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

**IN THE MATTER OF PROPOSED AMENDMENTS TO GROUND AND SURFACE WATER PROTECTION REGULATIONS, 20.6.2 NMAC**

**No. WQCC 17-03 (R)**

**AMIGOS BRAVOS/GILA RESOURCES INFORMATION PROJECT'S EXCEPTIONS TO THE HEARING OFFICER'S REPORT FILED APRIL 11, 2018**

## Introduction

Amigos Bravos and the Gila Resources Information Project (collectively referred to as "AB/GRIP") hereby file their Exceptions to the April 11, 2018 Hearing Officer's Report ("HOR"), separate from the New Mexico Environment Department's ("NMED") and other interested parties' Joint Proposed Hearing Officer's Report.

AB/GRIP initially joined NMED and other interested parties in NMED's May 4, 2018 Motion to Withdraw the Hearing Officer's Report. AB/GRIP conveyed their willingness to work with NMED on a proposed revised Hearing Officer's Report at the New Mexico Water Quality Control Commission ("WQCC") meeting held on May 8, 2018. However, once NMED provided a more complete draft report to AB/GRIP on May 9, 2018 it became apparent that AB/GRIP would not be able to stipulate to the proposed revised Hearing Officer's Report due to the inclusion of a new jointly proposed rule by NMED and the New Mexico Mining Association ("NMMA") that violates the logical outgrowth doctrine and was not properly noticed to the public and subject to public hearing.

## I. Exceptions to the April 11, 2018 Hearing Officer's Report.

1. Exception is taken to the finding, for which there is no support in the record, that "Both prior to and after the hearing, the parties worked collaboratively, to arrive at compromise language for contentious sections." HRO at 2. Neither the petitioner in this matter, NMED, nor any other interested party worked with AB/GRIP to arrive at compromise language for Sections 20.6.2.1210 NMAC, 20.6.2.4103.E and -.F NMAC either prior to or after the evidentiary hearing. NMED and NMMA, however, did work together and submitted a new jointly proposed rule in their proposed findings of fact submitted to the WQCC on February 16, 2018, well after the public hearing and closing of the public record. This process circumvented the public hearing process for regulatory change and therefore this finding must be removed.
2. Exception is taken to the HOR's "Authority" section to the extent that it fails to provide all relevant legal authority governing WQCC rulemaking. HOR at 4-6. AB/GRIP has provided to the HOR's "Authority" section, attached as Exhibit A. AB/GRIP's proposed new language is in bold blue underline (color)/bold black underline (black and white). Bold red strikethrough (color)/bold black strikethrough (black and white) represents language to be deleted.
3. Exception is taken to the HOR's "Procedural Background" section numbers 19, 25, 29, 31-33 to the extent that they are redundant. These paragraphs should be removed.
4. Exception is taken to the HOR's "Post-Hearing Submissions" section to the extent that it fails to include all post-hearing submissions filed by the parties. HOR at 19-20. This section merely summarizes NMED's post-hearing changes submitted in its Proposed Findings of Fact and Conclusions of Law on February 16, 2018. This section should

be amended to identify all of the parties who submitted post-hearing written closing arguments and proposed findings of fact and conclusions of law. AB/GRIP has provided changes to this section, attached as Exhibit B. AB/GRIP's proposed new language is in bold blue underline (color)/bold black underline (black and white). Bold red strikethrough (color)/bold black strikethrough (black and white) represents language to be deleted.

5. Exception is also taken to the HOR's "Post Hearing Submissions" subsection g to the extent that it includes a new jointly proposed rule by NMED and NMMA which violates the logical outgrowth doctrine and was not subject to public notice or hearing. HOR at 20. This new rule is not properly before the Commission and must be removed from the HOR. Briefing on this legal issue is provided in attached Exhibit C.

6. Exception is taken to the HOR's "20.6.2.1210 NMAC" section to the extent that its organization could be better organized. HOR at 27- 56, paragraphs 62-196. AB/GRIP has provided changes to this section, attached as Exhibit D. AB/GRIP's proposed new language is in bold blue underline (color)/bold black underline (black and white). Bold red strikethrough (color)/bold black strikethrough (black and white) represents language to be deleted.

7. Exception is also taken to the HOR's "20.6.2.1210 NMAC" section to the extent that it characterizes Mr. Olson's proposed changes as "compromise language." HOR at 52. Mr. Olson's proposed changes may be "compromise language" for NMED's initial proposed changes to Section 20.6.2.1210 NMAC and industry's proposed amendments to NMED's proposal, but it most certainly is not "compromise language" for NMED's proposal and AB/GRIP's proposed amendments to NMED's proposal.

8. Exception is taken to the HOR's paragraphs 214-221, "NMMA Position in Opposition" to NMED's proposed changes to Section 20.6.2.3105 NMAC, to the extent that its presentation is confusing. HOR at 63-65. The HOR discusses NMED's proposed exemptions on page 91, therefore NMED's proposal should be presented first, as NMED is the petitioner in this matter, and then NMMA's position in opposition should be presented. These paragraphs should be moved and incorporated with the "Exemptions" section starting on page 91.

9. Exception is taken to the HOR's inclusion of NMED's and NMMA's new jointly proposed amendment to Section 20.6.2.4103.A NMAC which violates the logical outgrowth doctrine and was not properly noticed or subject to a public hearing. HOR at 69. *See also* Exception # 5 and attached Exhibit C. This new jointly proposed rule must be removed from the HOR.

10. Exception is also taken to the HOR's finding that NMED's and NMMA's new jointly proposed amendment to NMED's originally proposed revisions to Section 20.6.2.4103.A and .B NMAC merely added a phrase. HOR at 69. This new jointly proposed rule, which violates the logical outgrowth doctrine and was not properly noticed or subject to a public hearing, did not merely add a phrase to NMED's original proposed rule. *See* Exceptions # 5 and 9, as well as attached Exhibit C. The new jointly proposed rule eliminates the following language of NMED's original proposed rule:

> Subsurface water contaminants shall be abated to concentrations below those which may with reasonable probability injure human health, animal or plant life or property, or unreasonably interfere with the public welfare or the use of property through percolation, capillary suction, sequestration, phytoextraction, plant uptake, volatilization, advection or diffusion into crops, structures, utility infrastructure, or construction excavations.

11. Exception is taken to the HOR's finding, for which there is no substantial supporting evidence in the record, that "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." HOR at 70, paragraph 240. *See* AB/GRIP's Statement of Reasons, pages 16-19. AB/GRIP has provided changes to this finding, attached as Exhibit E. AB/GRIP's proposed new language is in bold blue underline (color)/bold black underline (black and white). Bold red strikethrough (color)/bold black strikethrough (black and white) represents language to be deleted.
12. Exception is taken to the HOR's "20.6.2.4103.E NMAC" section to the extent that its organization could be better organized. HOR at 72, 79, 80-85, 87, 103-105, 121, 124-126. AB/GRIP has provided changes to this section, attached as Exhibit F.
13. Exception is taken to the HOR's paragraph 272 to the extent that it conveys a recommendation and/or final decision of the Commission. HOR at 87. This paragraph must be removed. The Commission did not request the Hearing Officer to include recommendations in her report.
14. Exception is taken to the HOR's "20.6.2.3103 NMAC" section found on pages 88-91 to the extent that it is redundant to, and should be incorporated with, the "20.6.2.3103 NMAC" section found on pages 56-63.
15. Exception is taken to the HOR's paragraph 348 to the extent that it conveys a recommendation and/or final decision of the Commission. HOR at 116. This paragraph must be removed. The Commission did not request the Hearing Officer to include recommendations in her report.

