volume I, page 92, lines 13-24; Section 20.6.6.18.D NMAC.

1. However, the Dairy Rule's variance provision may be unlawful. Section 20.6.6.18.D NMAC; § 74-6-4(H).

81. A regulated entity may request a variance from the prescriptive requirements of the Dairy Rule for more than five years, such as facility design requirements or monitoring requirements. Section 20.6.6.18.D NMAC.

82. A variance may be granted from the prescriptive requirements of the Dairy Rule "for the expected useful life of a feature." *Id.*

83. Therefore, NMED's and industry's proposal to open up the current five-year variance limit to allow permanent variances from the prescriptive requirements of the Dairy Rule is unnecessary. Vollbrecht Testimony, transcript volume I, page 92, lines 13-24.

84. However, no variance provision from the prescriptive requirements of the Copper Rule exists within the Copper Rule. Section 20.6.7 NMAC.

85. Though the Dairy Rule's variance provision may result in an unfair advantage for the Dairy industry, as alleged by NMED and mining interests, that is a result of a legislative policy decision. NMSA 1978, Section 74-6-4(K) (2009); Vollbrecht Testimony, volume I, pages 93-94; Mining interests legal counsel, Stuart Butzier, page 283, lines 5-7.

86. In 2008, the legislature amended the Water Quality Act, directing the Commission to promulgate regulations for the copper and dairy industries. NMSA 1978, § 74-6-4(K) (2009).

87. The Commission ultimately promulgated the Copper Rule *without* a variance provision and a Dairy rule *with* a variance provision. Section 20.6.7 NMAC; Section 20.6.6.18 NMAC.

88. If the copper industry wants to obtain variances from the prescriptive requirements of the Copper Rule "for the expected useful life of the feature," then the proper remedy is to amend the Copper Rule itself to allow such variance requests, and not Section 20.6.2.1210 NMAC.

89. The Copper Rule and the Dairy Rule are not the only prescriptive requirements under the Water Quality Act. Martin Testimony, transcript volume I, page 199, lines 20-25, page 200, lines 1-13.

90. The Commission's water quality standards set forth in Section 20.6.2.3103 NMAC are also prescriptive requirements under the Act. *Id.*

91. The Act does not permit the granting of variances from Section 20.6.2.3103 NMAC "for the expected useful life of the facility." § 74-6-4(H).

NMED'S AND INDUSTRY'S PROPOSED REMOVAL OF THE CURRENT FIVE-YEAR VARIANCE LIMIT DEFICIENCIES NMED's

and industry's proposed removal of the current five-year variance limit violates the Water Quality Act's purpose of preventing or abating water pollution.

92. NMED has proposed removing the Commission's current five-year limit on variances under Section 20.6.2.1210 NMAC. Vollbrecht Testimony, transcript

volume I, page 73, lines 21-24. Polluters support NMED's proposed removal of the five-year variance limit. Dairy industry's Notice of Intent to Present Technical Testimony, page 3; NMMA's Notice of Intent to Present Technical Testimony, page 5.

93. NMED has expressly stated numerous times that the purpose of its proposed removal of the current five-year variance limit is to grant variances "for the life of a facility". *See* attached Exhibit C of AB/GRIP's Motion to Dismiss in Part; NMED Notice of Intent to Present Technical Testimony Exhibit 13, page 14, lines 11-12; and NMED Response to AB/GRIP's Motion to Dismiss in Part, page 6.

94. Therefore, under NMED's and industry's proposal, a facility expected to operate for over 100 years could receive a variance to pollute New Mexico's most precious public resource for over 100 years. AB/GRIP's Motion to Dismiss in Part, page 6.

95. NMED's proposal is directly opposed to the Act's clear mandate of protecting ground water quality and abating pollution of ground water within a reasonable period of time. §§ 74-6-1 through 74-6-17 (1967, as amended through 2013).

96. The legislative policy clearly expressed in the Act is that of preventing and abating water pollution, and it is not within the Commission's prerogative to reverse that policy. *Id.*

97. The Commission has imposed a five-year variance limit because of the purpose of a variance and because of the link between variances and discharge permits. AB/GRIP's Consolidated Reply to Responses Filed by NMED, New Mexico Mining Association, and Los Alamos National Security, LLC on AB/GRIP's Motion to Dismiss in Part, pages 7-9 ("AB/GRIP's Consolidated Reply").

A. NMED's and industry's proposed removal of the current five-year variance limit violates the Water Quality Act's "reasonable period of time" requirement.

98. The Commission first promulgated implementing regulations for the Act in 1967. AB/GRIP's Motion to Dismiss in Part, page 5.

99. In 1968, Regulation No. 5, "Procedure for Requesting a Variance," was promulgated, providing the variance mechanism to regulated entities. *Id.*

100. A few years later, the Commission amended Regulation No. 5 to limit variances to one year. *Id.* In 1981, the Commission aligned the duration of variances with the duration of discharge permits by extending the variance limit from one year to five years. 1-210(D)(9) NMAC (1981). *Id.* The current five-year variance limit is due to 1) the purpose of a variance and 2) the link between a variance and a discharge permit. *Id.* at page 6.

101. The Act mandates that the Commission may *only* grant a variance on the condition that the facility requesting the variance effect "a particular abatement of water pollution *within a reasonable period of time.*" § 74-6-4(H) (emphasis added).

102. Variances provide a *temporary* relief mechanism for regulated entities to avoid strict compliance with regulations. AB/GRIP's Response, page 9.

103. Ground water pollution generally occurs through a discharge of water contaminants to ground water pursuant to a discharge permit. Martin Testimony, transcript volume I, page 195, lines 4-19; AB/GRIP's Motion to Dismiss in Part, page 7.

104. Ground water pollution may also come about by an unauthorized discharge of water contaminants to ground water. NMED has, however, failed to provide any

evidence of a regulated entity that has either requested a variance or been granted a variance that did not have an associated discharge permit. Vollbrecht Testimony, transcript volume I, pages 70-128; *see also* NMED's Exhibit 42 submitted during hearing.

105. Because a discharge permit is limited to five years, it is reasonable that a variance from Commission regulations applicable to that facility through its discharge permit (such as ground water quality standards) would be for the duration of the discharge permit. In this context, the Act's "reasonable period of time" requirement is the five-year duration of a discharge permit. AB/GRIP's Response, pages 7-9; Section 74-6-5(I).

106. Though the Act does not expressly limit variances to five years under § 74-6-4(H), the rules of statutory construction require § 74-6-5(I) and § 74-6-4(H) to be considered and interpreted in harmony with each other, as a whole, in order to effectuate the Act's purpose of preventing and abating water pollution. Pueblo of Picuris v. N.M. Energy, Minerals and Nat. Res. Dept., 2001-NMCA-084, ¶ 14, 131 N.M. 166, 169; AB/GRIP's Motion to Dismiss in Part, page 8.

107. When § 74-6-5(I) and § 74-6-4(H) are read harmoniously, as a whole, it naturally follows that variances would be limited to the duration of a discharge permit in order to effectuate the Act's purpose of preventing and abating pollution of ground water. *Id.*

B. Variances are linked with discharge permits that are statutorily limited to five-year terms, thereby limiting variances to no more than five years.

108. AB/GRIP has presented substantial evidence that variances are historically and currently linked with discharge permits that are statutorily limited to five years, thereby limiting variances to no more than five years. Martin Rebuttal Testimony, page 4-6, referencing Exhibits F1, F2 and F5. Evidence submitted by AB/GRIP demonstrates that the legal pathway for a variance is a discharge permit. *Id.*

109. The Commission has historically required NMED to incorporate conditions and requirements of an approved variance into the associated discharge permit. *Id.* at page 5, lines 16-21; page 6, lines 1-3, referencing Exhibit F5.

110. The Commission requires discharge permits for copper mines to include "any conditions based on a variance issued for the copper mine facility pursuant to 20.6.2.1210 NMAC." Section 20.6.7.10.H NMAC.

111. The discharge permit then becomes an enforcement mechanism for any violation of the variance conditions and requirements. *Id.*; Martin Testimony, transcript volume I, page 190, lines 8-20.

112. NMED has failed to provide in their direct and rebuttal written testimony and exhibits, as well as in their oral testimony at hearing, any evidence of a facility without a discharge permit needing a variance, that has requested a variance, or that has been granted a variance. Vollbrecht Testimony, transcript volume I, pages 70-128; s*ee also* NMED's Exhibit 42 submitted during hearing.

113. After careful review of all known requests for variances and orders granting variances, the Commission appears to have never been asked to grant a variance for a facility or entity that did not already have a discharge permit. Martin Rebuttal Testimony, page

5, lines 9-15, referencing Exhibit E; Martin Testimony, transcript volume I, page 193, lines 21-25, page 194, lines 1-19.

114. AB/GRIP's expert has conceded that there are "very limited circumstances under which a facility may be exempt from the requirement of obtaining a discharge permit. Those exemptions are found at Section 20.6.2.3105 NMAC." Martin Rebuttal Testimony, page 5, footnote 4. NMED, however, has still failed to provide any evidence that a facility exempt from discharge permit requirements has either requested a variance or been granted a variance pursuant to Section 74-6-4(H) and Section 20.6.2.1210 NMAC. Hence, a situation where a variance is not associated with a discharge permit remains purely hypothetical. Vollbrecht Testimony, transcript volume I, pages 70-128; s*ee also* NMED's Exhibit 42 submitted during hearing.

C. Alternative abatement standards are not a type of variance under Section 74-6-4(H) of the Water Quality Act.

115. NMED has argued the following, in pertinent part:

> Also, alternative abatement standards *are a type of variance* that the Commission addresses in the existing abatement regulations that are not necessarily related to permits and are not restricted to five years. In granting such alternative standards, the Commission has recognized that the reasonable period of time for them is typically in perpetuity, given their nature and the purpose.

Vollbrecht Testimony, volume I, page 80, lines 16-23 (emphasis added). NMED fails to provide any legal authority in support of this assertion. Vollbrecht Testimony, transcript volume I, pages 70-128.

The Water Quality Act and its implementing regulations make clear that an alternative

abatement standard is not a type of variance for three reasons.

116. First, the Act requires the Commission to "adopt, promulgate and publish regulations to prevent or abate water pollution." NMSA 1978, Section 74-6-4(E). This provision is the source of the Commission's authority to promulgate regulations pertaining to abatement and alternative abatement standards. The Commission has defined "abate" or "abatement" as "the investigation, containment, removal or other mitigation of water pollution." Section 20.6.2.7.B NMAC.

117. "Alternative" is defined as, "One or the other of two things; giving an option or choice; allowing a choice between two or more things or acts to be done." Black's Law dictionary.

118. The Commission has permitted the use of alternative abatement standards, under extremely limited circumstances, for the water quality standards set forth in Section 20.6.2.3103 NMAC. Section 20.6.2.4103 NMAC.

119. The mechanism of alternative abatement standards requires a regulated entity to still conduct abatement, but to a lesser standard than that identified in Section 20.6.2.3101 NMAC. Section 20.6.2.4103.F NMAC.

120. Whereas a variance, pursuant to § 74-6-4(H), permits a regulated entity to avoid compliance, in its entirety, with a Commission regulation. § 74-6-4(H).

121. A variance from the water quality standards set forth in Section 20.6.2.3103 NMAC would allow a regulated entity to avoid abatement entirely, albeit for a limited period of time. *Id.*

122. Second, if the Legislature intended for alternative abatement standards to be a type of variance it would have expressly stated so in the Act and would have authorized the

Commission to promulgate regulations for these two mechanisms pursuant § 74-6-4(H). *Id.*

123. Third, the Commission has historically treated these two mechanisms separately. Martin Testimony transcript, volume II, page 276, lines 10-25; page 277, lines 3-21.

124. Regulations for alternative abatement standards were promulgated pursuant to Section 74-6-4(E) of the Act and can be found at Section 20.6.2.4103.F NMAC.

125. Regulations for variances were promulgated pursuant to Section 74-6-4(H) of the Act and can be found at Section 20.6.2.1210 NMAC. NMED's expert also testified at hearing that there are "at least 30 such sites that are under abatement that do not have discharge permits. Those facilities could request a variance from the Commission's abatement regulations." Vollbrecht Testimony, transcript volume I, page 80, lines 12-15.

126. NMED then submitted Exhibit 42, "Sites Under Abatement With No Discharge Permit" during the hearing pursuant to AB/GRIP's request. *Id.* at page 90, lines 10-21.

127. This exhibit simply identifies sites currently under abatement without a discharge permit. It does not identify sites without discharge permits that have received variances. *Id.*

128. NMED has failed to provide substantial evidence of sites without discharge permits that have received variances from the Commission. *Id.* Therefore, NMED has failed to provide substantial evidence that variances are not linked with discharge permits.

D. NMED's and industry's proposed removal of the current five-year variance limit violates the Water Quality Act's public participation requirements.

i. *The Water Quality Act requires a public hearing for issuance, extension, renewal or continuance of a variance.*

129. The Act provides that a variance cannot be granted without the holding of a public hearing. § 74-6-4(H). Therefore, when a facility submits a petition for an initial variance, renewal, extension or continuance of a variance, a public hearing *must* be held. *Id.*; Martin Testimony, transcript volume I, page 248, lines 14-18.

130. Under NMED's and industry's proposed amendment to remove the five-year variance limit, NMED would instead conduct an *internal administrative review* of a variance issued for the "life of a facility" every 5 years to determine compliance and continuance of the variance. Vollbrecht Testimony, transcript volume I, page 73, lines 21-25, page 74, lines 1-9 (emphasis added).

131. NMED's and industry's proposed internal review does not require a mandatory public hearing be held on the five-year variance compliance report, violating the Act's hearing requirements. § 74-6-4(H).

132. This proposed internal review would be the functional equivalent of a variance renewal or extension, and therefore a public hearing must be held on any decisions to continue, renew or extend a variance. *Id.*; AB/GRIP Opening Statement, transcript volume I, page 169, lines 4-19, page 172, lines 1-9.

133. The statutory public hearing requirement for variance issuance, renewal, extension or continuance cannot be changed by regulatory amendment. "If there is a conflict or inconsistency between statutes and regulations promulgated by an agency,

the language of the statutes prevail," and not the language of the regulation. § 74-6-4(C); Jones v. Empl. Serv. Div. of Human Serv. Dep't, 1980-NMSC-120, ¶ 3, 95 N.M. 97, 98; § 74-6-4(C); State ex rel. Stapleton v. Skandera, 2015-NMCA-044, ¶ 8, 346 P.3d 1191 ("the administrative agency's discretion may not justify altering, modifying, or extending the reach of a law created by the Legislature").

ii. NMED's and industry's proposal would chill public participation.

134. NMED's and industry's proposed five-year internal administrative review of a variance compliance report would also chill public participation in the permitting process.

135. Under the Act and its implementing regulations found at Section 20.6.2.1210 NMAC, the public is guaranteed the right to be heard and to present evidence and witnesses every five years; the current five-year variance limit results in an automatic public hearing every five years, without the public having to request a public hearing. § 74-6-4(H); Section 20.6.2.1210 NMAC.

136. Under NMED's and industry's proposed amendment, a new onerous burden would be placed on the public to hold variance petitioners accountable. Martin Testimony, transcript volume I, page 185, lines 2-18; Martin Testimony, transcript volume II, page 310, lines 21-25, page 311, lines 1-4.

137. NMED's and industry's proposal would have the Department simply conduct an administrative completeness review of a variance holder's five-year variance compliance report and not proceed to conduct a technical review of the five-year variance compliance report in order to verify the information provided. As Commissioner Dunbar stated during the hearing, "...it seems like that's where the

responsibility ends." Transcript volume II, page 303, line 10. NMED's proposal, therefore, would place a new burden on the public to evaluate the technical completeness of a five-year variance compliance report. *Id.*

138. Furthermore, even if a member of the public requests a public hearing on NMED's proposed five-year variance compliance report a public hearing does not have to be held. Under NMED's and industry's proposal, automatic public hearings would become discretionary. Vollbrecht Testimony, transcript volume I, page 94, lines 16-19; 23-25, page 95, line 1; page 97, lines 13-19.

139. A discretionary hearing would chill public participation by placing a new, onerous burden on the public to demonstrate why a public hearing should be held on NMED's proposed five-year variance compliance report. Martin testimony, transcript volume I, page 249, lines 12-16; Martin Testimony, transcript volume II, page 310, lines 21-25, page 311, lines 1-4.

140. It is clear that the legislature intended for the public to play a key role in variance proceedings. NMSA 1978, § 74-6-4(H).

141. New Mexico Courts have also made clear that NMED's and industry's attempts to chill public participation in variance proceedings would not withstand legal challenge. In re Rhino Envtl. Servs., 2005-NMSC-024, ¶ 23, 138 N.M. 133, 139, 117 P.3d 939, 945; Communities for Clean Water v. New Mexico Water Quality Control Commission, 2017 N.M. App. LEXIS 115.

iii. NMED's and industry's proposal fails to provide transparency, thereby limiting public participation.

142. NMED's and industry's proposal also fails to provide transparency by allowing the variance holder to select what information it would provide in the proposed five-year variance compliance report. Under NMED's and industry's proposal, the variance holder could simply submit a one-sentence variance compliance "report" to NMED stating that there are no new facts or changed circumstances warranting a public hearing. *Id.* at page 100, lines 2-11.

143. A variance holder would be given unlimited discretion to determine what it considers to be a new fact or changed circumstance. *Id.* at page 99, lines 18-25, page 100, lines 1-11.

144. NMED would not be determining what information in the proposed variance compliance report constitutes a new fact or changed circumstance. *Id*; Commissioner Dunbar statement, transcript volume II, page 303, line 10.

145. Information is central to evaluation of the proposed five-year variance compliance report, not only for agency officials to make good decisions, but also for the public to participate in an informed, meaningful way. Martin Testimony, transcript volume I, page 185, lines 19-25; page 191, lines 21-25, page 192, lines 1-11; Vollbrecht Testimony, transcript volume I, page 99, lines 2-17.

146. In order to properly monitor variance compliance, the public needs access to information upon which the variance holder is relying for its variance compliance report. This need for information applies to both before and after issuance of a variance. *Id.*

147. NMED's and industry's proposal is especially concerning because the five-year variance compliance report would be the basis for the public to determine whether a

request for a public hearing should be made. Martin Testimony, transcript volume I, page 251, lines 2-22; page 252, lines 16-21.

148. By giving the variance holder unfettered discretion regarding information to be included in the variance compliance report, NMED would be enabling industry's efforts to preclude public participation and monitoring. Martin Testimony, transcript volume I, page 261, lines 19-25, page 262, lines 1-4; Vollbrecht Testimony, transcript volume I, page 100, lines 2-16.

149. NMED's proposal would also undermine its ability to determine whether to request a public hearing on the variance compliance report, as well as the Commission's ability to determine whether to grant a request for a public hearing on the variance compliance report. *Id.* at page 97, lines 20-25, page 98, lines 1-8.

E. *NMED's and industry's proposed internal administrative review of variance compliance reports exceeds the Commission's authority under the Water Quality Act.*

150. NMED's and industry's proposed removal of the current five-year variance limit and its replacement with an administratively reviewed five-year variance compliance report also violates the Water Quality Act.

151. Under NMED's and industry's proposal, the department would conduct a five-year variance compliance "review" and determine whether the variance should continue. This internal administrative review is the functional equivalent of a variance renewal or extension petition review and is not permitted under the Act. *Id.*

152. § 74-6-4(H) makes clear that only the Commission has review and approval authority for variance issuance, extension and renewal. *Compare* NMSA 1978, § 74-6-4(H) (authorizes *only* the Commission to review and approve variance issuance,

continuance, renewal or extension petitions) *with* NMSA 1978, § 74-6-5(A) (authorizes the Commission to delegate its review and approval authority of discharge permits to constituent agency NMED); Vollbrecht Testimony, volume IV, page 832, lines 20-22.

153. The Act does not authorize the Commission to delegate its review and approval authority for variances to NMED. *Id.*; § 74-6-4(F).

154. Under NMED's and industry's proposal, NMED would be reviewing and approving the proposed five-year variance compliance report – the functional equivalent of a variance continuance, renewal, or extension decision – and not the Commission. Therefore, NMED's proposal would be an unlawful delegation of authority. § 74-6-4(H); AB/GRIP counsel, transcript volume I, page 169, lines 4-9, page 172, lines 1-9; Old Abe Co. v. N.M. Mining Comm'n, 1995-NMCA-134, ¶ 31, 121 N.M. 83, 94; Kerr-McGee Nuclear Corp. v. N.M. Water Quality Control Comm'n, 1982-NMCA-015, ¶ 23, 98 N.M. 240, 246-247.

F. NMED's and Industry's Proposed Removal of the Current Five-Year Variance Limit Is Not Supported by Substantial Evidence.

i. NMED's and industry's proposed removal of the current five-year variance limit is not supported by substantial evidence.

155. The Commission's decision to adopt a regulation must be based on substantial evidence. "Substantial evidence supporting administrative agency action is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." Oil Transportation Co. v. New Mexico State Corporation Commission, 110 N.M. 568, 571, 798 P.2d 169, 172 (1990).

156. The agency must consider all evidence in the record. Perkins v. Department of

Human Services, 106 N.M. 651, 654, 748 P.2d 24, 27 (Ct. App. 1987).

157. Furthermore, the Commission's decision may be overturned when the decision is not supported by substantial evidence in the record. §74-6-7(B).

158. As petitioner, NMED bears the burden of proof in this rulemaking and must demonstrate that there is substantial evidence supporting adoption of its proposed amendments. Matter of D'Angelo, 105 N.M. 391, 393, 733 P.2d 360, 362 (1986); Foster v. Board of Dentistry, 103 N.M. 776, 777, 714 P.2d 580, 581 (1986).

159. NMED has failed to provide any evidence in support of its proposed removal of the current five-year variance limit. Vollbrecht Testimony, transcript volume I, pages 70-128. As such, NMED did not carry its burden.

160. NMED counsel stated at the beginning of the hearing, "As you will hear in the Department's testimony in this rule-making, the five-year limit is unduly restrictive and impractical for certain variances." NMED counsel, transcript volume I, page 23, lines 12-14. NMED expert, Kurt Vollbrecht, proceeded to testify to the following, in pertinent part:

> The current rule requires that a facility go through a full hearing before the Commission every five years, even if nothing has changed. This is a significant burden on the Commission, the entity requesting the variance, and the Department, that is unnecessary if nothing has changed…In the case of a variance from the requirement of a prescriptive rule, such as the Copper Rule or Dairy Rule, the time and effort associated with a variance – with a variance hearing every five years is inconsistent with the scope of the variance.

Vollbrecht Testimony, transcript volume I, page 74, lines 22-25, page 75, lines 1-17.

161. NMED did not provide any evidence supporting the following conclusions: 1) that the current five-year variance limit and accompanying mandatory public hearing

is a burden on the Commission, the entity requesting the variance and the Department; 2) that regulated facility operations and financial assurance remain static over five years, resulting in no changes in facts or circumstances; and 3) the time and effort associated with a variance hearing specific to variance requests from the prescriptive requirements of the Dairy Rule or Copper Rule. Vollbrecht Testimony, transcript volume I, pages 70-128.

162. NMED could have provided a cost and time analysis to demonstrate any burden on the Department's resources under the current rule and to demonstrate ease of that burden under its proposed amendment, but the Department failed to do so. *Id.*; *see generally*, NMED NOI to Present Technical Testimony, NMED NOI to Present Rebuttal Testimony.

163. Furthermore, NMED's example of how the current five-year variance limit is burdensome for certain types of variances, such as from the prescriptive requirements of the Dairy Rule, demonstrates that the Department's proposal is unnecessary. The Dairy Rule already has a variance provision of its own and allows regulated entities to request a variance for the "expected useful life of a feature" well beyond five years. Section 20.6.6.18 NMAC.

164. NMED's expert conceded that the Department's proposed amendment is unnecessary for variances from the Dairy Rule's prescriptive requirements, *Id.* at page 93, lines 3-8, and that the Copper Rule could be amended to allow for variances from its prescriptive requirements in lieu of amending Section 20.6.2.1210 NMAC. *Id.* at page 93, lines 23-25, page 94, lines 1-12.

RGR, NMCC and AmMg (Mining Companies) position

NMED Amendment Allowing Specifications of Time for Variances

165. RGR, NMCC and AmMg support NMED's language amending 20.6.2.1210.C to allow the Commission the discretion to "specify the length of time" that variances may be in place, effectively eliminating the arbitrary five-year limit on variances that can be granted by the Commission under the current provision.

166. The five-year limit on variances, as recognized by this Commission when it avoided the arbitrary prohibition when it adopted the Copper Rule, 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. NMED's proposed change, as pointed out by witness Kurt Volbrecht, would bring fairness and consistency to the variance requirements by eliminating the arbitrary five-year limit for all regulated communities, not just one part (*copper* mining) of one industry (mining).4

167. The testimony of Ms. Martin, the primary witness for the party opposing the change, was convoluted and unpersuasive. Although on cross-examination she acknowledged, as a former regulator in Oklahoma, the need for fairness and evenhandedness in regulations and the application of regulations in the real world, she retreated to an artifice when confronted with the unfairness of retaining the five-year limitation for everybody but the copper industry.

168. Specifically, she posited—unreasonably and without persuasive legal justification—that perhaps the five-year limitation in the general variance provision of 20.6.2.1210.C might be read by a court as indirectly limiting the variance provision of the Copper Rule that,

for the copper industry only, supplants it. This is the argument of a witness unpersuaded by her own position, and it should be soundly rejected.

Describing Water Bodies in Variance Requests (20.6.2.1210.A(5))

171. NMED and Olson each offer amendatory language for 20.6.2.1210.A. NMED's original proposal is reasonable; Olson's original and modified proposal are not and would be problematic. The current provision in question would require variance petitions under Rule 1210 to "describe the water body or watercourse affected by the discharge," and NMED's commonsense proposal was to limit this requirement to the discharge "*for which the variance sought,*" (emphasis added).

172. NMED's original language clearly 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. NMED's original proposal therefore is sensible.

173. Olson's original proposal for 20.6.2.1210.A(5) was to expand the information required by this provision to include an analysis of the present and future uses of any water that may be affected by the variance. This proposal thus alluded to the "place of withdrawal" language of the Water Quality Act that has occupied the attention of both this Commission and the New Mexico Court of Appeals in multiple lengthy adjudication proceedings, appeals, and remands. The proposal would foist onto permittees a task that has proven confounding to NMED, to this Commission, and to the Court of Appeals, which described the "place of withdrawal" as "beguiling."

174. Olson subsequently modified his proposal after discussing it with NMED, but he did not solve the fundamental problem of creating a confusing requirement that unduly complicates the variance application process for a permittee. Specifically, in attempting to revise the scope of his initial proposal, which Olson conceded was broader than he intended it to be, he proposes an almost identical avenue to expand the information required by 20.6.2.1210.A(5) by suggesting to include information on "uses of water that may be affected."

175. Olson's second proposal harbors the same flaws that his original proposal did, it would require an analysis of present and future uses of water that may be affected by the variance. The proposed language therefore introduces unnecessary uncertainty into the regulations that, if adopted, would be sure to be the subject of future controversy.

176. Moreover, the variance application requirements have been in the ground water program regulations literally for decades, including periods when Olson himself was a regulator under the program and a Commissioner of this Commission, and Olson completely failed to identify problems that have been encountered or reasons why the particular permit application requirement relating to identifying waters needs to be substantively changed as he now proposes in his private capacity.

Dairies Position Section 20.6.2.1210.E

Dairies proposal stresses materiality.

177. For a variance granted for a period in excess of five years, the petition 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 which are material to the variance.

178. 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. 147.

179. If such conditions are not being met, or there is evidence indicating changed circumstances or newly-discovered facts or conditions which are material to the variance or its 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 notice of availability of the report.

180. Dairies offer the following reasons for the additional highlighted language: "Dairies offered and the Department agreed to language that limits the consideration of changed circumstances and newly-discovered facts to those material to the variance, as addressed in the written direct testimony of Mr. Palla."

New Mexico Environment Department Proposal for Variances

NMEDS' position pages 43 through 47

181. 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 supported these changes through the testimony of Kurt Vollbrecht, Manager of the Mining Environmental Compliance Section in the Department's Ground Water Quality Bureau. Tr. Vol. 1, 79:1-128:18; NMED Exhibit 13, Written Direct Testimony of Kurt Vollbrecht ("*Vollbrecht Direct*"), 13:20-15:21.

182. At 20.6.2.1210.A(5) NMAC, the Department proposed a requirement that a petitioner for a variance "provide information on uses of water that may be affected" by the variance. Mr. Vollbrecht testified that it is important for a variance petition to contain an evaluation of any existing uses of water that may be affected by the variance. Tr. Vol. 1, 78:18-79:8.

Mr. Olson did not take a position on variances but proposed the following compromise:

Section 20.6.2.1210.E NMAC

Mr. *Olson's proposed compromise 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, ~~including the department~~ 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.

183 The NMMA and Dairies proposed alternative language to the variance section of 20.6.2.1210.E on the content of five-year review reports, clarification of the nature of changed circumstances and who may request a hearing to re-open an approved variance. The NMMA's and Dairies proposed language on facts being "*material*" to the variance is

reasonable. William C. Olson provided evidence 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.

184. Mr. Olson also testified that it is also not appropriate to link the five-year compliance report submission to a permit renewal. A variance is a deviation from Commission rules that is separate from issuance of a permit even though it may later be incorporated into a permit. A decision on re-consideration of an approved variance must be made within 90 days of availability of the report.

185. Permit renewals have many associated deadlines for submission and review and a deadline for re-consideration of a variance should not be buried within the framework of deadlines for permit renewals where many other issues are under consideration.

186. 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.

187. 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]. For the above reasons, the Commission adopts the above William C. Olson amendments to "*Amended NMED Exhibit 36*".

188. The Department proposed changes at 20.6.2.1210.A(9), A(10), C, D, and E that 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. Tr. Vol. 1, 73:18-74:9.

189. Subsection 74-6-4(H) of the WQA states that a variance may be granted "for the period of time specified by the Commission." Mr. Vollbrecht testified 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. *See* Tr. Vol. 1, 74:19-75:20; *Vollbrecht Direct*, 15:1-21.

190. The Department's proposal 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. Tr. Vol. 1, 74:10-18. The Commission adopted a similar variance provision in the Dairy Rule, at 20.6.6.18 NMAC, which was promulgated under the same authority, namely Subsection 74-6-4(H) of the WQA.

191. The Department opposed proposals by the Dairies and NMMA that a variance compliance report should be submitted with a permit application. Mr. Vollbrecht testified that this could allow for submission of variance compliance reports at intervals in excess of five years where a permit has been administratively continued while the Department acts on

an application to renew the permit. Tr. Vol. 1, 75:23-76:19; NMED Exhibit 30, Written Rebuttal Testimony of Kurt Vollbrecht ("*Vollbrecht Rebuttal*"), 14:9-15:2.

192. The Dairies proposed language at 20.6.2.1210.E NMAC providing that the variance compliance report "shall identify any changes of circumstances or newly discovered facts which are material to the variance and which are substantially different than the circumstances or facts presented in the original application for the variance." Tr. Vol. 1, 77:1-6.

193. The Department does not oppose specifying that changes of circumstances or newly discovered facts identified in the variance compliance report must be "material to the variance," and has included that language in the final version of the Department's proposed changes to 20.6.2 NMAC in NMED Exhibit 43. Tr. Vol. 1, 77:1-14; *Vollbrecht Rebuttal*, 15:3-5.

194. The Department does oppose the proposal to restrict the changes of circumstances or newly discovered facts identified in the variance compliance report to those that the variance holder deems "substantially different than the circumstances or facts presented in the original application." Mr. Vollbrecht testified that this would leave it to the variance holder to determine which facts and circumstances were "substantially different," and could result in information being left out of the variance compliance report that the Department would deem important. Tr. Vol. 1, 77:15-21; *Vollbrecht Rebuttal*, 15:5-12.