16. Exception is taken to the HOR's paragraph 350 to the extent that it conveys a recommendation and/or final decision of the Commission. HOR at 117. This paragraph must be removed. The Commission did not request the Hearing Officer to include recommendations in her report.

17. Exception is taken to the HOR's paragraph 353 to the extent that it conveys a recommendation and/or final decision of the Commission. HOR at 117. This paragraph must be removed. The Commission did not request the Hearing Officer to include recommendations in her report.

18. Exception is taken to the HOR's paragraph 358 to the extent that it conveys a recommendation and/or final decision of the Commission. HOR at 118. This paragraph must be removed. The Commission did not request the Hearing Officer to include recommendations in her report.

19. Exception is taken to the HOR's paragraph 365 to the extent that it conveys a recommendation and/or final decision of the Commission. HOR at 120. This paragraph must be removed. The Commission did not request the Hearing Officer to include recommendations in her report.

20. Exception is taken to the HOR's paragraph 368 to the extent that it conveys a recommendation and/or final decision of the Commission. HOR at 121. This paragraph must be removed. The Commission did not request the Hearing Officer to include recommendations in her report.

21. Exception is taken to the HOR's paragraph 389 to the extent that it violates the Commission's rules for rulemaking and the Commission's pre-hearing filing deadlines and the Commission's rules for rulemaking. HOR at 125. *See* Exception 4, citing to

June 2, 2017 Revised Procedural Order; August 11, 2017 Order; Sections 20.1.6.100, -.200.D, -.202, -.204, -.300 NMAC. This paragraph must be removed.

22. Exception is taken to the HOR's paragraph 391 to the extent that it appears to be an incomplete paragraph. This paragraph should be removed.

23. Exception is taken to the HOR's paragraphs 392-402 to the extent that the presentation is confusing. HOR at 126-128. These paragraphs should be grouped with paragraphs 332-347 found on pages 110-116 under a "Proposed Amendments to Section 20.6.2.4108 NMAC" header.

24. Exception is taken to the HOR's paragraph 402 to the extent that it conveys a recommendation and/or final decision of the Commission. HOR at 128. This paragraph must be removed. The Commission did not request the Hearing Officer to include recommendations in her report.

25. Exception is taken to the HOR's paragraphs 403-422 to the extent that they are redundant and the presentation could be better organized. HOR at 128-135. Paragraphs 403-422 should be grouped with paragraphs 50-59 found on pages 24-27, paragraphs 214-22 found on pages 63-65, paragraphs 271-272 found on page 87, and with paragraphs 280-294 found on pages 91-96. All of these paragraphs should be grouped together under a "Proposed Amendments to Sections 20.6.2.10 and 20.6.2.3105 NMAC" header. *See also* Exception #9.

26. Exception is taken to the HOR's paragraph 428 to the extent that it conveys a recommendation and/or final decision of the Commission. HOR at 137. This paragraph must be removed. The Commission did not request the Hearing Officer to include recommendations in her report.

27. Exception is taken to the HOR's paragraph 432 to the extent that it conveys a recommendation and/or final decision of the Commission. HOR at 138-139. This paragraph must be removed. The Commission did not request the Hearing Officer to include recommendations in her report.

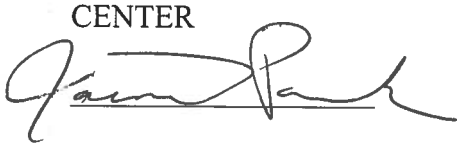
28. Exception is taken to the HOR's paragraph 436 to the extent that it conveys a recommendation and/or final decision of the Commission. HOR at 140. This paragraph must be removed. The Commission did not request the Hearing Officer to include recommendations in her report.

## II. Conclusion.

For all of the foregoing reasons, AB/GRIP request that the hearing officer incorporate all exceptions taken to the HOR.

DATED: June 15, 2018

NEW MEXICO ENVIRONMENTAL LAW CENTER



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## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Exceptions to the April 11, 2018 Hearing Officer's Report was served on June 15, 2018 via electronic mail to the following:

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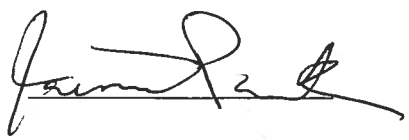


## I. AUTHORITY

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.*

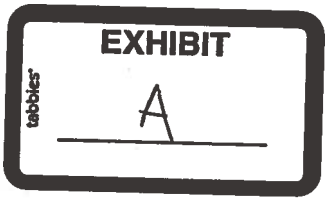
2. The WQA further requires the Commission to adopt regulations to prevent or abate water pollution in the state. NMSA 1978, § 74-6-4(E). In adopting regulations, the Commission shall give weight it deems appropriate to all relevant facts and circumstances, including:
   (1) character and degree of injury 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. **The decisions of the Commission with regard to adoption of proposed amendments to 20.6.2 NMAC shall not be (1) arbitrary, capricious or an abuse of discretion, (2) unsupported by the substantial evidence in the record, or (3) otherwise not in accordance with the law. NMSA 1978, Section 74-6-7(B).**

4. **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).**

5. **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).**

6. **The Commission's rulemaking authority is limited by NMSA 1978, Section 74-6-12, which states that in adopting regulations "reasonable degradation of water quality resulting from beneficial use shall be allowed. Such degradation shall not result in impairment of water quality to the extent that water quality standards are exceeded."**



7. **"Statutes create administrative agencies, and agencies are *limited to the power and authority that is expressly granted and necessarily implied by statute*." In re PNM Elec. Servs., 1998-NMSC-17, ¶ 10, 125 N.M. 302.**

8. **The Water Quality Act does not authorize the Commission to promulgate rules that would violate the Act. § 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").**

9. **The Commission may reject any petition, or parts thereof, regardless of whether NMED or another party submits it. NMSA 1978, Section 74-6-6(B) (the Commission's "denial of...a petition shall not be subject to judicial review"); NMSA 1978, Section 74-6-9(F) (providing that constituent agencies, such as NMED, may "on the same basis as any other person, recommend and propose regulations and standards for promulgation by the commission").**

10. 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).[1]

11. **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).**

12. 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. *Id.*[2]

13. 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.[3]

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[1] This was paragraph #3 of the HOR.
[2] This was paragraph # 4 of the HOR.
[3] This was paragraph # 5 of the HOR.

14. 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).[4]

15. 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.[5]

[4] This was subparagraph # 5a of the HOR.
[5] This was paragraph # 6 of the HOR.