195. The Dairies and NMMA also proposed to add language to 20.6.2.1210.E NMAC that would limit those who can request a hearing to revoke or modify a variance to "any person who would have standing to appeal a permit decision." The

Department opposes this proposed change. Mr. Vollbrecht testified that the WQA does not link variances to permits and does not limit who can participate in a variance hearing. Tr. Vol. 1, 77:22-78:7; *Vollbrecht Rebuttal*, 15:13-17.

196. The Department does not oppose NMMA's proposed change to 20.6.2.1210.D and E NMAC, which would change the plural "variances" to the singular, "a variance." The Department has included this language in NMED Exhibit 43. Tr. Vol. 1, 78:8-14.

20.6.2.3103 NMAC

197. NMED proposed to move the narrative standard for Toxic Pollutants from 20.6.2.7.WW to 20.6.2.3103.A(2), and to add numerical groundwater health standards for 13 constituents at 20.6.2.3103.A. Tr. Vol. 2, 362:9-389:23; *McQuillan Direct*, 4:9-18:13.

198. NMED also 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.

199. NMED supported the addition of these standards through the testimony of its Chief Scientist, Dennis McQuillan. Tr. Vol. 2, 362:9-389:23; *McQuillan Direct*, 4:9-18:13.

200. This 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, NMED proposed to adjust most standards to be equal to drinking water standards. 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. NMED 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.

201. NMED proposed 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, 369:5-371:11; *McQuillan Direct*, 24:15-28.

202. NMED proposed 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. Tr. Vol. 2, 369:5-371:11; *McQuillan Direct*, 24:15-28.

203. NMED presented testimony that many of the WQCC groundwater standards were adopted prior to when EPA developed drinking water standards for the same constituents. Most of these contaminants had been detected in groundwater in New Mexico, and this commission chose not to wait for EPA to develop drinking water standards. Consequently, some of the groundwater and drinking water standards now differ in numerical concentration. NMED compared the WQCC groundwater standards, with the human health standards set by EPA for drinking water, and proposed to adjust

most of the WQCC standards to be numerically equivalent to the drinking water standards. Tr. Vol. 2, 368:1-371:20; *McQuillan Direct*, 33:1-10.

204. EPA is currently reviewing scientific data for chromium in drinking water, and may propose to amend its drinking water standard in the future. Therefore, NMED did not propose to amend the WQCC standard for chromium at this time. The current numerical standard of 0.05 mg/L for chromium was set by this commission in 1977, no party submitted evidence showing that the commission erred when setting the groundwater standard for chromium. Tr. Vol. 2, 371:21-373:3.

205. In 1977, this commission set New Mexico's groundwater fluoride standard at 1.6 mg/L. In 1986, the EPA adjusted the National Primary Drinking Water Standard to 4.0 mg/L to protect against skeletal fluorosis, and established a national secondary (non-enforceable) fluoride standard of 2.0 mg/L to protect against dental fluorosis. The existing WQCC groundwater standard of 1.6 mg/L fluoride protects children from manmade groundwater pollution that could cause the harmful effects of dental fluorosis as shown in NMED Exhibit 26. NMED testified, and the commission agrees, that if the groundwater standard were raised up to 4 mg/L, the concentration of the EPA primary drinking water standard, then the groundwater standard would no longer protect children in New Mexico from dental fluorosis. The commission agrees with NMED that it would not be good public policy to allow dischargers to increase groundwater fluoride to a concentration that could cause dental fluorosis. Tr. Vol. 2, 373:5-375:12; *McQuillan Direct*, 33:18-34:10.

206. NMED presented testimony reflecting that xylenes, toluene, and ethylbenzene occur in gasoline and other petroleum products, and have similar chemical

and physical properties. This commission originally set the groundwater standard for toluene at 15 mg/L in 1981, which had to be lowered in 1985 to the existing standard of 0.75 mg/L, for reasons explained by NMED's medical expert at that time. NMED is concerned that raising the groundwater standard for xylenes from the existing concentration of 0.62 mg/L to 10 mg/L, the concentration of the EPA drinking water standard, might create issues similar to those of toluene. Tr. Vol. 2, 375:13-376:24; *McQuillan Direct*, 34:11-36:10; NMED Exhibit 9, 1985 Testimony of Victor Zalma, M.D.

USAF/DoD presented testimony suggesting that the language in the toxic pollutant narrative standard be amended to require "best available science". Tr. Vol. 2, 477:17-484:19; USAF/DoD Exhibit 1, Written Direct Testimony of Samuel Brock.

207. NMED proposed to amend language in the narrative standard of Toxic Pollutant regarding the kind of information that the Department must use when determining the concentration at which a constituent becomes a Toxic Pollutant, in response to testimony provided by USAF/DoD, to better conform with the language of the Water Quality Act. Tr. Vol. 2, 382:14-385:6. NMED Exhibit 28, Written Rebuttal Testimony of Dennis McQuillan ("*McQuillan Rebuttal*"), 2:2-4:2. The language is included in NMED Exhibit 43. Mr. Olson adopted 3103.a 2.

Mr. Olson's Position

Section 20.6.2.3103.A(2) NMAC

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.

208. The USAF/DoD" proposed revisions to language in "*Amended NMED Exhibit 36*" to clarify the scientific basis for setting standards for toxic pollutants by rewriting the language of 20.6.2.3103.A(2) for establishing how a toxic pollutant standard is determined and adding criteria for sources of acceptable scientific information used in such determinations. William C. Olson testified that in "*Amended NMED Exhibit 36*", the Department moved the existing language for determining toxic pollutants from the definitions section of the rule to the standards but preserved the long-standing language on how the Commission determines toxic pollutants. 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).

209. 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. Subsequently, Mr. Olson proposed the above alternate compromise language consistent with the statutory language on Commission powers for setting standards in NMSA 1978 74-6-4.D and existing Commission rule language. [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].

210. The USAF/DoD testified that it was amenable to support William C. Olson's language if a new DoD proposed definition of credible science was adopted. The USAF/DoD's proposal is similar to Mr. Olson's proposed language, but contains limiting criteria inconsistent with the broader requirements of the WQA. [Olson Testimony Tr. vol. 2, pg. 505, lines 10-23.]. The Commission should adopt amendments to 20.6.2.3103.A that include the changes to the health-based standards for chromium and fluoride

A. Human Health Standards- . . . .

. . . .

(4) Chromium (Cr)……..……0.05 0.01mg/l

. . . .

(6) Fluoride (F)……..……1.6 4.0 mg/l

. . . .Reasons: "The Commission adopts the changes to the human health standards for chromium and fluoride as proposed by the New Mexico Mining Association so

that the human health standards in 20.6.2.3103.A for those constituents are consistent with EPA Maximum Contaminant Levels established under the Safe Drinking Water Act for protection of human health."

Note to 20.6.2.3103

212. The Commission should adopt the changes to the Note to 20.6.2.3103 regarding the effective date of changes to the standards of 20.6.2.3103 in the following form: [Note: For purposes of application of the amended numeric 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-pryene, 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-pryene 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.]

186. Regarding the changes proposed by the NMMA, reasons can be expressed as follows: "The New Mexico Mining Association proposed, and the Department agreed, to language for the Note to 20.6.2.3103 that allows for the Department, in

relation to an abatement completion report approved as of the effective date of the rule, to require compliance with the new and amended standards adopted under this rule if the secretary determines and notifies the responsible person that the contaminants pose a hazard to public health."

213. USAF/DoD presented testimony suggesting that the language in the toxic pollutant narrative standard be amended to require "best available science". Tr. Vol. 2, 477:17-484:19; USAF/DoD Exhibit 1, Written Direct Testimony of Samuel Brock.

USAF DOD Position on Toxic pollutant

NMMA POSITION IN OPPOSITION

20.6.2.3105 NMAC Pages 44 through 45

Language Limiting the 3105.A Exemption (20.6.2.3105.A)

214. RGR, NMCC and AmMg oppose NMED's proposal to narrow the 3105.A exemption .NMED proposes to narrow the scope of the exemption by adding the underlined language to the exemption for: A. Effluent or leachate which conforms to all the . . . standards of Section 20.6.2.3103 NMAC and has a total nitrogen concentration of 10 mg/l or less. If treatment or blending is required to achieve these standards this exemption does not apply. There can be little doubt that, on its face and in its plain meaning, the underlined language proposed by NMED would dramatically 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.

215. The Department proposed changes at 20.6.2.3105.A NMAC to 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 NMAC only applies when *untreated* effluent meets all water quality standards. 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.

216. Moreover, in the cross-examination of NMED's primary witness on the proposed narrowing of the exemption, Ground Water Quality Bureau Chief Michelle Hunter, three things became painfully clear.

217. First, NMED had not thought through even the most obvious issues about how it might work in practice. For example, when asked whether just the first user of blended or treated water or all subsequent users, would need to permit their discharges, Ms. Hunter had no answer and merely said that would be something NMED would need to talk about.

218. Second, NMED's witness acknowledged that the exemption as written has been in effect 40 or possibly even 50 years without prior change or any specification of fundamental problem.

219. Third, and most tellingly, Ms. Hunter revealed on cross examination that NMED is about to embark on a two- or three-year rulemaking process

specifically addressed to water recycling and reuse, yet she could not acknowledge the most obvious take-away from her testimony, which is that it is premature to interject a recycling and reuse component into the 3105.A exemption that has been in effect for 40 or 50 years, when the very subject of recycling and reuse has not yet been vetted through the 2 or 3 rulemaking process NMED now plans to pursue.

220. Finally, in any event the narrowing of the 3105.A would serve as an ill-advised inhibitor on treating and making secondary uses of water. As examples that were raised during the cross examination of Ms. Hunter, cities may be less inclined to use beneficially reclaimed water for irrigating parks, and municipal and private golf courses may find that development of fresh water resources are more affordable and less burdensome that going through a lengthy and costly groundwater discharge permitting process with NMED.

221. Creating such unintended and counterproductive incentives in the rush to interject an issue that is about to be the subject of a full-blown permitting process makes little sense, especially when the 3105.A exemption from the requirement to get a discharge permit is justified by the common-sense premise of the exemption: this discharge is question would be nothing more than water already meeting standards. The Department supported the proposed changes submitted by EMNRD in 20.6.2.3105.L, M, and N NMAC regarding the proper statutory and current agency references. Tr. Vol. 3, 598:8-14. The language is included in NMED Exhibit 43.

20.6.2.3106 C

223. The Department proposed changes to 20.6.2.3106.C NMAC that would add "Modifications" to the title of that section. Mr. 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.

20.6.2.3107

224. 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. *See* NMED Exhibit 43; Tr. Vol. 551:19-552:20.

225. LANS proposed changes to 20.6.2.3108.H and K NMAC that would require the Department to prepare a fact sheet containing specific information to be issued with all draft permits. 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. Tr. Vol. 3, 549:13-550:7.

226. 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.

20.6.2.3108NMAC

20.6.2.3109

227. The Department 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.

228. The Department also proposed language, to be codified as a revision to 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.

229. 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.

20.6.2.3112C

230. 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.

20.6.2.3114C

231. 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* NMED Exhibit 43.

20.6.2.4101C

232. The Department proposed clerical changes to 20.6.2.4101 NMAC to align with the Department's proposed changes to the abatement regulations at 20.6.2.4013 NMAC. *See* NMED Exhibit 43. 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.

233. 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. *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*").

234.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.*

235.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.

236. 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.

237. Mr. McQuillan testified as to the definitions of water, including groundwater and subsurface water, as defined in the Water Quality Act; the authority in the Water Quality Act 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.

238. NMMA was the only party to present testimony opposing NMED's proposal. Tr. Vol. 4, 970:17-985:12; NMMA Rebuttal Exhibit E, Rebuttal Testimony of Daniel Stephens/Neil Blandford. 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 proposed Statements of Reasons, each party filed 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." NMED Exhibit 43.

239. The Department proposed changes to Subsections 20.6.2.4103.E and F NMAC regarding petitions for alternative abatement standards. Mr. Vollbrecht testified that these changes are primarily structural in nature, with two substantive changes. Tr. Vol. 4, 831:7-13; *Vollbrecht Direct*, 16:1-18:17.

240. Alternative abatement standards are a form of variance from the Commission's regulations under the authority set forth under Section 74-6-4(H) of the WQA. Thus, alternative abatement standards can only be granted by the Commission following a mandatory public hearing. Tr. Vol. 1, 832:20-22; *Vollbrecht Direct*, 16:12-18.

241. 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.

242. 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.

243. 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.

244. 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. They provide greater public notification and opportunity for public participation. They also 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.

245. The Department proposed changes to 20.6.2.4103.F(1)(d) NMAC regarding the sampling frequency required for technical infeasibility demonstrations. Mr. Vollbrecht testified that at many sites under abatement, the frequency of 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's proposed change to 20.6.2.4103.F(1)(d) NMAC addresses 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.

Dairy Position on ABATEMENT RULE

Existing Section 20.6.2.4103.E NMAC (Technical Infeasibility)

246. Dairies propose the following reasons for the Commission not to adopt the Department's proposed amendment to strike and repeal 20.6.2.4103.E NMAC: "The Commission does not adopt the Department's proposal to repeal 20.6.2.4103.E NMAC regarding technical infeasibility demonstrations made by the Department. Sufficient reasons have not been given to overturn the Commission's determination, when it adopted the technical infeasibility determination provision, that such determinations are not "variances" as that term is used in the Water Quality Act. Technical infeasibility determinations made by the Department under 20.6.2.4103.E are limited by specific objective criteria, so the Department's discretion is narrow.

247. Adequate public notice and opportunity for participation regarding technical infeasibility determinations can be provided under 20.6.2.4108 NMAC. Also, the Department has not addressed how repeal of this provision would affect previous technical infeasibility determinations granted by the Department, and repeal could result in undue uncertainty regarding their effect and the potential need for the Commission to hear many additional variance cases on both past and future technical infeasibility determinations."

248. Any additional information that may reasonably be required to design and perform an adequate site investigation. Dairies offer these reasons: "The Commission should adopt the Dairies minor changes to 20.6.2.4106.C(7) because the proposed amendment is necessary to explicitly state and clarify the role of the Department. While it may be

argued that the Department would implicitly act reasonably, the proposed amendment clarifies and explicitly requires the Department to act in a reasonable manner with regard to information the Department may require for an abatement plan."

Laun-Dry

249. Jay Snyder was tendered and accepted as an expert at hearing. Tr. Vol. III 789:9; Laun-Dry Ex. A.

250. Chief Scientist Dennis McQuillan ("McQuillan") of NMED and Chief of Ground Water Quality Bureau within Water Protection Division of NMED Michelle Hunter ("Hunter") provided technical testimony on behalf of NMED.

251. Laun-Dry is a low to middle capitalized private industrial responsible party on a significant site that is already in abatement. Tr. Vol. I 59:25-61:6; Snyder NOI, p.3. Under NMED's proposed amendment to 20.6.2.4103(F)(d) NMAC, Laun-Dry needs eight consecutive quarters of sampling showing decrease in groundwater contamination to close or partially close the site, but does not have this data yet. *Id.*

252. The plume at the Laun-Dry site is cigar shaped and Laun-Dry seeks partial closure of a portion of the site. *Id.*

In re 20.6.2.4103 (C) (2) NMAC

Pages 63-66

253. Laun-Dry proposed the following additional provision to NMED's proposed 20.6.2.4103 (C) (2) NMAC:

The standards of Section 20.6.2.3103 A, B, or C NMAC shall be met, 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. Snyder NOI, p.4.

254. At hearing, Laun-Dry argued the term "existing condition" has been interpreted as synonymous with "background" from a regulator standpoint to date. *See also* Snyder NOI, p. 4 ("background is in law and practice tied to TCE standards under the regulations"). "Existing condition" is a phrase that principally applies to discharge plans pursuant to section 3103. Tr. Vol. III 792.

255. Laun-Dry illustrated a hypothetical where background is assumed 300 parts/ billion TCE, but a downstream responsible party leaching into groundwater at 200 parts/billion TCE can continue indefinitely polluting. 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. I 61:12-64:25. The matter of the contiguous Dona Ana dairies in abatement presented this potential scenario but for their successful consortium formed that that presented a single abatement plan by agreement of all parties including regulators. Tr. Vol. III 793.