## POST HEARING SUBMISSIONS

~~1. 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.~~

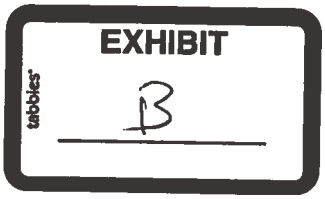
~~h. Changes to references and timeframes were made in 20.6.2.4109 NMAC to align with other changes proposed by the Department.~~

~~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.*~~

1. AB/GRIP filed its Written Closing Argument and Proposed Statement of Reasons (Findings of Fact and Conclusions of Law) on February 16, 2018 pursuant to the Order on the Joint Stipulation Regarding the Post Hearing Submittals Filing Deadline (December 11, 2017).

2. Dairy Producers of New Mexico's and Dairy Industry Group for a Clean Environment submitted their Written Closing Argument and Proposed Statement of



Reasons on February 16, 2018 pursuant to the Order on the Joint Stipulation Regarding the Post Hearing Submittals Filing Deadline (December 11, 2017).

3. Laun-Dry submitted its Proposed Findings of Fact and Conclusions of Law on February 16, 2018 pursuant to the Order on the Joint Stipulation Regarding the Post Hearing Submittals Filing Deadline (December 11, 2017).

4. LANL submitted its Written Closing Argument and Proposed Statement of Reasons on February 16, 2018 pursuant to the Order on the Joint Stipulation Regarding the Post Hearing Submittals Filing Deadline (December 11, 2017).

5. NMED submitted its Written Closing Argument and Proposed Statement of Reasons on February 16, 2018 pursuant to the Order on the Joint Stipulation Regarding the Post Hearing Submittals Filing Deadline (December 11, 2017).

6. NMMA submitted its Written Closing Argument and Proposed Statement of Reasons on February 16, 2018 pursuant to the Order on the Joint Stipulation Regarding the Post Hearing Submittals Filing Deadline (December 11, 2017).

7. New Mexico Municipal League submitted its Written Closing Argument and Proposed Findings of Fact and Conclusions of Law on February 16, 2018 pursuant to the Order on the Joint Stipulation Regarding the Post Hearing Submittals Filing Deadline (December 11, 2017).

8. Rio Grande Resources Corporation, New Mexico Copper Corporation, and American Magnesium, LLC submitted their Written Closing Argument and Proposed Findings of Fact and Conclusions of Law on February 16, 2018 pursuant to the Order on the Joint Stipulation Regarding the Post Hearing Submittals Filing Deadline (December 11, 2017).

9. The City of Roswell submitted its Proposed Findings of Fact and Conclusions of Law on February 16, 2018 pursuant to the Order on the Joint Stipulation Regarding the Post Hearing Submittals Filing Deadline (December 11, 2017).

10. United States Air Force/Department of Defense submitted its Written Closing Argument and Partial Findings of Fact and Conclusions of Law on February 16, 2018 pursuant to the Order on the Joint Stipulation Regarding the Post Hearing Submittals Filing Deadline (December 11, 2017).

11. William C. Olson submitted his Written Closing Argument, Proposed Statement of Reasons, and "Final Proposed Amendments to NMED Proposed Revisions to 20.6.2 NMAC" on February 16, 2018 pursuant to the Order on the Joint Stipulation Regarding the Post Hearing Submittals Filing Deadline (December 11, 2017).

12. The Hearing Officer issued her first draft report on April 6, 2018.

13. Scheduling Order for Filing Exceptions to the Hearing Officer's Report was then issued by the Hearing Officer on April 6, 2018.

14. The Hearing Officer issued her second draft report on April 11, 2018.

15. NMED filed a Second Notice of Errata of its Proposed Statement of Reasons on April 23, 2018. It is unclear whether and when NMED filed a First Notice of Errata of its Proposed Statement of Reasons as such a document is not posted in the WQCC No. 17-03(R) Pleading Log.

16. NMED filed a Motion to Withdraw the Hearing Officer's Report and Vacate the Post Scheduling Order on April 26, 2018 with the Hearing Officer, Erin Anderson.

17. Rio Grande Resources, New Mexico Copper Corporation, and American Magnesium, LLM filed a Joint Motion to Provisionally Extend, From May 7 to June 15, 2018 the Deadline for Parties' Exceptions to the Hearing Officer's Report on May 4, 2018 with the Hearing Officer, Erin Anderson.

18. Rio Grande Resources, New Mexico Copper Corporation and American Magnesium, LLC filed an Unopposed Motion to Vacate Current Deadline for Parties' Exceptions to the Hearing Officer's Report on May 4, 2018 with the Hearing Officer, Erin Anderson.

19. The Hearing Officer denied NMED's Motion to Withdraw the Hearing Officer's Report and Vacate the Post Scheduling Order and issued a Revised Scheduling Order on May 4, 2018.

20. Petitioner and all of the interested parties filed a Joint Motion to Withdraw the Hearing Officer's Report or, Alternatively, to Waive the Deadline Under 20.6.2.305.C NMAC with the Commission on May 4, 2018.

21. The Commission heard oral argument on the motions on May 8, 2018 and issued its Order denying the Joint Motion to Withdraw the Hearing Officer's Report or, Alternatively, to Waive the Deadline Under 20.6.2.305.C NMAC with the Commission, retaining the Hearing Officer's draft report, extending the deadline for parties to submit exceptions to the Hearing Officer's Report to June 15, 2018, and delaying deliberations on NMED's Petition to Amend 20.6.2 NMAC until July or August 2018.

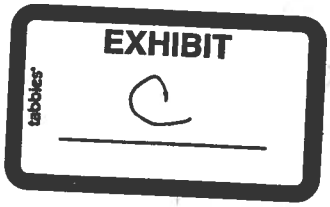
22. The Hearing Officer issued a new Scheduling Order for the Parties' Exceptions to the Hearing Officer's Report on May 31, 2018.

**MEMORANDUM ON LOGICAL OUTGROWTH AND THE NEW MEXICO ENVIRONMENT DEPARTMENT'S AND THE NEW MEXICO MINING ASSOCIATION'S NEW JOINTLY PROPOSED AMENDMENT TO SECTION 20.6.2.4103.A,B NMAC.**

Amigos Bravos and GRIP ("AB/GRIP") provide this legal memorandum on the logical outgrowth doctrine and the New Mexico Environment Department's ("NMED") and the New Mexico Mining Association's ("NMMA") new jointly proposed amendment to Section 20.6.2.4103.A, B NMAC in support of their Exceptions to the April 11, 2018 Hearing Officer's Report. *See* Exceptions 5, 9 and 10.

NMED's and NMMA's new jointly proposed rule violates the logical outgrowth doctrine for the reasons discussed below and was not properly noticed or subject to public hearing. The logical outgrowth doctrine is fundamentally about due process in rulemaking. The doctrine serves to limit the extent to which an agency may change a published proposed rule and ensures that public participation in the rulemaking process is protected. The Hearing Officer must therefore exclude all reference to this new jointly proposed rule from the Hearing Officer Report and the Commission may only deliberate on NMED's originally proposed rule that was properly noticed and subject to public hearing. In the alternative, the Commission must provide public notice and hold a public hearing on this new jointly proposed rule before final Commission deliberations may begin.

Section I details the procedural history of NMED's published proposed rule and NMED's and NMMA's new jointly proposed rule. Section II provides AB/GRIP's argument as to how NMED's and NMMA's new jointly proposed rule violates the logical outgrowth doctrine. Section III provides a brief conclusory statement.



## I. Procedural History

### *A. NMED's Proposed Rule Before Hearing.*

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 NMELC, NMED withdrew its Petition on April 19, 2017. 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.

Notice of the November 14, 2017 public hearing was published in the Albuquerque Journal on June 17, 2017. The Notice stated the following, in pertinent part:

> The proposed amendments, docketed as WQCC 17-03(R), include amendments proposed by the New Mexico Environment Department's ("NMED") Ground Water Quality Bureau, and may potentially include proposed amendments from other parties that are logical outgrowths of NMED's proposals. Proposed amendments include the addition of several definitions, modifications to variance procedures, changes to the numeric standards to bring those standards more in line with the Maximum Contaminant Levels for each pollutant as specified by the U.S. Environmental Protection Agency under the federal Safe Drinking Water Act, restructuring of the provisions on technical infeasibility and alternative abatement standards, adding an exemption for facilities or activities subject to the authority of the Environmental Improvement Board, **and other proposals.**

Notice published June 17, 2017 (emphasis added).

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 ("DOE");

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

NMED's Petition proposed amendments to Section 20.6.2.4103.A NMAC, with a new subsection B, as follows:

> A. The vadose zone shall be abated so that water contaminants in the vadose zone shall not be capable of contaminating ground water or surface water, in excess of the standards in Subsections B, [~~and~~] C and D below, through leaching, percolation or as the water table elevation fluctuates.
>
> B. Subsurface water contaminants shall be abated to concentrations below those which may with reasonable probability injure human health, animal or plant life or property, or unreasonably interfere with the public welfare or the use of property through percolation, capillary suction, sequestration, phytoextraction, plant uptake, volatilization, advection or diffusion into crops, structures, utility infrastructure, or construction excavations.

NMED Petitions dated May 1, 2017, page 35; July 27, 2017, page 35; August 7, 2017, page 35; NMED Statement of Position; NMED Notice of Intent to Present Technical Testimony, pages 38-46.

Parties filed Statements of Position and Proposed Amendments on NMED's Petition on July 27, 2017. The New Mexico Mining Association ("NMMA") stated that it "opposes the new subsection B added to section 20.6.2.4103." NMMA Statement of Position, page 4. Parties then filed Notices of Intent to Present Technical Testimony on September 11, 2017. NMED expressly stated that its proposed new subsection is intended to "ensure that abatement actions include subsurface water, and protect against the types of injuries specified by the Legislature in the statutory definition of 'water pollution'." NMED Notice of Intent to Present Technical Testimony, page 38. NMED's intent is to fully implement the statutory definition of "water pollution" and protect against injuries to plants, animals, property, and public welfare. *Id.* at 38-42. NMED in no way stated that its "most substantial concern relates to authority to require abatement to address vapor intrusion." NMMA Proposed Statement of Reasons, page 9.

Parties filed Notices of Intent to Present Rebuttal Testimony on October 27, 2017. NMMA provided written rebuttal testimony regarding NMED's proposed new subsection B to Section 20.6.2.4103 NMAC. NMMA stated that "the proposed amendment is overly broad and will be problematic and burdensome in practice." NMMA Notice of Intent to Present Rebuttal Testimony, Exhibit H, page 2. NMMA did not provide any proposed changes to NMED's proposed new subsection B. *Id.* at pages 2-5.

***B. NMED's Proposed Rule at Hearing.***

The Commission held a public rulemaking hearing in Santa Fe, New Mexico on NMED's Petition over the course of four days, from November 14, 2017 through November 17, 2017. During the Commission's rulemaking hearing on NMED's proposed new subsection B to Section 20.6.2.4103 NMAC, NMED presented technical expert Dennis McQuillan. NMED vigorously defended its proposed new subsection B and made clear its intent behind its proposed rule:

> Question by NMED Counsel:...but to be clear, the Water Quality Act is not limited to protecting just the health of New Mexicans who drink groundwater; isn't that right?
>
> Answer by NMED Expert: That's correct. And you can see that in the definition of water pollution. The legislature has explicitly directed that plants, animals, property, and public welfare also be protected from water pollution by the regulations this Commission adopts.

Dennis McQuillan Testimony, Hearing Transcript vol. IV, page 907: 11-19. NMED's expert provided several examples of how subsurface contaminants harm plants, animals, property and public welfare, such as through vapor intrusion into buildings, underground utilities and construction excavations; uptake of contaminants by the root zone of plants; and interference with private domestic wells, irrigation wells, and public water utilities. *Id.* at pages 908-919. NMED in no way stated that its "most substantial concern [was limited to] authority to require abatement to address vapor intrusion." NMMA Proposed Statement of Reasons, page 9. NMED made clear that the intent behind its proposed new subsection B is to address not only vapor intrusion, but

uptake of contaminants by plant root zones and interference with private domestic wells, irrigation wells, and public water utilities caused by subsurface contaminants. Dennis McQuillan Testimony, Hearing Transcript vol. IV, pages 908-919.

NMED concluded its testimony with the following exchange between NMED counsel and its expert:

> Question by NMED Counsel: Mr. McQuillan, this Subsection B, as drafted today, if there are still challenges to the Department's authority – were this to be adopted, if there were still challenges to the Department's authority to regulate subsurface water contaminants, as we have been doing for years, and as we are attempting to codify today, would that be a good reason to not adopt Subsection B, as we have asked for here today?
>
> Answer by NMED Expert: You confused me on that. I think we should adopt it, to codify it.
>
> Question by NMED Counsel: Okay. Even if there will still be potentially challenges to the Department's authority to regulate this type of contamination in the future?
>
> Answer by NMED Expert: Yes. I think the act requires us to protect all these various media from the harmful effects that are specified in the definition of water pollution.
> Question by NMED Counsel: Clarifying our current authority and making it more clear to regulated entities?

Answer by NMED Expert: As we have been administering that authority for decades.

Hearing Transcript vol. IV, pages 961-962.

NMMA then presented its technical expert Daniel B. Stephens. Hearing Transcript vol. IV, pages 971-994. Mr. Stephens testified regarding a possible exemption to NMED's proposed subsection B for mines. *Id.* at pages 982-984. NMED Counsel stated during cross-examination of NMMA's expert, in pertinent part:

> Just as an opening to a few cross-examination questions, I just want to state, the Department is absolutely willing to work with Mr. Moellenberg [NMMA Counsel] and yourself [NMMA Expert] to craft language that might better clarify **exemptions** such as those which you just discussed, which certainly were not the intent of the Department in crafting this 4103.B to apply to.

Hearing Transcript vol. IV, pages 985-986 (emphasis added).