256. Laun-Dry submitted that the application of section 4103 as currently applied is problematic where multiple sources of contamination are involved because another responsible party downstream does not necessarily clean man-made, non-natural conditions. *Id.*

257. As a result, Laun-Dry argued it was more comfortable using background as the standard to remediate over existing condition because a path to exit abatement as expeditiously as possible is a goal of the regulations (*see* § 4106 C NMAC) verses a scenario where 90 % abatement is achieved but sampling goes on indefinitely— 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.* At hearing, neither Hunter nor McQuillan opposed this testimony or proposed revision to 20.6.2.4103 (C) (2) NMAC.

258. At hearing Commissioner DeRose-Bamman asked Snyder how one could meet the abatement treatment standards of A(2) 3103 cited under section 4103 NMAC. Tr. Vol IV: 826. Snyder responded that recourse to NMED tables provided numerical standards to address specific concerns related to regulating carcinogens. Tr. Vol IV: 827.

In re 20.6.2.4104 (C) NMAC

259. Laundry proposed the following revision to NMED's proposed 20.6.2.4104 (C) NMAC indicated by italics.

"*C. If the source of the water pollution to be abated is a facility that operated under a discharge plan, 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."

260. At hearing, Snyder testified that requirement of financial assurance would inhibit timely implementation if applied to low to middle capitalized parties. Tr. Vol. IV 818; Snyder NOI, p. 3. Snyder has participated in several hundred ground water assessments and cleanups, is familiar with the abatement regulations and currently has clients going through abatement. *Id.* Tr. Vol. II 448. Snyder noted cleanup costs can vary substantially by method of cleanup, and cleanup technologies can change in actions and costs over time.

This makes estimating cleanup costs over time variable. Snyder presented the scenario where some "mom and pop" wells were perhaps 3 times standards 15 years ago but come up now because of potential purchase or where urban commercial re-development triggers burdensome requirement of financial assurance. Tr. Vol. III 792, 796.

261. In opposition to Laun-Dry's proposed revision, Hunter testified that the NMED would use discretion and be reasonable in its application of financial assurance requirement to regulated communities such as mobile homes and villages. Tr. Vol. IV 996:11-999:16.

Section 20.6.2.4113 and 4114

20.6.2.4113 DISPUTE RESOLUTION:

262. 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.

20.6.2.4114 APPEALS FROM SECRETARY'S DECISIONS:

263. If the secretary determines that an abatement plan is required by certified mail to the responsible person and any person who participated in the action. pursuant to Paragraph (9) of Subsection A of 20.6.2.1203, Paragraph (4) of Subsection E 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 20.6.2.4113 NMAC, he shall provide written notice of such action

Standards of 20.6.2.3103.A

D. Abatement of Vapor Intrusion

264. The Commission should adopt the following change to section 20.6.2.4103.A, and should not adopt the Department's proposed new subsection B to 20.6.2.4103 as presented in the Department's pre-hearing rule language, Department Exhibit B:

A. The vadose zone shall be abated as follows:

(1) 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.

265. The Department proposed a new abatement standard for "subsurface water contaminants" as a new subsection B of 20.6.2.4103 NMAC. The New Mexico Mining Association opposed this new standard for the reasons given in the written rebuttal testimony and hearing testimony of Dr. Dan Stephens. During the hearing, the Department emphasized the need for authority to require abatement of water contaminants to address the accumulation of vapors that may be capable of endangering human health. Following the hearing, the Department and the Mining Association reached agreement that the Department would withdraw its proposed standard for abatement of "subsurface water contaminants" and instead propose a new paragraph (2) to 20.6.2.4103.A to address vapor intrusion. The Commission adopts the change to 20.6.2.4103.A to add a new paragraph (2) as proposed by the Department and the Mining Association."

F. *Retaining Technical Infeasibility Determinations by the Department*

266. NMMA proposes the following reasons for the Commission not to adopt the Department's proposed amendment to strike and repeal 20.6.2.4103.E NMAC: "The Commission does not adopt the Department's proposal to repeal 20.6.2.4103.E NMAC regarding technical infeasibility demonstrations made by the Department. Sufficient reasons have not been given to overturn the Commission's determination, when it adopted the technical infeasibility determination provision, that such determinations are not "variances" as that term is used in the Water Quality Act. Technical infeasibility determinations made by the Department under 20.6.2.4103.E

are limited by specific objective criteria, so the Department's discretion is narrow. Adequate public notice and opportunity for participation regarding technical infeasibility determinations can be provided under 20.6.2.4108 NMAC.

267. Also, the Department has not addressed how repeal of this provision would affect previous technical infeasibility determinations granted by the Department, and repeal could result in undue uncertainty regarding their effect and the potential need for the Commission to hear many additional variance cases on both past and future technical infeasibility determinations."

G. Abatement Financial Assurance

268. The Commission should not adopt the Department's proposed amendment of 20.6.2.4104.C to require financial assurance for abatement by parties who do not hold discharge permits. The reasons, as expressed in Mr. Neumann's rebuttal testimony, are the lack of statutory authority to impose financial assurance for abatement, the lack of any rules regarding financial assurance requirements, and the undue burdens such a requirement would impose.

20.6.2.4103.E NMAC

The City of Roswell

269. The city of Roswell proposed to give the Secretary of the Environment Department the discretion to determine the number and frequency of sampling events required for demonstrating technical infeasibility. Snyder Testimony, transcript volume III, page 796, lines 2-7.

AB/GRIP position on Sampling

270. Proposed to increase the number of sampling events required from eight to a minimum of ten for demonstrating technical infeasibility. Martin Testimony, transcript volume IV, page 869, lines 2-9.

NMED'S PROPOSED ALTERNATIVE

ABATEMENT STANDARDS RULE AMENDMENTS.

271. NMED has proposed a number of changes to Section 20.6.2.4103.E and F regarding alternative abatement standards. Vollbrecht Testimony, volume IV, page 831, lines 7-9.

272. NMED's proposed changes regarding alternative abatement standards regulations are primarily structural, with two substantive changes to Section 20.6.2.4103 NMAC. Id. at lines 12-13.

273. NMED's first proposed substantive change to Section 20.6.2.4103.E(2), (3) NMAC pertains to review and approval of technical infeasibility requests. Id. at lines 14-25, page 832, lines 1-5.

274. NMED's second proposed substantive change to Section 20.6.2.4103.E(1) NMAC pertains to the frequency of sampling required for a technical infeasibility determination. The Department's proposed changes will maintain the existing requirements with respect to the minimum number of sampling events, which is eight, but it would extend the period of time over which those eight sampling events would occur.

275. Under the current rule, a statistically valid decrease cannot be demonstrated by fewer than eight consecutive quarters. This translates to a minimum requirement of eight consecutive sampling events over a period of two years. NMED's proposal would require eight consecutive sampling events over a period of four years. *Id.* at lines 6-8. The City of Roswell proposed to give the Secretary of the Environment Department the discretion to determine the number and frequency of sampling events

required for demonstrating technical infeasibility. Snyder Testimony, transcript volume III, page 796, lines 2-7. AB/GRIP proposed to increase the number of sampling events required from eight to a minimum of ten for demonstrating technical infeasibility. Martin Testimony, transcript volume IV, page 869, lines 2-9.

276. AB/GRIP's justification for their proposal is that technical infeasibility should be demonstrated by a statistically valid extrapolation of the decrease of any water contaminant over the remainder of a twenty (20) year period with parametric statistics. Therefore, at a minimum, ten (10) data points should be provided to allow for substantially more sophisticated conclusions than could be provided with non-parametric statistics (or only eight (8) data points). AB/GRIP's Statement of Position with Proposed Changes to NMED's Petition, page 48.

277. EPA guidance makes clear that if the number of sampling events is less than ten, one cannot get a confidence level of more than ten percent. Requiring a minimum of ten sampling events results in a better confidence interval, increasing the quality of the statistical analysis. Martin Testimony, transcript volume IV, page 869, lines 5-9, page 2-11.

278. NMED and the City of Roswell failed to provide any substantial evidence in support of their proposals regarding the current Section 20.6.2.4103.E(1). Vollbrecht Testimony, volume IV, pages 831-861; Snyder Testimony, transcript volume III, pages 789-800, transcript volume IV, pages 812-830.

279. The City of Roswell also proposed to give the Secretary of the Environment Department the discretion to determine the number and frequency of sampling events required for demonstrating completeness of abatement. Snyder Testimony, transcript

volume III, page 796-798.

280. Under the City of Roswell's proposal, the Secretary of the Environment Department could require a facility in abatement to provide only one sampling event for demonstrating completeness of abatement. Martin Testimony, transcript volume IV, page 16-24.

281. EPA Guidance recommends a minimum of eight sampling events to evaluate completion of abatement. *Id.* at page 873, lines 24-25.

282. The City of Roswell presented no substantial evidence in support of its proposal. Snyder Testimony, transcript volume III, page 796-798.

283. Therefore, the Commission rejects the City of Roswell's proposal and maintains the current rule requiring a minimum of eight sampling events to demonstrate completeness of abatement.

AB/GRIP POSITION

AB/GRIP Focused their briefing mainly on one issue under alternative abatement standards. Sampling as it relates to alternative abatement standards and technical infeasibility. AB/GRIP requests 10 samples for statistically accuracy

20.6.2.1210 NMAC

JUSTIFICATION FOR ADOPTING AB/GRIP'S PROPOSED AMENDMENTS TO THE ALTERNATIVE ABATEMENT STANDARDS RULE, SECTION 20.6.2.1210 NMAC.

284. AB/GRIP provided substantial evidence in support of their proposal to increase the current minimum eight consecutive quarterly sampling events to a minimum of ten consecutive quarterly sampling events over the period

of four years for a technical infeasibility determination and a completeness of abatement determination. Martin Testimony, transcript volume IV, page 866, lines 2-25, page 867, lines 1-15 (referencing three exhibits to Ms. Martin's pre-filed written Rebuttal Testimony: the March 2009 EPA Statistical Analysis of Groundwater Monitoring Data at RCRA Facilities, Unified Guidance; the July 2014 EPA Groundwater Statistics Tool User's Guide; and the August 2014 EPA Memorandum, Transmittal of the Recommended Approach for Evaluating Completion of Groundwater Restoration Remedial Actions at a Groundwater Monitoring Well and the Groundwater Statistics Tool).

285. AB/GRIP's proposal meets the criteria for Commission rule promulgation found in § 74-6-4(E) for the following reasons:

Character and degree of injury to or interference with health, welfare, environment and property.

286. AB/GRIP's proposal would protect health, welfare, environment and property. In New Mexico, ground water is public property. Increasing the number of consecutive sampling events from eight to ten for a technical infeasibility determination and a completeness of abatement determination will result in the protection of this State's most precious public resource. Martin Testimony, transcript volume IV, page 866, lines 2-25, page 867, lines 1-15 (referencing three exhibits to Ms. Martin's pre-filed written Rebuttal Testimony: the March 2009 EPA Statistical Analysis of Groundwater Monitoring Data at RCRA Facilities, Unified Guidance; the July 2014 EPA Groundwater Statistics Tool User's Guide; and the August 2014 EPA Memorandum, Transmittal of the Recommended Approach for

Evaluating Completion of Groundwater Restoration Remedial Actions at a Groundwater Monitoring Well and the Groundwater Statistics Tool).

The public interest, including the social and economic value of the sources of water contaminants.

287. The Constitution declares that "water and other natural resources of this state" are "of fundamental importance to the public interest, health, safety and the general welfare." N.M. Const. art. XX, § 21. Again, groundwater is a public resource and approximately ninety (90) percent of New Mexico's population depends on groundwater as the primary source of drinking water. AB/GRIP's proposal protects the social and economic value of this state's most precious public resource – ground water – by increasing the number of consecutive sampling events from eight to ten for a technical infeasibility determination and a completeness of abatement determination. *Id.*

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.

288. The Commission finds that increasing the number of consecutive sampling events from eight to ten for a technical infeasibility determination and a completeness of abatement determination is technically practicable and economically reasonable.

Successive uses, including but not limited to domestic, commercial, industrial, pastoral, agricultural, wildlife and recreational uses.

289. AB/GRIP's proposal would protect successive uses of ground water by increasing the number of consecutive sampling events from eight to ten for a technical infeasibility determination and a completeness of abatement determination, which increases the confidence level of such determinations.

Feasibility of a user or a subsequent user treating the water before a subsequent use.

290. AB/GRIP's proposal protects the future user of ground water by increasing the number of consecutive sampling events from eight to ten for a technical infeasibility determination and a completeness of abatement determination maintaining, which increases the confidence level of such determinations.

Property rights and accustomed uses.

265. In addressing property rights, it is important to note that a person or regulated entity does not have the right to contaminate ground water in excess of ground water quality standards. Ground water is public property and is protected as a public resource.

Federal water quality requirements.

266. AB/GRIP's proposal has no negative impact on federal water quality requirements for regulated facilities.

NMED

267. The Department proposed changes to 20.6.2.4103 (F)(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. The revised language is included in NMED Exhibit 43. Tr. Vol. 4, 836:17-837:14; Vollbrecht Rebuttal, 16:4-18.The Department opposed the Dairies' proposed change to 20.6.2.4103.F NMAC that would change "one of the exemptions" to "one or more of the exemptions." Mr. Vollbrecht testified that this change was unnecessary. Tr. Vol. 4, 837:15-25; *Vollbrecht Rebuttal*, 16:20-24.

268.. The Department opposed Laun-Dry's proposed changes to 20.6.2.4103.C(2) NMAC. Mr. Vollbrecht testified that the Department's proposed changes more appropriately address the issue of background concentrations at sites under abatement. Tr. Vol. 4, 839:5-21; *Vollbrecht Rebuttal*, 17:4-14.

277. The Department did not oppose the City of Roswell's proposed changes at 20.6.2.4103.E and F NMAC, which would allow the Department discretion in determining the appropriate sampling time frame for demonstrating that a site under abatement has met standards. Tr. Vol. 4, 838:6-17; 839:22-840:19.

269. The Department opposed Roswell's proposed changes at 20.6.2.4103.F NMAC, which would remove the requirement for a technical infeasibility demonstration to show less than a 20 percent reduction over 20 years, and instead leave the amount of reduction over time and the time frame for that to the Department's discretion. Mr. Vollbrecht testified that the language in the current regulations has been effective and sets forth an appropriate amount of reduction and time frame. Tr. Vol. 4, 840:20-841:21; Vollbrecht Rebuttal, 23:4-20.

270. AB/GRIP proposed to increase the number of sampling events required from eight to a minimum of ten for demonstrating technical infeasibility. Martin Testimony, transcript volume IV, page 869, lines 2-9.

City of Roswell Position

The City of Roswell proposed to give the Secretary of the Environment Department the discretion to determine the number and frequency of sampling events required for demonstrating technical infeasibility. Snyder Testimony, transcript volume III, page 796, lines 2-7.

20.6.2.3105 NMAC RCRA and CERCLA

Proposed Rule Exemptions by LANS and USAF/DoD

271.Both LANS and USAF/DoD proposed to exempt activities regulated under the federal Solid Waste Disposal Act, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and the Resource Conservation and Recovery Act (RCRA) from discharge permitting requirements of the Commission rules. William C. Olson testified that there is no statutory exemption in the Water Quality Act for these activities. In fact, some CERCLA and RCRA sites have operational discharge permits issued under Commission rules. [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].

272. Due to the lack of a statutory exemption and the need for the state to protect its interests in preventing and abating water pollution in New Mexico pursuant to its statutory authority, the Commission does not adopt LANS' and USAF/DoD's proposed federal exemptions in 20.6.2.3105 NMAC.

Section 20.6.2.3103 NMAC – Content of the Narrative Standard

NMED petitioned the Commission to amend the definition of toxic pollutant under the Rules proposing to add several contaminants to the list of toxic pollutants and proposing to relocate the content of what is referred to as the "Narrative Standard" from 20.6.2.7.WW NMAC in the existing Rules to a new sub-section, proposed at 20.6.2.3103(A)(2) NMAC.

273. The Narrative Standard provides NMED with regulatory authority to control discharges onto or below the surface of the ground to protect groundwater with an existing concentration of 10,000 mg/l or less TDS where the discharges: contain a constituent identified as a toxic pollutant identified in (proposed) 20.6.2.7.T(2) NMAC that does not have a corresponding numeric human health standard in (proposed) 20.6.2.3103.A(1) NMAC; or contain contaminants may be more toxic in combination then individually. *See* Exhibit NMED 5, p. 20, lns. 8-9 & 15-18. In both scenarios, when implemented NMED must set numeric standard(s). *See* Transcript Vol. II, pgs. 427, lns. 15- 19; 483 – 484 lns. 22- 1.

274. NMED stated that the move of the narrative standard provision is designed to provide, "regulatory clarity since the toxic pollutant definition is a narrative groundwater standard." *See* Exhibit NMED 5, p. 21, lns. 13-14.

275. USAF/DoD written testimony recommended changes to the Rules to identify, clarify and explain NMED's process and what scientific information NMED is to consider when implementing the Narrative Standard. *See* Exhibit USAF/DoD 2, p. 3, lns. 10-22. USAF/DoD explained that the broad scope of NMED's proposed language creates the possibility that a standard could be adopted based on scientific information that is incomplete or does not meet an

acceptable standard of practice of within the scientific community. *See e.g.* Exhibit USAF/DoD 2, p. 3, lns. 4 – 6.

276. NMED's Narrative Standard would allow a toxic pollutant standard to be based on any scientific information that is publicly available, regardless of whether or not the scientific information is based on legitimate peer reviewed, and accepted scientific research. *See* Exhibit USAF/DoD 2 p. 2-3, lns. 22 - 1. USAF/DoD proposals seek to give consideration to the weight of scientific evidence through a systematic process as is standard practice in the scientific community. *See* Exhibit USAF/DoD 2, p. 3, lns. 16 – 22. USAF/DoD asserted that NMED's then proposed language does not require that the scientific information be peer reviewed, which is "a necessary element in the evaluation of scientific information used in the formulation of scientifically and legally defensible standards," and otherwise "falls well short of scientifically accepted validation methods." *See* Exhibit USAF/DoD 2, pgs. 6 -7, lns. 21 – 1. USAF/DoD' Existing standards that explain exactly what the regulator is to consider in similar scenarios to ensure the quality, objectivity, and integrity of the scientific analysis that support regulatory decision making. *See* Exhibit USAF/DoD 2, pgs. 4-6, lns. 12 -20. Specifically, USAF/DoD proposed to change the language of the Narrative Standard to read as follows:

> Standards for Toxic Pollutants. A concentration upon exposure, ingestion, or assimilation either directly from the environment or indirectly by ingestion through food chains: (1) shown by human health risk assessments to warrant actions to reduce or prevent direct or indirect injury to human health, (2) creates a lifetime risk of more than one cancer per 100,000 exposed persons, or (3) produces harmful effects to the health of animals or plants which are commonly

> hatched, bred, cultivated, or protected for use by man for economic benefit. Appropriate sources of toxicological information for human health risk assessments, at a minimum, include the following elements: (1) based on the best science available, peer reviewed science and supporting studies conducted in accordance with sound and objective scientific practices, as well as data collected by accepted methods or best available methods,
>
> (2) available to the public, and (3) transparent about the methods and processes used to develop the values. Integrated Risk Informant System, the EPA's Provisional Peer Reviewed Toxic Values, Agency for Toxic Substances and Disease Registry Minimal Risk Levels and Human Effects Assessment Summary Tables are examples of acceptable sources for toxicological information for human health risk assessments.
>
> *See* Exhibit USAF/DoD 2, pgs. 8-9, lns. 8 – 2.

277. Environmental Quality Association, Subsection, New Mexico Municipal League ("Municipal League") raised similar concerns as USAF/DoD, seeking that the process of adopting standards from scientific studies be codified for consistency and ensuring public participation. *See* Exhibit NMML-4 lns. 96 - 99. The Municipal League claimed that NMED's proposed move of the Narrative Standard would allow NMED to expand its authority beyond the list of toxic pollutants. *See* Exhibit NMML-4, lns. 94 - 96. Similar to USAF/DoD, the Municipal League asserted that "scientific information currently available to the public' needs to be peer reviewed before translating to a regulatory standard outside the rulemaking process."

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 p. 1, lns. 35 – 44. The Municipal League also claimed that NMED's proposed changes to the Narrative Standard provision should only be adopted by the Commission if NMED's implementation powers were limited to the listed toxic pollutants. *See* Exhibit NMML-4, lns 99 -101.

278. NMED's written rebuttal testimony claims that the USAF/DoD proposed language is too prescriptive, inconsistent with the flexibility afforded by the Act and limits the toxicological information that could be relied upon when implementing the Narrative Standard. *See* Exhibit NMED 28, p. 3, lns. 13 – 18. NMED's written rebuttal testimony explained what types of data NMED might consider in implementing the Narrative Standard. *See* Exhibit NMED 28 p. 5, lns. 13 – 16. I

279. In response to USAF/DoD concerns, NMED proffered to substitute the term "scientific information" (in the existing Rules and proposed at 20.6.2.3103(A)(2)) with language derived from the Act: "credible scientific data and other evidence appropriate under the Water Quality Act" [74-6-4.D NMSA] *See* Exhibit NMED 28, p. 3, lns. 20 – 21; & p. 6, lns. 21 – 22; *see also* Transcript Vol. II, p. 366, lns. 8-14; p. 367 lns.. 2 - 9. At the hearing, Mr. McQuillan explained that NMED believed that this change "was very good public policy." *See* Transcript Vol. II, p. 10 – 11.

Exemptions (20.6.2.10 and 20.6.2.3105 NMAC

280. NMED proposed changes to 20.6.2.3105.A, L, M NMAC and proposed to add subsection N & O to 20.6.2.4105 NMAC. With respect to 20.6.2.3105.A, NMED seeks to limit the exemption if treatment or blending is required to meet the standards. The Municipal League

opposed NMED's changes to this subsection, claiming that NMED's additions would make it likely that "no scenarios would qualify for this exemption." *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 p. 3, lns. 151 – 152.

281. The Municipal League also seeks to expand the exemption in subsection A to apply to Aquifer Storage and Recovery (ASR)) projects, so long as the (treated) source water chemistry is compatible with the ground water. The Municipal League asserts that treated water from ASR projects meets the regulatory requirements of the federal Safe Drinking Water Act should be exempt the discharge permit requirements because the treated water is safe to drink. *See* Exhibit NMMLRT-2 at pgs. 1 – 3, lns. 8 – 18.

282. The Municipal League argued that the discharge permit requirement is duplicative and provided examples of the costs, time and resource strain caused by requiring ASR projects obtain discharge permits. *See* Exhibit NMML- 5, at pgs. 2-3. The Municipal League also claimed that ASR projects are an key tool to water resource management, especially in a state like New Mexico where water resources are scarce. *See* Exhibit NMML-5, at pgs. 2-3. The Municipal League claimed that instead of encouraging entities to engage in recharge efforts, NMED insistence on the need for discharge permit in such cases serves as a disincentive due to the costs, strain and additional regulatory requirements imposed on municipalities. *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 p. 4, lns. 207 - 208.

282. USAF/DoD and LANS noted that NMED proposed subsection O relates to statutory exceptions found in 74-6-12(B) & (G) of the Act, which apply to all the requirements under the Act and Rules and are not reserved to the discharge permit requirements.

283. Both LANS and USAF/DoD claimed that the current Rules apply to the regulated community even if such entities are already subject to regulatory control and oversight pursuant to other statutory authorities, such as the Hazardous Waste Act (NMSA 1978 Sections 74-4-1 to -14), resulting in duplicative and reporting and permitting requirements. *See* USAF/DoD Exhibit 6 pgs 3 – 5, lns. 8 – 12. As such, LANS and USAF/DoD requested changes to the Rules that provide express exceptions/limitation to the Rules (proposed for 20.6.2.10 NMAC), as well and revisions to discharge permit exemptions in 20.6.2.3105 NMAC. *See* Pleading Log No. 52, Notice of Intent to Present Technical Testimony, Direct Testimony of Robert S. Beers, LANS at pgs. 4 – 6, lns. 18 – 18; *see also* USAF/DoD Exhibit 6 p. 4, lns. 11 – 18; pgs. 5-6, lns. 20 –22.

284. The Energy, Minerals and Natural Resources Department ("EMNRD") submitted written testimony supporting NMED's proposed changes to 20.6.2.3105.L, M & N NMAC. *See* EMNRD Exhibit 1, pgs. 1 – 3.

285. At the hearing, Rio Grande Resources Corp., American Magnesium, LLC and New Mexico Copper Corp. questioned NMED regarding the limits of the exemptions (20.6.2.3105.A NMAC) and why a discharge permit is required for treated effluent from NMED- approved water treatment systems. See Transcript Vol. III, pgs. 602 – 610, lns. 17 - 25.

286. NMED stated that a discharge permit, and all of its accompanying requirements are required when treated effluent is used for irrigation purposes. *See* Transcript, Vol. III, p. 607, lns 12 – 22. NMED acknowledged that it is in NMED's best interest to encourage recycled water use. *See* Transcript Vol. III, p.

608, lns. 22-24. But, NMED's position was that a regulated entity would need to seek a discharge permit so NMED could monitor the discharge and ensure that the treated effluent meets the standards. *See* Transcript Vol. III, pgs. 607 – 609, lns. 5 - 1.

287. NMED agreed to include a limitation (as proposed by LANS and USAF/DoD) provision in the Rules, but NMED countered with a caveat proposed to added to 20.6.2.10.A NMAC that would limit the exception to the Rules, where the activity or condition is to "abate water pollution or control the disposal of septage and sludge." At the hearing, USAF/DoD questioned NMED on the language of NMED's proposed caveat, and why it opposed an exception that would apply where regulated entities are already subject to NMED oversight. Ms. Hunter admitted that NMED proposed caveat to 20.6.2.10.A NMAC contained language that was so broad (*See* Transcript Vol. III, p. 612, lns. 3 – 12) that it would ensure 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. *See* Transcript Vol. III, p. 613, lns. 12 - 17.

288. Mrs. Hunter claimed that it opposed LANS and USAF/DoD's proposed language for 20.6.2.10 because such proposed changes did not track exactly the language of the act and that groundwater treatment systems may fail. *See* Transcript Vol. III p. 596, lns 17 – 20; p. 611, lns. 14 – 20. Mrs. Hunter and Mr. McQuillan also emphasized that if a regulated entity were subject to NMED regulatory oversight under a NMED-issued Hazardous Waste Act (NMSA 1978 Sections 74-4-1 to -14) permit, such permit would not cover the specific underground injection

control requirements of Part V of the Rules. *See* Transcript Vol. III p. 616, lns 5 – 25.

289. USAF/DoD asked why NMED would insist on including its proposed caveat when the abatement plan requirements of the Rules contain exceptions to those requirements for regulated entities abating water pollution subject to the authority of environmental regulators. *See* Transcript, Vol. III, pgs. 619 - 622, lns. 6 – 4; *see also* 20.6.2.4105.A – B NMAC. NMED's justification was that the Rules (at 20.6.2.4105.B) allow NMED to "reopen" the abatement plan requirements if the NMED determines that the abatement standards and requirements (20.6.2.4103 NMAC) or that additional action is necessary to protect health, welfare, environment or property. *See* Transcript, Vol. III, pgs. 619 - 620, lns. 12 – 19; *see also* 20.6.2.4105.B NMAC.

290. NMED acknowledged, however, that if the treated effluent was part of a Hazardous Waste Act corrective action cleanup subject to NMED oversight, and the treated effluent failed to meet the standards, NMED could take action under the Hazardous Waste Act permit. *See* Transcript, Vol. III, pgs. 621, lns. 4 – 11. NMED explained that it was its position that a regulated entity should need to submit a notice of intent to NMED to submit for NMED determination of whether the Rules apply. *See* Transcript Vol. III, p. 613, lns. 12 - 17.

291. USAF/DoD's believes NMED's proposed exception (20.6.2.10) is too limited, fails to provide transparency on when the Rules apply, fails to account for NMED's regulatory controls under other environmental programs, allows NMED to have too much discretion, and would continue unnecessary and costly duplicative oversight

and permitting requirements. *See* Transcript, Vol. III, pgs. 697 - 698, lns. 2 - 13.

292. Specifically, Mr. Clark explained that NMED's caveat to proposed 20.6.2.10 NMAC, does not achieve USAF/DoD's intended purpose of seeking the exception/limitation to the Rules because "abatement of water pollution could include any groundwater cleanup project that is already covered under [the Hazardous Waste Act], the corrective action provisions." *See* Transcript, Vol. III, p. 697, lns. 2 - 13.

293. Thus, regulated entities would still "have to deal with two layers of permitting and oversight for the same treatment system and exact same effluent." *See* Transcript, Vol. III, p. 697, lns. 14 - 18. USAF/DoD believes 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 - 698, lns. 25 - 4. Mr. Clark proposed adding 20.6.2.3105.N to the Rules, providing a limited exception for land application discharges subject to NMED regulatory oversight. *See* Transcript, Vol. III, pgs. 696-700, lns. 7 - 7.

294. Specifically, Mr. Clark proposed the following language: "N. Effluent or leachate discharges for land application or infiltration trenches regulated by the Hazardous Waste Bureau pursuant to a permit or a consent order under the Hazardous Waste Act, NMSA 1978 Sections 74-4-1 to -14." *See* Transcript, Vol. III, p. 698, lns. 15 - 21. Mr. Clark explained that his proposed 20.6.2.3105.N is limited so it would not apply to discharges that would otherwise be subject to Part V of the Rules. S*ee* Transcript, Vol. III, p. 699 - 700, lns. 18 - 7.

295. Los Alamos National Security, LLC (LANS) rebuttal testimony explained that

they agree with USAF/DoD that the Rules would benefit from a more defined process under the Narrative Standard. *See* Pleading Log No. 80, Rebuttal Testimony of Robert S. Beers, LANS at p. 10, lns. 20 - 22. Mr. Olson's written rebuttal testimony stated that USAF/DoD's recommended language was reasonable, but claimed that the specific language proposed by was not consistent with the Act, recommended that that the Commission adopt only portions of USAF/DoD's initial recommended changes. *See* Exhibit WCO Rebuttal 1 at p. 4.

295. Municipal League rebuttal testimony concurred with USAF/DoD's position on the Narrative Standard, explaining that NMED proposed language is vague and does not specify NMED's methodology for setting standards under the Narrative Standard. *See* Exhibit NMML- RT-2, p. 1, 30 – 31; p. 4, lns. 2 – 7. The Municipal League explained that NMED's Narrative Standard provision, "provides NMED flexibility, but results in uncertainty for the regulated community," and this issue serves an example of "how NMED often regulates by guidance and not rule." *See* Exhibit NMML-RT-2, p. 1, 31 – 33. The Municipal League reiterated its agreement with USAF/DoD that "all transparency and peer review should be used in the formulation of groundwater standards." See Exhibit NMML-RT-2, p. 4, lns. 2 – 7.

296. USAF/DoD written sur-rebuttal testimony addressed and countered NMED and Mr. Olson's rebuttal testimony. Specifically, USAF/DoD claimed while derived from the Act, NMED and Mr. Olson's proposed changes are not defined or explained in the Act or the Rules (*See* Exhibit USAF/DoD 4, p. 7). As such, USAF/DoD explained that the NMED and Mr. Olson proposed changes do not address the lack of transparency, or clarity to the regulated community on the

meanings of the terms NMED seeks to add as well as the unfettered discretion afforded to NMED in implementing the Narrative Standard. *See* Exhibit USAF/DoD 4, p. 7.

297. USAF/DoD written sur-rebuttal testimony proposes to remedy these deficiencies by adopting Mr. Olson's proposed changes and adding a definition for "credible science" be added to the Rules (proposed for 20.6.2.7.C(8) NMAC), derived from the regulations for the federal Toxic Substances Control Act. *See* Exhibit USAF/DoD 4, pgs. 8 -9. Specifically, USAF/DoD offered the following definition for "credible science":, science that is reliable and unbiased.

298. 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.

See Exhibit USAF/DoD 4, pgs. 8 -9; *see also* Exhibit A.