No compromise language was crafted during the cross-examination of NMMA's expert witness or at any other time of the four-day long hearing. *Id.* at pages 986-988. *Compare with* compromise language being reached on other NMED proposed rules during cross-examination of expert witnesses pertaining to Section 20.6.2.10 NMAC (Olson Testimony, Tr. vol. III, page 705:19 to page 706:13; Beers Testimony, Tr. vol. III, page 686:3-6) and Section 20.6.2.4108 NMAC (Vollbrecht Testimony, Tr. vol. IV, page 1006:21 to page 1007:31; Olsen Testimony, Tr. vol. IV, page 1012: 19 to page 1013:3).

### *C. NMED's and NMMA's New Jointly Proposed Rule After Hearing and Record Closure.*

At the close of the four-day hearing on November 17, 2017, Hearing Officer Erin Anderson stated, "So the record is going to remain open, I am not sure exactly how long, probably four to six weeks." Hearing Transcript vol. IV, page 1027:21-22. Therefore, the record closed either on December 15, 2017 or December 29, 2017. Months after the four-day hearing and the closing of the record, NMED and NMMA jointly stipulated to NMED's withdrawal of the Department's proposed subsection B and proposed an entirely new rule for Section 20.6.2.4103.A NMAC. NMED Proposed Statement of Reasons, page 26, paragraph 92; NMMA Proposed Statement of Reasons, page 9, paragraph D.

Unlike the Joint Stipulation entered into between AB/GRIP and NMED, public notice was not provided of this joint stipulation through the filing of a Joint Stipulation with the Commission. *See* Joint Stipulation between NMED and AB/GRIP filed September 6, 2017. Additionally, unlike NMED's withdrawal of its originally proposed amendments to Section 20.6.2 NMAC pertaining to "discharge permit amendments," no notice of withdrawal was filed by NMED pertaining to its withdrawal of its proposed subsection B to Section 20.6.2.4103 NMAC. *See* NMED Notice of Withdraw filed November 7, 2017. Instead, NMED and NMMA

"notified" the public of NMED's withdrawal of the proposed subsection B and their new jointly proposed rule for Section 20.6.2.4103.A NMAC in their proposed findings of fact. NMED Proposed Statement of Reasons, page 26, paragraph 92; NMMA Proposed Statement of Reasons, page 9, paragraph D.

Finally, both NMED and NMMA have mischaracterized to the Commission and the public the nature of the new jointly proposed rule and the intent behind the originally proposed rule. First, NMED has mischaracterized the nature of the new jointly proposed rule by stating that the new jointly proposed rule merely adds a phrase to Section 20.6.2.4103.A NMAC. "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 Proposed Statement of Reasons, page 26, paragraph 92.

In fact, the new jointly proposed rule entirely removes NMED's originally proposed subsection B to Section 20.6.2.4103 NMAC and adds new language to the current subsection A of Section 20.6.2.4103 NMAC. This is the functional equivalent of a withdrawal of an originally proposed rule that was properly noticed and subject to hearing and the proposal of an entirely different, new rule that was not properly noticed or subject to hearing. The new jointly proposed language deals solely with vapor intrusion and injuries to humans caused by vapor intrusion. It does not pertain to potential exemptions for mines from NMED's originally proposed subsection B, as discussed by NMMA's expert at the hearing.

Simply put, NMED's originally proposed rule went from this:

> A. The vadose zone shall be abated so that water contaminants in the vadose zone shall not be capable of contaminating ground water or surface water, in excess of the standards in Subsections B, [~~and~~] C and D below, through leaching, percolation or as the water table elevation fluctuates.

B. Subsurface water contaminants shall be abated to concentrations below those which may with reasonable probability injure human health, animal or plant life or property, or unreasonably interfere with the public welfare or the use of property through percolation, capillary suction, sequestration, phytoextraction, plant uptake, volatilization, advection or diffusion into crops, structures, utility infrastructure, or construction excavations.

NMED Petitions dated May 1, 2017, page 35; July 27, 2017, page 35; August 7, 2017, page 35; NMED Statement of Position; NMED Notice of Intent to Present Technical Testimony, pages 38-46.

To this:

A. The vadose zone shall be abated as follows:

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

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

NMED Proposed Statement of Reasons, page 26, paragraph 92.

Again, the intent of NMED's originally proposed subsection B - that was subject to public notice and a four-day evidentiary hearing - is to protect plants, animals, property and public welfare from subsurface contaminants that could occur through vapor intrusion, uptake of contaminants by plant root zones, or contamination of private domestic wells, irrigation wells and public water utilities. NMED Petitions dated May 1, 2017, page 35; July 27, 2017, page 35; August 7, 2017, page 35; NMED Statement of Position; NMED Notice of Intent to Present Technical Testimony, pages 38-46; Dennis McQuillan Testimony, Hearing Transcript vol. IV, pages 908-919.

Second, NMMA has mischaracterized to the Commission and the public that NMED's "most substantial concern relates to authority to require abatement to address vapor intrusion."

NMMA Proposed Statement of Reasons, page 9, paragraph D. NMED has expressly stated in its pre-hearing filings and at the hearing that the intent behind its originally proposed subsection B is to protect plants, animals, property and public welfare from subsurface contaminants that could occur through vapor intrusion, uptake of contaminants by plant root zones, or contamination of private domestic wells, irrigation wells and public water utilities.

Nowhere in the record has NMED asserted that its primary concern behind its originally proposed subsection B is solely its authority to require abatement to address vapor intrusion. NMED Petitions dated May 1, 2017, page 35; July 27, 2017, page 35; August 7, 2017, page 35; NMED Statement of Position; NMED Notice of Intent to Present Technical Testimony, pages 38-46; Dennis McQuillan Testimony, Hearing Transcript vol. IV, pages 908-919.

## II. Argument

### A. NMED's and NMMA's New Jointly Proposed Rule Is Not A Logical Outgrowth Of NMED's Originally Proposed Rule.

#### *1. NMED's and NMMA's New Jointly Proposed Rule is Not a Logical Outgrowth of NMED's Originally Proposed Rule.*

a. Legal basis of the logical outgrowth doctrine.

The logical outgrowth doctrine is "a well settled and sound rule which permits administrative agencies to make changes in the proposed rule after the comment period without a new round of hearings." Zen Magnets, LLC v. Consumer Prod. Safety Comm'n, 841 F.3d 1141, 1153 (10th Cir. 2016), 2016 U.S. App. LEXIS 2100, 29 (citing to Beirne v. Sec'y of Dep't of Agric., 645 F.2d 862, 865 (10th Cir. 1981)). *See also* Long Island Care at Home v. Coke, 551 U.S. 158 (2007) (holding that, in order for public notice to be proper, a final rule promulgated by the Department of Labor must be a logical outgrowth of the rule initially proposed by the agency); National Black Media Coalition v. FCC, 791 F.2d 1016, 1022 (2d Cir. 1986); First Am.