299. USAF/DoD explained that these additional changes are aligned with its initial proposed changes – to ensure that NMED's narrative standard decisions are transparent and based on sound science *See* (Transcript Vol. II, p. 477 – 480 lns 23 – 4) and to allow for certainty, transparency, accountability and accuracy in NMED's implementation of the narrative standard. *See* Transcript Vol. II, p. 481 lns 2-4.

300. At the hearing, Mr. McQuillan explained that when NMED has implemented the Narrative Standard, it would look to whatever information is available, so long as it is credible scientific data. *See* Transcript Vol. II, p. 435, lns. 21 - 23. Mr. McQuillan explained that NMED opposes USAF/DoD's proposed changes to the Narrative Standard, claiming that the NMED's proposed change to the Narrative Standard, "credible scientific data and other evidence appropriate under the Water Quality Act" is "much clearer," and "a broader standard, and it includes a lot of good information that may not be considered the best available, but it's important." *See* Transcript Vol. II, p. 387, lns. 13 – 17. Mr. McQuillan acknowledged, however, that the terms "credible science" or "other evidence appropriate under the

Water Quality Act" are not defined or explained in relevant laws, regulations or guidance. *See* Transcript, Vol. II, p. 414, lns. 7 – 10; p. 423, lns. 20 – 23; p. 424, lns. 9 – 17). Mr. McQuillan also acknowledged that there is no statute, regulation or guidance indicating how NMED is to weigh evidence when implementing the Narrative Standard. *See* Transcript Vol. II, p. 428, lns. 1 – 4.

301. Mr. McQuillan acknowledged that his explanation of what NMED might consider in his written testimony was merely an illustration of the types of data, not a formalized process. *See* Transcript Vol. II, pgs. 412 – 414 , lns 23 - 4. As for specific components of USAF/DoD's proposed changes, Mr. McQuillan explained that NMED opposed the insertion of the term "best available" science, claiming that NMED did not want to have "[its] hands tied" in the type of information used. *See* Transcript Vol. II, p. 387, lns. 2 – 13. Mr. McQuillan explained that NMED would like to retain the discretion to decide what to use in administering the Narrative Standard (Transcript, Vol. II, p. 413 - 414, lns. 12 - 10 p. 423, lns. 4 - 10), which offers "simplicity and flexibility" to NMED that is "just perfect" in his opinion. *See* Transcript, Vol. II, pgs. 422, lns. 21 – 23. Mr. McQuillan claimed that NMED would never use "junk science," or use a standard set by another state that NMED determines to not be based on credible scientific data. *See* Transcript, Vol. II, p. 386, lns. 6 – 7; p. 388, lns. 11 – 17; p. 416, lns. 22 -24; p. 425 lns. 1 -21; *see also* Exhibit NMED 28 p. 3, lns. 7-10. Mr. McQuillan also claimed that was not aware of "any problems" or litigation from NMED's implementation of the Narrative Standard. *See* Transcript, Vol. II, p. 386, lns. 6 – 7; *see also* Exhibit NMED 28 p. 3, lns. 7-10 Brock testified that the USAF/DoD's proposed changes to the Narrative

Standard seek transparency in what NMED is to consider and how it makes decisions under the Narrative Standard, and specific considerations be included in the Rules concerning the scientific data used to make such decisions. USAF/DoD proposals focus on transparency and the use of sound and objective scientific practices. *See* Transcript Vol. II, p. 479, lns. 17 – 22. USAF/DoD believes that better transparency will assure that the Commission, the citizens of New Mexico and regulated parties have a more clear understanding of the basis" for NMED's decisions under the Narrative Standard. *See* Transcript Vol. II, p. 484, lns. 6-13.

302. Dr. Brock explained that USAF/DoD appreciates NMED's willingness to make changes to the Narrative Standard provision in response to USAF/DoD's concerns. *See* Transcript Vol. II, p. 47, lns. 10 – 11. But, NMED's proposed changes fall short because it fails to address USAF/DoD's fundamental concerns that NMED's decisions be transparent and based on sound science. *See* Transcript Vol. II, p. 479, lns. 10 – 16. USAF/DoD would be amendable to NMED proposed changes to the Narrative if a definition for "credible science" were added to the Rules (Transcript Vol. II, p. 479, lns. 17 – 21). Dr. Brock's written sur-rebuttal testimony offers a definition for this term derived from the regulations for the federal Toxic Substance Control Act. *See* Transcript Vol. II, p. 479 - 480, lns. 24 -4. Dr. Brock explained that USAF/DoD's written sur-rebuttal testimony seeks to provide "a more granular level of detail to illustrate to the Commission and [NMED] the kinds of information and facts that would be needed to satisfy" USAF/DoD's initially proposed changes to the Narrative Standard. See Transcript Vol. II, pl. 494 – 495, lns. 9 – 17.

303. Dr. Brock explained that USAF/DoD does not seek to impose federal laws and regulations (Transcript Vol. II, 480 – 481, lns. 5 – 22) or rigid rules that if not followed, NMED is prevented from taking appropriate action. *See* Transcript Vol. II, p. 496 - 497, lns. 16 – 14. Dr. Brock explained that USAF/DoD understood that by definition, there is going to be a level of uncertainty of the available science for toxic pollutants that don't have corresponding numerical standard in the Rules, because "if the data were sufficient to set a numerical standard, [the Commission] would just set one." *See* Transcript Vol. II, p. 494, lns. 7 – 23. Dr. Brock also indicated that there may be situations where the scientific information is not sufficient for setting a numeric standard under the Narrative Standard, in which case, he suggested that NMED wait until the science has matured to a level that can be reliably used to set a goal, or establish a standard based on the information available to the Department. Dr. Brock explained that USAF/DoD's proposed changes seek transparency on what data should be considered when implementing the Narrative Standard - how the data is examined, to explain the rationale, and logic for why the standard is set at the level chosen by NMED. *See* Transcript Vol. II, pgs. 496 – 499, lns. 16 – 2. With regard to the scientific process, Dr. Brock stated that USAF/DoD seeks peer-reviewed science, explaining that it is "basic to the scientific method." *See* Transcript Vol. II, p. 478, lns. 8 – 9. Dr. Brock explained, however, that USAF/DoD does not suggest that information should be rejected if it is not peer-reviewed, just that such information be examined more closely. *See* Transcript Vol. II, pgs. 490 – 491, lns. 9 -12.

304. As to the listed numeric criteria in USAF/DoD's proposed definition of "credible

science," Dr. Brock explained that this is intended to identify what is considered as part of a flexible and adaptable process evaluation of the science by NMED, not to restrict NMED's ability to implement the Narrative Standard. *See* Transcript Vol. II, pgs. 496 – 500, lns. 3 – 4. Dr. Brock explained that the Commission may choose to implement different terms than proposed by USAF/DoD, but the Rules currently lack sufficient detail to meet needed scientific processes to ensure "thoroughness, systematic review, transparency, accuracy and reliability of the data." *See* Transcript, Vol. II, pgs. 496 – 497, lns 2

Municipal League

306. As to NMED's claims that no litigation has arisen as a result of its administering the Narrative Standard, USAF/DoD submitted evidence indicating that NMED proposes to add several controversial contaminants where the science is currently not sufficiently mature enough to establish a health-based standard. *See* Exhibit USAF/DoD 4, at pgs. 5, 10 – 11; *see also* Transcript Vol II, pgs. 482 - 483 lns. 24-16. Dr. Brock explained that federal regulators have faced multiple challenges after adopting scientifically unsupportable decisions. *See* Exhibit USAF/DoD 4, pgs. 5-6.

20.6.2.4103. E NMAC

Proposed Amendments by Roswell

307. Roswell proposed to amend 20.6.2.4103.E NMAC by deleting existing Commission language requiring that subsurface water and surface water abatement is not complete until "*a minimum of eight (8) consecutive quarterly standards from all compliance sampling stations*" meets standards. Roswell proposed to replace this

explicit requirement with language that abatement is complete when "*sufficient*" samples meet standards. William C. Olson testified that he was a member of the Commission during the 1995 adoption of the abatement rules and subsequently implemented and enforced abatement rules with both the Department and Oil Conservation Division. The intent of this requirement is to ensure that water pollution has definitively been abated prior to closure. The existing Commission rule language was adopted because, during abatement of water pollution, the concentration of water contaminants at individual monitoring stations can vary throughout the year and year to year due to fluctuations in the water levels from seasonal and climatic influences that affect recharge of water. Mr. Olson testified that he was a hydrologist implementing and enforcing New Mexico water pollution abatement rules for both the Department and Oil Conservation Division for 25 years and frequently observed this phenomenon. [Olson Rebuttal Testimony, WCO Rebuttal Exhibit 1, pgs. 12-14; and Olson Testimony Tr. vol. 4, pg. 877, line 5 to pg. 878, line 6].

308. Roswell argued that sites can be satisfactorily monitored with semi-annual or annual sampling to complete abatement. Mr. Olson testified that less frequent monitoring schedules during abatement activities are often approved and the abatement rules in 20.6.2.4106.C(3) NMAC and 20.6.2.4106.E(4) NMAC allow flexibility in monitoring water quality during implementation of abatement activities, including sampling frequencies such as those referenced by Roswell.

309. However, upon closure it is necessary that cessation of abatement activities, or clean closure, be demonstrated by 8 quarters of sampling to account for variations in water quality, as discussed above.

310. In addition, Mr. Olson testified that the language proposed by Roswell is vague and subjective and will lead to disputes over abatement closure requirements with no consistent closure requirement from site to site.

311. Under Roswell's proposed language it is likely that different standards of closure will be applied to different parties at different sites. Due to limited water supplies in New Mexico and the fact that approximately 90 % of New Mexico residents rely on ground water as a source of drinking water, it is imperative that water pollution be definitively abated by a responsible party to standards.

312. Mr. Olson testified that this is best accomplished as demonstrated by 8 consecutive quarters of clean water quality sampling to account for repeated fluctuations in water levels. [Olson Rebuttal Testimony, WCO Rebuttal Exhibit 1, pgs. 13-14; and Olson Testimony Tr. vol. 4, pg. 878, line 7 to pg. 879, line 19]

313. The Dairies proposed to add language to 20.6.2.4113 NMAC and 20.6.2.4114 NMAC to allow for appeal of a secretary decision on a dispute resolution. William C. Olson testified that he was a member of the Commission during the rulemaking hearings on the adoption of the abatement rules. Mr. Olson also implemented and enforced the abatement rules with both the Department and Oil Conservation Division for approximately 16 years after their adoption. Mr. Olson testified that the intent of the dispute resolution of 20.6.2.4113 NMAC was to allow a responsible party to contest technical decisions of Department staff implementing the rule by disputing staff requirements to the Secretary of the Department for a Secretary decision on a

specific technical issue. 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. Final agency action in this form is explicitly appealable to the Commission under 20.6.2.4114 NMAC.

314. The Rule would be unwieldy for both the Department 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 under 20.6.2.4113 NMAC is a non-public process between the agency and the responsible party for achieving compromise on technical issues. There is no public participation in dispute resolution.

316. Private resolution of technical issues between the agency and the 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].

317. The Department in its hearing testimony confirmed Mr. Olson's above analysis of the Dairies proposed amendment to this section and reiterated that the outcome of dispute resolution is not a final appealable agency action and that any Department action resulting from dispute resolutions would be incorporated into a broader final decision or approval that could then be appealed to the Commission. [Vollbrecht Testimony Tr. vol. 3, pgs. 582, line 14 to pg. 583,

318. The Department proposed changes to 20.6.2.4103.G NMAC 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.

319. No party objected to the proposed change to 20.6.2.4013.G NMAC.

20.6.2.4104C

320.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. 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, 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.

321. Ms. Hunter testified 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. 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.

322. The Commission has authority to require financial assurance for sites under abatement pursuant to Section 74-6-4(E) of the WQA, which provides that the Commission shall promulgate regulations to prevent and abate water pollution. The entirety of the Commission's abatement regulations at 20.6.2.4000 NMAC were promulgated under that authority, and nothing in the

statute precludes the Commission from requiring financial assurance for any site under abatement as part of those regulations. Tr. Vol. 4, 997:23-998:8.

323. Ms. Hunter testified that there is no principled distinction between sites under abatement with an associated permit, and a site under abatement without an associated permit. At either site, pollution has occurred and cleanup is required. Financial assurance helps ensure that such cleanup is carried out. Tr. Vol. 4, 998:9-15.

324. The Department's proposed language would not require financial assurance at all sites. Ms. Hunter testified that, in considering whether to require financial assurance at a given site, the Department would determine whether requiring financial assurance would impede remediation progress and would decline to require it for entities for which it would cause undue hardship. Tr. Vol. 998:16-999:16.

325. The Department proposed changes to 20.6.2.4104.D NMAC that would give the Secretary discretion to require oversite 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. Tr. Vol. 4, 999:22-1000:9; *Hunter Direct*, 9:7-12.

20.6.2.4105C

326. NMED proposed to add the narrative subsurface water standard, proposed new 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.

20.6.2.4106C

327. 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.

328. 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.

329. 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.

330. 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.

331. The Department opposed the Dairies' proposed changes at 20.6.2.4106.C and C (7) NMAC, which would insert the word "reasonably." Mr. Vollbrecht testified that such changes are unnecessary. Tr. Vol. 4, 837:25-838:3; Vollbrecht Rebuttal, 16:20-24.

20.6.2.4108 NMAC

332. 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.

333. 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; *Vollbrecht Direct*, 19:14-21.

334. The Department supported Mr. Olson's proposed public notification process for submittal of a petition for alternative abatement standards in 20.6.2.4108 NMAC, with a few changes. Mr. Vollbrecht testified that the proposed public notification process would provide the public greater opportunity to review a petition for alternative abatement standards. This process would be similar to the initial public notification process associated with submittal of a discharge permit application. Tr. Vol. 4, 1006:21-1007:13.

335. The Department's proposed changes to Mr. Olson's proposal are indicated in Mr. Vollbrecht's Rebuttal Testimony at NMED Exhibit 30, 20:6-22:21.

Mr. Olson Proposal Pages 74 through 78

Section 20.6.2.4108 NMAC

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~~]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 ~~proposal~~, 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 ~~Stage 2 abatement plan~~ public notice proposal 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.

336. William C. 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.

337. The requirements in the Department's proposed section 20.6.2.4103.F(5) NMAC of "*Amended NMED Exhibit 36*" specifies that review of alternate abatement standards petitions follow Commission adjudicatory procedures in 20.1.3 NMAC (Variance Hearings).

338. However, the Commission variance hearing procedures only require a *one-time newspaper* publication and notification of the facility-specific list 30 days prior to a Commission hearing.

339. There is no initial public notice of submission of alternate abatement standards petitions to the Department. The public, 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.

340. 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.

341. 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. In addition, the information contained in an alternate abatement standard petition is highly technical and extensive.

342. 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. [Olson Direct Written Testimony WCO Exhibit 1, pgs. 13-15; and Olson Testimony Tr. vol. 4, pg. 1010, line 16 to pg. 1012, line 18].

343. 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.

344. His proposed amendments to this section also clarified that hearings on alternate standards are before the Commission and not the Secretary of the Department. [Olson Direct Written Testimony WCO Exhibit 1, pgs. 13-15; and Olson Testimony Tr. vol. 4, pg. 1010, line 16 to pg. 1012, line 18].

345. The Department agreed with Mr. Olson's testimony and supported his proposed public notice amendments to 20.6.2.4108 NMAC, if they were slightly modified. [Vollbrecht Testimony Tr. vol. 4, pg. 1006, line 21 to pg. 1007, line 13; Vollbrecht Rebuttal Testimony, NMED Exhibit 30, pgs. 20-22]. Mr. Olson testified that NMED's suggested modifications to his proposed amendments on abatement plan public notices were acceptable. [Olson Testimony Tr. vol. 4, pg. 1012, line 19 to pg. 1013, line 3].

346. The USAF/DoD, NMMA and Dairies objected to Mr. Olson's proposed amendments on the rationale that public notice of the Commission hearing under the adjudicatory procedures of the Commission is sufficient. None of these parties provided evidence contrary to Mr. Olson's testimony that the rule language in 20.6.2.4108 does not address initial public notice of submission of alternate abatement standards petitions. Nor did they provide evidence that contradicts Mr. Olson's testimony that the public may not have an opportunity to provide input on a petition prior to a Commission hearing if an alternate abatement standards petition is submitted outside of a Stage 2 abatement plan

or abatement plan modification. [Olson Testimony Tr. vol. 4, pg. 1014, line 25 to pg. 1015, line 17].

347. NMMA also questioned whether public notices of abatement plan modifications already cover public notice of alternate abatement standards petition. Mr. Olson testified that they do not. Alternate abatement standards are separate actions that must be granted by the Commission before an abatement plan modification. Alternate abatement standards are a form of variance from the Rules subject to a Commission hearing and approval, and are not approved by the Department under the modification process. 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. [Olson Testimony Tr. vol. 4, pg. 1015, line 18 to pg. 1016, line 23].

348. Consequently, the Commission adopts Mr. Olson's above-proposed language for 20.6.2.4108 NMAC, as modified and supported by NMED. This language ensures that the public is properly noticed when the alternate abatement standard process begins and gives the public the opportunity to provide information and concerns during the Department's review of the petition prior to a Commission hearing on the variance.

20.6.2.4109 NMAC

349. 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.

350. The Commission finds that the Department's proposed changes at 20.6.2.4104.D NMAC are well taken, and agrees with the Department's amendments as proposed.

20.6.2.5003 NMAC

351. 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.

352. 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.

353. No party objected to these changes, based on the weight of the evidence, the Commission agrees with the Department's proposal to amend 20.6.2.5003 NMAC as proposed.

20.6.2.5004 NMAC

354. 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.

355. 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.

356. 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.

20.6.2.5005 NMAC

357. The Department proposed to include a provision 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.

358. No party objected to these changes, based on the weight of the evidence, the Commission agrees with the Department's proposal to amend 20.6.2.5005 NMAC as proposed.

20.6.2.5006 NMAC

359. 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.

360. 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.

361. The Department addressed the testimony of John Stomp on behalf of the Municipal League suggesting that 20.6.2.3105.A NMAC is an exemption from the UIC regulations. Ms. Hunter testified that the Department disagrees that the 20.6.2.3105 NMAC exemptions are in any way applicable to the Department's UIC primacy program. She explained that the federal program does not allow for the state exemptions to apply. Tr. Vol. 3, 713:25-714:18.

362. Ms. Hunter addressed Mr. Stomp's claim that ASR projects that inject treated drinking water are already subject to regulation under the federal Safe Drinking Water Act, and by the State Engineer under the Underground Storage and Recovery Act, and therefore the Department's regulation of ASR projects would cause duplicative regulation. Ms. Hunter explained that the Department is the only regulatory agency that evaluates and regulates water quality issues in aquifers associated with ASR projects, which inject enormous amounts of water into an existing aquifer. She noted that the State Engineer regulates the water quantity issues, and the federal Safe Drinking Water Act regulates the quality of the source water, but only the Department looks at water quality issues associated with the aquifer itself, which include evaluation of possible adverse water quality impacts that could result from injecting into the aquifer, and the proximity of sites with plumes of contaminated groundwater and the potential impacts of ASR projects on those sites, as well as the project site. Tr. Vol. 3, 714:19-716:7.

363. The Department opposed the Municipal League's proposed language regarding the monitoring of ASR projects that do not utilize drinking water, which would limit

monitoring only to those contaminants that are either present in the source water or which have the potential to be mobilized during injection. Ms. Hunter testified that, while the Department agrees with the Municipal League's intent to limit unnecessary monitoring, the Department opposes exempting any ASR projects from permitting requirements, or putting specific restrictions on the type of monitoring that can be considered. She stated that the Commission's regulations should remain flexible to accommodate site-specific and project-specific issues that may arise. Tr. Vol. 3, 716:8-717:3.

364. The Department also opposed the second part of the Municipal League's proposal regarding a permittee's ability to petition for reduced monitoring. Ms. Hunter testified that this change is not necessary because permittees already have that ability. Tr. Vol. 3, 717:4-7.

365. Based on the weight of the evidence, the Commission finds that the Department's proposed changes at 20.6.2.5006 NMAC are well taken, and agrees with the Department's amendments as proposed.

20.6.2.5101 NMAC

366. The Department proposed to add language in this section to include the Surface Mining Act, NMSA 1978, §§ 69-25A-1 to -36; the Oil and Gas Act, NMSA 1978, §§ 70-2-1 to -38; 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.

367. 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.

368. No party objected to these changes, based on the weight of the evidence, the Commission agrees with the Department's proposal to amend 20.6.2.5101 NMAC as proposed

20.6.2.4103.F(1)(d) NMAC Proposed Amendments by Roswell

369. Roswell proposed to amend 20.6.2.4103.F(1)(d) NMAC by deleting existing Commission 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*". Roswell proposed to replace this with language that allows technical infeasibility in cases where the reduction in the concentration of water contamination is "*substantially*" less. Roswell's also proposed to delete 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)…*". William C. Olson testified that the language proposed by Roswell is vague and subjective, allows wide variation in criteria for considering technical infeasibility and 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 8 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 above 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].

City of Roswell

370. Jay Snyder was tendered and accepted as an expert at hearing. Tr. Vol. III 789:9; Roswell Ex. A.

371. Chief Scientist Dennis McQuillan ("McQuillan") of NMED and Chief of Ground Water Quality Bureau within Water Protection Division of NMED Michelle Hunter ("Hunter") provided technical testimony on behalf of NMED.

372. Roswell is a municipality located in Chaves County, NM that was gifted the former Walker Air Force Base that is a very large site with substantial TCE over standard. Tr. Vol. I 48:17-24. Previous to transfer in 1967, United States Army Corps of Engineers ("USACE") tested for and cleaned ground water contamination. Tr. Vol. I 49:1-50:8. After 1967, the USACE does not test for or tell Roswell where TCE is located, but rather, Roswell is in the unenviable position of having to determine and characterize contamination. Tr. Vol. I 50:1-14.

373. On balance, Roswell asserts performance standards are much more manageable under current NMED abatement regulations than federal superfund. Current New Mexico abatement regulations, as applied, provide robust safe harbor. Tr. Vol. I 50:14-51:9.

374. Roswell may need to enter abatement or voluntary remediation under NMED regulations.

<u>20.6.2.3103(C) NMAC [Foot Note]:</u>

375. Roswell agrees with the NMED's proposed prospective application of the new standards taking effect on July 1, 2020 pursuant to proposed footnote but argues the note should be formally codified as 20.6.2.3103 (D) NMAC.

376. In support of this contention, Roswell argued that the intent of the foot note is obvious—to give the regulated community time to comply within a reasonable grace period. Tr. Vol. I 51: 23-24.

377. Roswell does not want to waste time, money and resources in the future arguing in administrative, state, or federal arenas 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. I 51: 20.

378. McQuillan testified that he was the primary witness regarding proposed amendment to section 3103. Vol. II 391: 11-12; 392. Regardless of lack of codification, McQuillan testified that the regulated community could rely on the foot note language being legally effective. Tr. Vol. II 395: 10-16.

379. McQuillan stated he had no objection to codification unless there was some reason advanced to not codify by Archives and Records Center. Tr. Vol. II 396: 1-7.

380. McQuillan testified the NMED "want[s] the [footnote] to have teeth." *Id.*

381. No objection or rebuttal or any other argument by any party was made that the foot note language should not and could not be codified as 20.6.2.3103 (D) NMAC.

382. Snyder testified and agreed that the foot 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. II 449. For Roswell, specifically, it allows it to establish abatement plans on a very large facility. *Id.*

383. 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. II 450.

384. Snyder testified the footnote should be "elevated" and codified as section 3103.D from a regulator perspective to provide specific citation to issue responsible party letters regarding re-opening of sites. Tr. Vol. II 451:5-11.

20.6.2.4103 (E) and 20.6.2.4103(F) (d) NMAC (alternative abatement):

385. Roswell does not agree that eight (8) consecutive quarterly samples from all compliance sampling stations should be a precondition to completing abatement and argues the regulation should be revised and amended (deletions in ellipses and additions in bold) to allow discretion to the Secretary as follows:

20.6.2.4103 (E) (revisions in bold and ellipses)

"Subsurface-water and surface-water abatement shall not be considered complete until ... ***sufficient*** *samples from ... compliance sampling stations* ***as determined by the Groundwater Quality Bureau*** *approved by the secretary meet the abatement standards of Subsections A, B, [andl] C, and 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. Surface water pollution shall be abated to conform to the Water Quality Standards for Interstate and Intrastate Streams in New Mexico (20.6.4 NMAC)"* Roswell Amended NOI, p. 2.

20.6.2.4103(F) (d) NMAC (alternative abatement) (revisions in bold and ellipses)

"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." Id.*

386. Roswell argued 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. I 52:19-53:4.

387. Snyder testified Roswell's proposed language to 20.6.2.4103 (E) and 20.6.2.4103(F) (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. IV 796: 8-15; 797:4-5.

388. 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. IV 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. IV 795.

389. Snyder also provided public comment and stated section 4106.C purpose is to select a remedy in Stage I abatement to proceed expeditiously to Stage II to clean ground water contamination. Tr. Vol. III. 643:6. Snyder commented extracted water returned to the aquifer is more desirable because it minimized 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. III 644-645. Snyder concluded that the expeditious intent to clean ground water

contamination under section 4106.c could be stream lined in one public comment and hearing process regarding class V injection wells. Tr. Vol. III 646-647.

390. There was no challenge, objection or rebuttal to Snyder's direct technical testimony.

391. 20.6.2.4103 (E) and 20.6.2.4103(F) (d) NMAC reasonable and warranted. The language does not prevent eight consecutive quarters of sampling but merely provides the Secretary additional tools to as expeditiously as possible approve completion of abatement and close sites, taking into account a variety of technical and other factors in the Department's goal to protect groundwater for the environment and the public.

20.6.2.4108 (B) (4) (Roswell's revisions in bold)

392. Roswell submits the following proposed revision to 20.6.2.4108 (B) (4) NMAC.

"owners and residents of surface property located inside, and within 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;..." Roswell Amended NOI at summary of direct, p. 5.

393. In support of the revision, Roswell argues it 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 Amended NOI, at summary of direct testimony, p. 5.

394. At hearing, Snyder provided testimony that notice to the public is given by mail regarding Stage 2 abatement within a one-mile radius. Tr. Vol. III 798.

395. 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. III 799.

396. 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. III 799:6-19("[T]h goal is to get the public notified, not necessarily do 7,500 mailings.").

397. Hunter testified in rebuttal that Roswell allegedly provided no evidence in support of its proposed revision noting that sparsely populated locales would not be burdensome to notify within a 1 mile radius. Tr. Vol. IV 1023.

D. 20.6.2.4108 NMAC Roswell Proposed Reduced Public Notice Requirements

398. Roswell proposed to amend 20.6.2.4108.B(4) NMAC by reducing the existing public notice *radius* for notifying owners and residents of adjacent surface property of a proposed Stage 2 abatement plan from "*one (1) mile*" to "*1/3 of a mile*". As a rationale for this amendment, Roswell argued that its proposal is consistent with the notice requirements regarding discharge permits under 20.6.2.3108 NMAC. William C. Olson testified that it is inappropriate to compare discharge permit public notice requirements with those for abatement of water pollution. The purpose of a discharge permit is to prevent water pollution at a facility.

399. A shorter radius for discharge permits is appropriate because water pollution is not allowed by Commission rules and should not occur. Mr. Olson also testified that once water pollution has occurred in violation of Commission rules, the effects of that contamination can extend for large distances from a facility.

400. A more extensive landowner public notification radius is warranted under an abatement plan to notify persons who could potentially be affected by pollution. Mr. Olson 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 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, once it has, occurred and how the effects of that pollution can extend over 1 mile in distance.

401. Mr. Olson testified that during his 25 years of experience in working on water pollution abatement with both the Department and Oil Conservation Division there were numerous examples of extensive water pollution within Department and Oil Conservation Division case files across different industries and that he personally worked on many of these sites. In some cases, water pollution at these sites has 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].

402. For the above reasons, the Commission does not adopt Roswell's proposed amendments to 20.6.2.4108.B (4) NMAC. For the above reasons, the Commission does not adopt Roswell's proposed amendments to 20.6.2.4103.E NMAC.

LANS

403. LANS expressed general support of the Department's goal to conform the regulations to the exemptions provided for by law, but suggested that it would be better accomplished by moving the statutory exemptions to a new section, 20.6.2.10 NMAC, and deleting the current 20.6.2.3105.J and M NMAC.

404. LANS also proposed revising the Department's proposed new exemption at 20.6.2.3105.O NMAC to (1) clarify that the exemptions for hazardous waste and solid waste extend to exempt activities and conditions already subject to federal authority under the federal Solid Waste Disposal Act and (2) add language exempting activities or

conditions subject to the federal Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). LANS position on each of these proposals is discussed in turn below.

Proposal to move exemptions to a new 20.6.2.10 NMAC

and delete 20.6.2.3105.J NMAC

405. LANS proposed a new 20.6.2.10 NMAC to provide exemptions from the WQCC regulations for activities or conditions that are subject to the authority of the Environmental Improvement Board under the Hazardous Waste Act, the Ground Water Protection Act, or the Solid Waste Act, or the authority of the Oil Conservation Commission under the Oil and Gas Act. See Pleading Log No. 29 at ¶ 2.

As LANS explained in its corrected proposed amendments and statement of reasons,

406. Pleading Log No. 35 at 1, and the written testimony of Mr. Beers, Pleading Log No. 52 at 5:5-15, the Water Quality Act, specifically NMSA 1978, Section 74-6-12 (1999), expressly exempts certain activities and conditions subject to the authority of the Environmental Improvement Board, or subject to the authority of the Oil Conservation Commission from the Commission's authority under the Water Quality Act. Thus, the proposed 20.6.2.10 NMAC, which incorporates these exemptions into the regulations, is necessary to bring the regulations into conformity with the Water Quality Act. Pleading Log No. 52 at 5:5-15. Id.

407. LANS additionally explained that adoption of this proposal would render the current permit exemptions in 20.6.2.3105.J NMAC redundant, and therefore, unnecessary. Mr.

Beers, therefore, requested that they be deleted. Pleading Log No. 52 at 5:17-6:2. See also Pleading Log No. 35 at 1-2.

408. The United States Department of Defense ("DoD"), through the corrected technical testimony of Scott Clark, similarly expressed the necessity of amending the regulations pertaining to exemptions to conform to statute, and similarly proposed adding a provision identical to that proposed by LANS. See Pleading Log No. 66 at 4:8-18. See also Pleading Log No. 76 at 2:20-3:6 (stating as part of rebuttal testimony that the DoD proposed 20.6.2.10 NMAC is identical to the proposal submitted by LANS).

409. William Olson submitted rebuttal testimony addressing this section, stating the concept was reasonable, but the language in the proposal did not conform to the language of the Water Quality Act in that "it omits portions of the statutory language." See Pleading Log No. 85 at 2-3. Mr. Olson, therefore, proposed an amendment to 20.6.2.10 NMAC that (1) deleted "except as provided in Part 4" from LANS and the DoD proposal, and (2) added language at the end of subsection A stating "except to abate water pollution or to control the disposal or use of septage and sludge." The Department amended its petition to include a new Section 20.6.2.10 adopting the language proposed by Mr. Olson. See Pleading Log No. 81 at 24.

410. At hearing, Ms. Hunter testified that the Department had submitted an amended petition moving the exemptions previously provided for in Section 20.6.2.3105 for activities regulated under the Hazardous Waste Act, the Groundwater Protection And, and the Solid Waste Act into new Section 20.6.2.10 in response to the proposals submitted by LANS, the DoD, and Mr. Olson. Tr. Vol. 3 at 594:14-20, 595:16-25.

411. The proposal adopted the amended language proposed by Mr. Olson. The Department also agreed with LANS' proposal to delete the current discharge permit exemptions for leachate from solid waste facilities, 20.6.2.3105.J NMAC. See Pleading Log 87; Tr. Vol. 3 at 601:6-8, 686:7-687:2 (Ms. Hunter's testimony that the exemption for leachate from solid waste facilities in 20.6.2.3105.J NMAC was no longer necessary).