Discount Corp. v. Commodity Futures Trading Comm'n, 222 F.3d 1008, 1015 (D.C.Cir.2000); Arizona Pub. Serv. Co. v. EPA, 211 F.3d 1280, 1300 (D.C.Cir.2000); American Water Works Ass'n v. EPA, 40 F.3d 1266, 1274 (D.C.Cir.1994); Trustees for Alaska v. Dept. Nat. Resources, 795 P.2d 805 (1990); Sullivan v. Evergreen Health Care, 678 N.E.2d 129 (Ind. App. 1997); Iowa Citizen Energy Coalition v. Iowa St. Commerce Comm., 335 N.W.2d 178 (1983); Motor Veh. Mfrs. Ass'n v. Jorling, 152 Misc.2d 405, 577 N.Y.S.2d 346 (N.Y.Sup.,1991); Tennessee Envir. Coun. v. Solid Waste Control Bd., 852 S.W.2d 893 (Tenn. App. 1992); Workers' Comp. Comm. v. Patients Advocate, 47 Tex. 607, 136 S.W.3d 643 (2004); Dept. Of Pub. Svc. re Small Power Projects, 161 Vt. 97, 632 A.2d 13 73 (1993); Amer. Bankers Life Ins. Co. v. Div. of Consumer Counsel, 220 Va. 773, 263 S.E.2d 867 (1980).

The doctrine serves as a limitation on changes to be made to a proposed rule by an agency after the public comment and hearing period. "A final rule qualifies as a logical outgrowth if interested parties should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period." Zen Magnets, 841 F.3d 1141, 1153 (citing to CSX Transp., Inc. v. Surface Transp. Bd., 584 F.3d 1076, 1079-80, 388 U.S. App. D.C. 244 (D.C. Cir. 2009).

To assess whether interested parties should have anticipated changes to the initially proposed rule, Courts will look to the notice of the proposed rulemaking and whether the final rule is "surprisingly distant" from the originally proposed rule. Id. A final rule that is "surprisingly distant" (*Id.*) from the original text or constitutes a "surprise switcheroo on regulated entities." Envtl. Integrity Project v. E.P.A., 425 F.3d 992, 996, 368, U.S. App. D.C. 116 (D.C. Cir. 2005).

Furthermore, cases finding that a final rule was not a logical outgrowth "have often involved situations where the proposed rule gave no indication that the agency was considering a different approach, and the final rule revealed that the agency had completely changed its position." CSX Transp., Inc., 584 F.3d 1076, 1080. Courts have also rejected agency arguments that the logical outgrowth doctrine is satisfied when the agency repudiates its proposed rule and adopts the inverse in the final rule. Id. (citing to Environmental Integrity Project, 425 F.3d 992, 996).

The New Mexico Legislature also recently amended the State Rules Act, directing the Attorney General's office to promulgate procedural rules for regulatory change that serve as default procedural rules for those agencies that have not yet adopted their own regulatory change rules. For agencies that have already promulgated rules for rulemaking, Section 1.24.25 NMAC serves as the floor for public participation in the administrative rulemaking process by providing mandatory minimum requirements for agency regulatory change rules. Section 1.24.25.8 NMAC.

In particular, agencies must provide similar or more protective rules than are provided at Section 1.24.25.14.C NMAC as follows:

> The agency may adopt, amend or reject the proposed rule. Any amendments to the proposed rule must fall within the scope of the current rulemaking proceeding. Amendments that exceed the scope of the noticed rulemaking may require a new rulemaking proceeding. Amendments to a proposed rule may fall outside of the scope of the rulemaking based on the following factors:
>
> 1) Any person affected by the adoption of the rule, if amended, could not have reasonably expected that the change from the published proposed rule would affect the person's interest;
> 2) Subject matter of the amended rule or the issues determined by that rule are different from those in the published proposed rule; or
> 3) Effect of the adopted rule differs from the effect of the published proposed rule.

Id.

Section 1.24.25.14.C NMAC clearly serves as codification of the logical outgrowth test found in case law. Zen Magnets, LLC v. Consumer Prod. Safety Comm'n, 841 F.3d 1141, 1153 (10th Cir. 2016), 2016 U.S. App. LEXIS 2100, 29 (citing to Beirne v. Sec'y of Dep't of Agric., 645 F.2d 862, 865 (10th Cir. 1981)). *See also* Long Island Care at Home v. Coke, 551 U.S. 158 (2007) (holding that, in order for public notice to be proper, a final rule promulgated by the Department of Labor must be a logical outgrowth of the rule initially proposed by the agency); National Black Media Coalition v. FCC, 791 F.2d 1016, 1022 (2d Cir. 1986); First Am. Discount Corp. v. Commodity Futures Trading Comm'n, 222 F.3d 1008, 1015 (D.C.Cir.2000); Arizona Pub. Serv. Co. v. EPA, 211 F.3d 1280, 1300 (D.C.Cir.2000); American Water Works Ass'n v. EPA, 40 F.3d 1266, 1274 (D.C.Cir.1994); Trustees for Alaska v. Dept. Nat. Resources, 795 P.2d 805 (1990); Sullivan v. Evergreen Health Care, 678 N.E.2d 129 (Ind. App. 1997); Iowa Citizen Energy Coalition v. Iowa St. Commerce Comm., 335 N.W.2d 178 (1983); Motor Veh. Mfrs. Ass'n v. Jorling, 152 Misc.2d 405, 577 N.Y.S.2d 346 (N.Y.Sup.,1991); Tennessee Envir. Coun. v. Solid Waste Control Bd., 852 S.W.2d 893 (Tenn. App. 1992); Workers' Comp. Comm. v. Patients Advocate, 47 Tex. 607, 136 S.W.3d 643 (2004); Dept. Of Pub. Svc. re Small Power Projects, 161 Vt. 97, 632 A.2d 13 73 (1993); Amer. Bankers Life Ins. Co. v. Div. of Consumer Counsel, 220 Va. 773, 263 S.E.2d 867 (1980); Envtl. Integrity Project v. E.P.A., 425 F.3d 992, 996, 368, U.S. App. D.C. 116 (D.C. Cir. 2005); CSX Transp., Inc. v. Surface Transp. Bd., 584 F.3d 1076, 1079-80, 388 U.S. App. D.C. 244 (D.C. Cir. 2009).

Additionally, the Commission recently promulgated its own rules for regulatory change, before Section 1.24.25 NMAC was promulgated. The Commission's rules do not provide similar or more protective rules than those found at Section 1.24.25.14.C NMAC. Therefore,

Section 1.24.25.14.C NMAC serves as the default rule to be applied to this proceeding until the Commission brings its rules into compliance with Section 1.24.25 NMAC.

b. NMED's and NMMA's new jointly proposed rule violates the logical outgrowth doctrine.

In this matter, the Commission has not yet deliberated and promulgated a final rule. However, the logical outgrowth doctrine applies to NMED and its proposed amendments. The public was put on notice that the Commission would be considering NMED's proposed amendments that "may potentially include proposed amendments from other parties that are logical outgrowths of NMED's proposals." Notice published June 17, 2017. NMED is now proposing, jointly with NMMA, months after the four-day evidentiary hearing and record closure, an entirely new rule that was not properly noticed and subject to a public hearing. This new jointly proposed rule violates the logical outgrowth doctrine for the following reasons.

First, interested parties could not have anticipated NMED's and NMMA's new jointly proposed rule based upon the notice published on June 17, 2017 in the Albuquerque Journal, upon all of the pre-hearing filings submitted by the parties before the four-day evidentiary hearing, and upon statements made at the hearing. The notice published did not state that the Commission will be considering the scope of NMED's proposed subsection B to Section 20.6.2.4103 NMAC. The notice stated the following, in pertinent part:

> Proposed amendments include the addition of several definitions, modifications to variance procedures, changes to the numeric standards to bring those standards more in line with the Maximum Contaminant Levels for each pollutant as specified by the U.S. Environmental Protection Agency under the federal Safe Drinking Water Act, restructuring of the provisions on technical infeasibility and alternative abatement standards, adding an exemption for facilities or activities subject to the authority of the Environmental Improvement Board, **and other proposals**.

Notice published June 17, 2017 (emphasis added).

The language "and other proposals" does not provide sufficient notice that the Commission will be considering the scope of NMED's proposed subsection B. Interested persons therefore could not reasonably anticipate any changes to the scope of NMED's proposed subsection B. NMED's and NMMA's new jointly proposed rule clearly changes the scope of the originally proposed rule. NMED gave no indication in its petition or other pre-hearing filings that it would consider an entirely different scope or approach to regulating subsurface contaminants. NMED, at the hearing, did however express a willingness to craft a *limited exception* for mines specific to utilization of reclamation cover. Hearing Transcript vol. IV, pages 985-986. On its face, NMED's and NMMA's new jointly proposed rule is not an exception to NMED's originally proposed subsection B.

Additionally, any new language creating an exception to NMED's proposed subsection B must have occurred during the hearing so that the public would have notice of such a change and would have the opportunity to provide comment and cross-exam witnesses regarding a new proposed exception. Instead, NMED and NMMA entered into a joint stipulation months after the four-day hearing and record closure, putting forth a new rule that presents an entirely different scope or approach to regulating subsurface contaminants.

Finally, NMED's and NMMA's new jointly proposed rule reveals that NMED has completed changed its position with regard to the scope and approach to subsurface contaminant regulation. NMED provided substantial pre-hearing written testimony and extensive expert witness testimony at the four-day hearing regarding its authority to regulate subsurface contaminants and the scope of that authority. NMED's originally proposed subsection B is a means of codifying the department's broad scope of regulatory authority over subsurface contaminants. NMED has never taken the position that its regulatory authority over subsurface

contaminants is limited to vapor intrusion and injuries to human health due to inhalation of vapors. NMED has vigorously defended its original position that its regulatory authority over subsurface contaminants includes subsurface contaminant uptake by plant root zones, injuries to plants, animals, public welfare, and injuries to property, such as private domestic water wells, irrigation wells and public water utilities. NMED Petitions dated May 1, 2017, page 35; July 27, 2017, page 35; August 7, 2017, page 35; NMED Statement of Position; NMED Notice of Intent to Present Technical Testimony, pages 38-46; Dennis McQuillan Testimony, Hearing Transcript vol. IV, pages 908-919.

NMED's and NMMA's new jointly proposed rule expressly states that NMED's only authority over subsurface contaminants is vapor intrusion and injury to human health due to inhalation of vapors. Therefore, the new rule serves as the inverse of NMED's original position that it has regulatory authority over all forms of subsurface contaminants and over all injuries to plants, animals, public welfare and property caused by subsurface contaminants. Courts have held that agencies cannot satisfy the logical outgrowth doctrine by repudiating the proposed rule and adopting the inverse in the final rule. CSX Transp., Inc., 584 F.3d 1076, 1080 (citing to Environmental Integrity Project, 425 F.3d 992, 996).

NMED's change of position also results in a change in effect. An amendment to a proposed rule may fall outside of the scope of the rulemaking proceeding when the effect of the final adopted rule differs from the effect of the published proposed rule. Section 1.24.25.14.C NMAC. The new jointly proposed rule no longer has the effect of protecting plants, animals, public welfare and property from all subsurface contaminants and codifying NMED's broad regulatory authority of subsurface contaminants. The effect of the new jointly proposed rule is the inverse of the originally proposed rule – plants, animals, public welfare and property are no

longer protected from injuries caused by subsurface contaminants and NMED no longer has regulatory authority over vapor intrusion and injury to human health due to inhalation of vapors.

In conclusion, this new jointly proposed rule is surprisingly distant from the text and intent of NMED's originally proposed subsection B, constituting a "surprise switcheroo" on both the public and the Commission. Envtl. Integrity Project, 425 F.3d 992, 996 (D.C. Cir. 2005). The Hearing Officer must therefore exclude all reference of this new rule in the HOR.

In the alternative, if the Commission proceeds to consider this new jointly proposed rule, the Commission must issue public notice and hold a public hearing on this new rule before final deliberations may commence. Section 1.24.25.14.C NMAC.

*2. The Commission Cannot Adopt NMED's and NMMA's New Jointly Proposed Rule Because Such a Final Rule Would Violate the Logical Outgrowth Doctrine.*

If the Hearing Officer does not exclude NMED's and NMMA's new jointly proposed rule from the HOR and no notice or hearing is held on the new rule, the Commission cannot adopt this new rule as a final agency rule because it would violate the logical outgrowth doctrine for the reasons discussed above. Any Commission final rule that changes NMED's approach and scope of regulatory authority over subsurface contaminants will violate the logical outgrowth doctrine. Furthermore, the Courts will reject any argument that the Commission has satisfied the logical outgrowth doctrine by repudiating the proposed rule and adopting the inverse in the final rule. CSX Transp., Inc., 584 F.3d 1076, 1080 (citing to Environmental Integrity Project, 425 F.3d 992, 996).

Finally, consideration and adoption of NMED's and NMMA's new jointly proposed rule would violate fundamental due process and the Water Quality Act's public participation requirements. NMSA 1978, Sections 74-6-4, 74-6-6.

## III. Conclusion

For the reasons discussed above, the Hearing Officer must exclude all reference to NMED's and NMMA's new jointly proposed rule. In the alternative, if the Hearing Officer does not exclude this newly proposed rule from the HOR, the Commission must issue public notice and hold a public hearing before final Commission deliberations may commence.

## Section 20.6.2.1210 NMAC

*NMED and other interested parties will be submitting their exceptions to the HOR with a proposed revised HOR pursuant to the May 31, 2018 Scheduling Order issued in this matter. Therefore AB/GRIP are not providing a complete proposed reorganization of this section, but rather a proposed reorganization of AB/GRIP's position on NMED's and industry's proposed amendments to Section 20.6.2.1210 NMAC. The Hearing Officer could then incorporate AB/GRIP's proposed reorganization with NMED's and industry's proposed revisions to this section of the HOR. AB/GRIP reserve the right to file exceptions to NMED's and industry's proposed revised HOR. AB/GRIP recommends that this section of the HOR be organized as follows: NMED's proposed amendments first as NMED is the petitioner, industry's position and proposed revisions to NMED's proposal, William Olson's position and proposed revisions to NMED's proposal, and concluding with AB/GRIP's position and proposed revisions to NMED's proposal.