412. Mr. Olson also testified that subsection was not necessary. Tr. Vol. 3 at 708:1-4. LANS does not object to the Department'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.

413. Accordingly, the Commission should adopt a new 20.6.2.10 NMAC with the language in the Department's revised petition. See Ex. A, ¶ 2. Additionally, the Commission should delete the current 20.6.2.3105.J NMAC.1 Proposal to exempt activities or conditions subject to RCRA and CERCLA As stated above, the Department initially proposed a new exemption t 20.6.2.3105.O NMAC, which exempted discharges from facilities or conditions regulated under RCRA. See Pleading Log No. 1 at Attachment 2 pg. 24:54-56 ("or regulated under the Resource Conservation and Recovery Act, except to abate water pollution or to control the disposal or use of septage and sludge"). LANS proposed revising the exemption to instead exclude "Any activity or condition regulated under the federal Solid Waste Disposal Act, 42 U.S.C. §§6901 to 6992k, or any removal or remedial action under the federal Comprehensive Environmental Response,

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[1] The Department's amended petition also includes EMNRD's proposed language in a revised subsection M relating to an exemption for discharges from activities regulated by that department under the Geothermal Resources Development Act. LANS' proposal to delete subsection M does not extend to EMNRD's GRDA proposal.

Compensation and Liability Act, 42 U.S.C. §§9601 to 9675" for purposes of clarifying that the exemptions for hazardous waste and solid waste extend to activities and conditions already subject to federal authority under the federal Solid Waste Disposal Act, which includes RCRA,2 and to add an exemption for activities or conditions subject to CERCLA to avoid duplication and acknowledge that federal law preempts the necessity to obtain state permits for removal or remedial actions. Pleading Log No. 35 at 2.

414. The written testimony of Mr. Beers in support of this proposal explains that LANS' revised language clarifies that activities regulated under the federal Solid Waste Disposal Act and activities regulated under CERCLA are exempt from the discharge permitting requirements because they are already subject to federal authority. Pleading Log No. 52 at 3-7. With respect to CERCLA, Mr. Beers also pointed out that Section 121(e) of CERCLA (42 U.S.C. § 9621(e)(1)) provides that "[n]o Federal, State, or local permit shall be required for the portion of any removal or remedial action conducted entirely onsite, where such remedial action is selected and carried out in compliance with [Section 121]," demonstrating that duplicative regulation was not intended. *Id.* at 6:10-14.

The proposed exemption for CERCLA

415. The Department, through rebuttal testimony of Ms. Hunter, objected to LANS' proposal to add an exemption for CERLA. Pleading Log No. 81, Exh. 26 (Hunter Rebuttal). LANS, in an effort to reach a compromise, agreed at hearing to withdraw its request to include an

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[2] RCRA, Public Law 94-580 (October 21, 1976), is a 1976 amendment to the federal Solid Waste Disposal Act that added federal regulation of hazardous waste, solid waste, and underground storage tanks.

exemption for facilities and activities subject to CERLA, but maintained its proposal to exempt facilities and activities subject to RCRA. Tr. Vol. 3 at 688:3-8.

i. The proposed exemption for RCRA

416. As noted above, RCRA establishes programs for the regulation of hazardous waste, solid waste, and underground storage tanks, and covers the same areas as the New Mexico Hazardous Waste Act, Solid Waste Act, and Groundwater Protection Act. Generally, New Mexico regulates these activities under delegation/program approval from EPA under RCRA. Regulations adopted by EPA are enforceable by EPA under the federal acts until New Mexico adopts them under state law.

417. Thus, in some circumstances, there may be a delay in state regulation of hazardous waste, solid waste, and underground storage tanks. It is this gap that LANS seeks to address by its proposed exemption. It would be inconsistent with the exclusions in Section 74-6-12 to only exempt regulation of hazardous waste, solid waste, and underground storage tanks upon formal adoption of these regulations by the Environmental Improvement Board. LANS believes that the better approach is to exempt these activities once regulation has been initiated under RCRA.

418. Ms. Hunter testified on cross examination that the Department's amended petition removed the proposed Section 20.6.2.3105.O NMAC in its entirety, including the proposed exemption for RCRA. Tr. Vol. 3 at 601:23-24.

419. Ms. Hunter characterized LANS' proposal as different from, and arguably broader than, the language of the Water Quality Act. Tr. Vol. 3 at 596:11-14. Ms. Hunter supported the Department's position to not include that proposal, stating that "[t]he Water Quality Act sets forth the regulatory authority of the commission and the Department and sets the

limits on that authority. The Department believes that it would be inappropriate to include limitations on such authority in the regulations that go beyond the scope of the Water Quality Act." *Id.* at 596:15-20.

420. On cross examination by counsel for LANS, Ms. Hunter testified that the Department did not intend to subject "facilities that had certain discharges subject to [federal] permits...under [RCRA] to state jurisdiction. Tr. Vol. 3 at 601:18-602:10.

421. Mr. Beers testified on behalf of LANS in favor of including an exemption for RCRA, stating that inclusion of the proposed exemption was necessary to ensure that the exemption sections are comprehensive. Tr. Vol. 3 at 687:20-688:2. Mr. Beers expressed concern that the Department's proposal 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. Clark, on behalf of the DoD, also testified regarding the proposed exemption for RCRA. Mr. Clark, in favor of the exemption, stated that the regulations should go beyond just reiterating the statute to "provide more detail and consider the real-life scenario where the rules need not apply because of the direct oversight in other environmental programs." Tr. Vol. 3 at 697:25-698:4.

327. Mr. Olson testified in support of the Department's position stating that the Water Quality Act agreeing that the exemption for RCRA should not be included where there is no statutory exemption in the Water Quality Act for these activities. Tr. Vol. 3 at 706:21-707:7. Mr. Olson also agreed with the Department's testimony that some RCRA sites have operational discharge permits issued under Commission rules. *Id.* at 707:7-9. Mr. Olson further stated that the Commission "needs...to protect public interests which may or may not be aligned through the federal statutes."

422, LANS' testimony explains why activities that are already subject to federal authority under RCRA should be exempted under the Regulations. Moreover, the Department's argument in opposition, that exemptions must be limited to the express language of the Water Quality Act, is inconsistent with the existing exemptions in 20.6.2.3105 NMAC and creates the potential for dual regulation. As such, the Commission should reject the Department's position and instead adopt an exemption for "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." *See* Ex. A, ¶ 4.

LANS PROPOSED AMENDMENTS TO 20.6.2 NMAC

NOT INCLUDED IN THE DEPARTMENT'S PETITION

423. LANS' proposal to include CAS numbers for each pollutant currently listed at 20.6.2.7. WW NMAC and 20.6.2.3.3103 NMAC and each pollutant proposed by the Department to be listed at 20.6.2.7.T(2) NMAC.

424. LANS proposed to add the Chemical Abstract Service Registry Number ("CAS Number") for each pollutant currently listed at 20.6.2.7. WW NMAC and 20.6.2.3.3103 NMAC, and proposed by the Department to be listed at 20.6.2.7.T(2) NMAC in order to unambiguously identify the pollutants listed as toxic pollutants and to ensure consistency throughout the ground and surface water regulations. *See* Exh. A, ¶¶ 1, 3, tables 1, 2.

425. In support of its proposal, LANS submitted written technical testimony of Mr. Beers. *See* Pleading Log No. 52 at 1:8-12. Mr. Beers explained that each substance in the CAS Registry (the most comprehensive collection of disclosed chemical substance

information in the world) is assigned a "unique, unmistakable, and, universally recognized identifier" which thus provides an "unambiguous way to identify a chemical substance or molecular structure when there are many possible alternative systematic, generic, proprietary or trivial names for that substance." *Id.* at 3:17-4:17.

426. Mr. Beers further stated that "reference to the CAS number, as opposed to the generic name, provides an unambiguous way to identify a chemical substance or molecular structure when there are many possible alternative systematic, generic, proprietary or trivial names for that substance." *Id.* Mr. Beers thus concluded that "using the CAS number will ensure for the Department, as well as the regulated community, that regulated contaminants are properly and consistently identified and regulated." *Id.* Mr. Beers further concluded that "inclusion of the unique CAS Number for each contaminant identified in the regulations will serve to standardize references throughout the regulations," providing the example that the Commission already identifies contaminants by CAS Number in the surface water standards in 20.6.4.900.J NMAC. *Id.*

427. The proposal to include CAS numbers was uncontested by other parties to this proceeding. *See* Tr. Vol. 2 at 458:23-25. The Department, through the Rebuttal testimony of Mr. McQuillan, expressed support for inclusion of this proposed amendment. *See* Pleading Log No. 81, Ex. 28 at 4:1-2 (McQuillan Rebuttal Testimony). No other party to the proceeding addressed this proposal in pre-filed direct or rebuttal testimony or during the hearing, cross-examined Mr. Beers' written or oral testimony in support of this proposal, or otherwise

expressed opposition to this proposal. Finally, the Commission did not question Mr. Beers regarding this proposal or otherwise raise any issues or concerns.[3]

428. For these reasons, the Commission should adopt LANS' proposal and include the Chemical Abstract Service (CAS) numbers for each pollutant listed in 20.6.2.3103, 20.6.2.7.WW, and the Department's proposed 20.6.2.7.T(2) NMAC. See Ex. A, ¶¶ 1, 3, tables 1, 2.

1) Inclusion of the CAS number will also serve to standardize references throughout the regulations. For example, the Commission identifies contaminants by CAS number in Standards for Interstate and Intrastate Surface Waters (20.6.4.900.J NMAC).

2) The proposed amendment to include CAS numbers is uncontested by the other parties to the proceeding.

LANS' proposal to reduce the time period stated in 20.6.2.3106.B NMAC for making a decision on whether a discharge permit is required.

429. LANS proposed to amend 20.6.2.3106.B NMAC to reduce the time period from 60 days to 30 days in which the Department must make a decision on whether a discharge permit is required. In support of this proposal, LANS submitted written testimony of Mr. Beers, stating that the current time period is unnecessarily long for what is generally a very straightforward process. Mr. Beers further stated that the shorter period will "allow entities proposing a discharge for which no permit is required to commence work more quickly" and, where a permit is required, providing notice more quickly will expedite the process by

allowing entities to begin preparation of an application right away. Pleading Log No. 52 at 7:10-18 (Beers Direct).

430. The Department, through the rebuttal testimony from Ms. Hunter, stated that it did not oppose LANS' proposed change to 20.6.2.3106(B), but asked that the time period be reduced by only 15 days- from 60 to 45. In support of this request, Ms. Hunter testified that the Ground Water Quality Bureau "reviewed the 2017 record of data regarding the length of time that it takes staff to respond to Notice of Intent to Discharge; [and] nearly half receive a determination within 30 days and 80% receive a determination within 45 days." Pleading Log No. 81 Ex. 26 at 5:6-10 (Hunter Rebuttal). No other party submitted direct or rebuttal testimony addressing this proposal.

431. At hearing, Ms. Hunter testified that "the Department does not necessarily oppose the shortening of the time frame [provided in 20.6.2.3106(B)], but because this affects the Oil Conservation Division at the Energy Minerals and Natural Resources Department, we cannot agree to this change." Tr. Vol. 3 at 544:1-8.

432. In his direct testimony, Mr. Beers stated that the Department's average response time on the sixteen (16) Notices of Intent submitted by LANS to the Department over the last four years was approximately 38 days. Based on that, Mr. Beers stated that LANS' would prefer the 30 day period, but was willing to agree to 45 days by way of compromise.[4] No other party to the proceeding addressed this proposal during the hearing, crossed Mr. Beers' written or oral

[4] Mr. Beers' testimony at hearing as reflected in the transcript appears to have created confusion as to the reduction that LANS was proposing. LANS clarifies here that it proposed reducing the time period to 30 days, but stated at hearing it was to accept the Department's proposal to reduce it by 15 days.

testimony in support of this proposal, or otherwise expressed opposition to this proposal. Finally, the Commission did not question Mr. Beers regarding this proposal or otherwise raise any issues or concerns. Accordingly, the Commission should adopt LANS proposal to amend 20.6.2.3016 NMAC. *See* Exh. A, ¶ 5.

433. Although this proposal was not included in the Department's initial proposed changes to the regulations, the Department agreed with LANS' proposal and decided to incorporate the change into its proposal as well. At the hearing, the Department expressed that it supports the reasoning of LANS' proposal to this section, and agreed that providing a response to comments would be worthwhile. Tr. Vol. 3 at 570: 13-23. Accordingly, the Department's proposed changes incorporate a requirement for the Department to provide responses to public comment on a draft permit. *See* Pleading Log No. 89, Amended Exh. 36 at 29 (20.6.2.3109(B)).

434. At the hearing, LANS accepted the changes to 20.6.2.3109 NMAC as stated by the Department in Amended Exhibit 36 and noted that LANS would offer no additional testimony on this section. Tr. Vol. 3 at 571: 10-14. William C. Olson also expressed his support of the Department's proposed language in this section. None of the other parties indicated disagreement with the proposed language. Tr. Vol. 3 at 572: 8-14.

435. The Department proposed one additional substantive change at 20.6.2.3109(E)(4), to require the Secretary give notice via certified mail of when a discharge permit is terminated and the reasons for doing so, as well as giving written notice of the action to all participating parties and those persons on the facility-specific list maintained by the Department. *See* Pleading Log No. 89, Amended Ex. 36 at 30. The Department explained at this hearing that the purpose of this change was to conform the language of the regulations more closely with that of the Water Quality Act. Tr. Vol. 3 at 570: 6-12. As noted in its Corrected Statement of Position, LANS supports this change

and offered no further testimony on the matter. *See* Pleading Log No. 34 at 5. No parties indicated disagreement with this proposed change at the hearing.

436. For these reasons, LANS' proposal as reflected in the Department's proposed 20.6.3.3109.B NMAC should be accepted, and the regulations should be amended to require that the Department issue a response to comments on a draft permit at the time that a final permitting decision is made. *See* Ex. A, ¶ 7. Additionally, the Department's proposed changes to 20.6.2.3109.E(4) NMAC should be approved to bring notice requirements in the regulations into conformity with the language of the Water Quality Act.

VII. THE MAJOR ISSUES

During deliberations, the Commission may want to proceed through the rule itself. Or the Commission may choose to focus on areas where there are no disputes and then approach the more contentious issues. Issues that have leapt out are as follows:

A. Removal of the 5-year limitation on variances 20.6.2.1210 NMAC

B. Retaining WQCC set standards for several constituents below MCL's 20.6.2.3103 NMAC

C. Exemptions 20.6.210 and 20.6.23105 NMAC

D. Alternative Abatement Standards 20.6.2.4103 NMAC, 8, 10, or secretary choice in sampling

E. Public Process associated with petitions for alternative abatement standards 20.6.2.4108

F. ASR, concern for Municipal Association that permits will raise costs versus the desire for evaluation of the quality of the groundwater injected into sites

G. Overall the tension between the regulated community wanting a specific set of standards and NMED wanting to retain New Mexico specific standards that may be more cumbersome for the regulated community.

H. RCRA for Labs and NMED

VIII. ATTACHMENTS TO REPORT

Attachment A. will be a copy of the proposed rule by NMED. This rule is the key document to have handy.

Attachment B. will be a package containing all the proposed draft language on specific sections of the proposed rule submitted by the parties. The parties will identify the section number, and the party recommending the rule change.

The Hearing Officer would recommend that the Commissioners have their laptops or tablets at the ready to refer to the parties' post hearing submissions as they are quite voluminous.

VII. NEXT STEPS

The parties will receive a Post Hearing Procedural Order that sets out the time for submission of exceptions to the report. The parties have 30 days from the date of the filing to submit their exceptions. The hearing officer has requested that if the parties have their exceptions done earlier that they e-mail those to the hearing officer, in redline format, so she can begin revising the report. If time permits the hearing officer would like to circulate a revised report amongst the parties. Anticipate a revised hearing officer report with revisions before deliberations.

Respectfully Submitted,

Erin O. Anderson

Erin O. Anderson
Administrative Law Judge
Hearing Officer for 17-03 (R)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the **Hearing Officer Report** was served to the following parties on April 9, 2018 via email, and on April 10, 2018 via mail:

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