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*AB/GRIP's Position on NMED's and industry's proposed revisions to Section 20.6.2.1210 NMAC*

AB/GRIP provided the Commission with the following statutory and regulatory variance requirement history:

### I. STATUTORY AND REGULATORY VARIANCE REQUIREMENTS

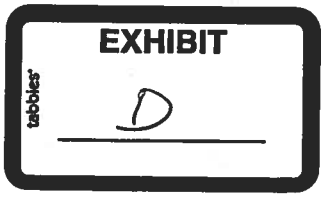
1. The Water Quality Act ("WQA" or "Act") is the primary statutory mechanism by which ground water in our state is protected and by which the public can participate in the permitting process for the State's most precious public resource. AB/GRIP's Motion to Dismiss in Part, page 2.

2. 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.

3. 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").

4. 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).

5. 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:



> [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).

6. 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.*

7. 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).

8. 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).

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

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

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

12. 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.*

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

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

15. 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).

16. 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.

17. 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.

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

19. 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.

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

21. 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.

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

23. 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.

24. 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).

25. 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.

26. 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.

27. 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.

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

29. 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).

AB/GRIP provided extensive pre-hearing briefing on how NMED's and industry's proposed amendments to Section 20.6.2.1210 NMAC violate the Water Quality Act, as well as legal argument and technical testimony at the evidentiary hearing. AB/GRIP's argument is as follows:

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

### A. 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.

30. NMED and industry have 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.

31. 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.

32. 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.

33. 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.

34. 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).

35. 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.*

36. 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").

**B. 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.**

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

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

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

40. 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.*

41. 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.

42. 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).

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

44. 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.

45. 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; s*ee also* NMED's Exhibit 42 submitted during hearing.

46. 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).

47. 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.

48. 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.*

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

49. 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.

50. Evidence submitted by AB/GRIP demonstrates that the legal pathway for a variance is a discharge permit. *Id.*

51. 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.

52. 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.

53. 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.

54. 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.

55. 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.

56. 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.

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

57. 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.

58. The Water Quality Act and its implementing regulations make clear that an alternative abatement standard is not a type of variance for three reasons:

59. 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.

60. "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.

61. 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.

62. 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.

63. 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).

64. 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.*

65. 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.*

66. 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.

67. 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.

68. 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.

69. 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.

70. 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.

71. 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.*

72. NMED has failed to provide substantial evidence of sites without discharge permits that have received variances from the Commission. *Id.*

73. Therefore, NMED has failed to provide substantial evidence that variances are not linked with discharge permits.

**E. 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.***

74. The Act provides that a variance cannot be granted without the holding of a public hearing. § 74-6-4(H).

75. 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.

76. 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).

77. 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).

78. 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.

79. 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.***

80. 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.

81. 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.

82. 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.

83. 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.*

84. 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.

85. 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.

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

87. 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.*

88. 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.

89. 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.

90. 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.

91. 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.

92. 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.*

93. 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.

94. 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.

95. 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.

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

96. 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.

97. 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.*

98. § 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.

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

100. 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.

### G. 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.

101. 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).

102. 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).

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

104. 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).

105. 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.

106. 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.

107. 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.

108. 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.

109. 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.*; s*ee generally*, NMED NOI to Present Technical Testimony, NMED NOI to Present Rebuttal Testimony.

110. 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, actually 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.

111. 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.

**ii. Industry's proposed variance rule amendments are not supported by substantial evidence.**

**a) The dairy industry failed to provide substantial evidence in support of its proposed amendments.**

112. The Dairy Producers of New Mexico and the Dairy Industry Group For a Clean Environment ("dairy industry") presented Eric Palla as their expert witness at the hearing. Palla Testimony, transcript volume I, pages 134-161.

113. The dairy industry supports NMED's proposed variance rule amendments and has put forth a few suggestions on how to clarify or improve upon NMED's

proposal. *See generally*, dairy industry's Notice of Intent to Present Technical Testimony and Notice of Intent to Present Rebuttal Testimony.

114. However, the dairy industry also failed to present any substantial evidence in support of its conclusion that the current variance rule is burdensome on the dairy industry and that NMED's proposed amendment is necessary for the dairy industry. *Id.*; Palla Testimony, transcript volume I, pages 134-168.

115. Like NMED, the dairy industry could have provided a cost and time analysis of the current and proposed rule to demonstrate its conclusions, yet it failed to do so. AB/GRIP's Closing Argument, page 19.

116. Additionally, the dairy industry's expert testimony lacked any credibility. Mr. Palla submitted a resume demonstrating his qualifications as an "expert" as follows:

1) Raised on Family Farm in Clovis, NM
2) Bachelor of Science Degree in Ag-Business from Texas A&M University
3) Married Megan Stock 1997
4) 1997 returned to family dairy farm
5) Current operations partner in family farm

Dairy industry Notice of Intent to Present Technical Testimony, Exhibit B.

117. Mr. Palla failed to demonstrate that he had any personal experience with the variance petition process, with interpreting and applying Commission regulations, and with the technical justifications of the current rule and of NMED's proposal. Palla Testimony, transcript volume I, pages 134-168.

118. Mr. Palla also testified at the hearing that "life on a farm and a little common sense" qualified him as an expert regarding variances. *Id.* at page 141, lines 19-20.

119. Mr. Palla demonstrated that he did not understand and could not articulate basic concepts and terminology used in his own pre-filed written testimony. *Id.*, pages 134-168.

120. For example, the dairy industry proposed a "materiality test" for when a public hearing could be held on the five-year variance compliance report under NMED's proposal. Dairy industry Notice of Intent to Present Technical Testimony, page 4. Mr. Palla could not define "materiality" and could not provide the criteria for determining "materiality." Palla Testimony, transcript volume I, page 148, lines 22-25, page 149, lines 1-3.

121. Mr. Palla was also unable to define what "substantially influenced" meant in relation to his proposed "materiality test." *Id.* at page 149, lines 17-22.

122. The dairy industry also proposed limiting who could request a public hearing on a variance compliance report under NMED's proposal to "Only those persons who would have standing to appeal a permit decision." Dairy industry's Notice of Intent to Present Technical Testimony, page 4.

123. Mr. Palla did not explain what the legal term "standing" means in either pre-filed written testimony or at the hearing and did not provide any substantial evidence supporting why the Commission should approve this amendment. *See generally*, dairy industry's Notice of Intent to Present Technical Testimony and Notice of Intent to Present Rebuttal Testimony; Palla Testimony, transcript volume I, pages 134-168.

**b) The Mining Industry Failed to Provide Substantial Evidence in Support of Its Proposed Amendments.**

124. The New Mexico Mining Association ("NMMA" or "mining industry") presented Michael Neumann as their expert witness at the hearing. Neumann Testimony, transcript volume II, pages 329-334.

125. The mining industry also supports NMED's proposed variance rule amendments and has put forth a few suggestions on how to clarify or improve upon NMED's proposal. *See generally*, NMMA's Notice of Intent to Present Technical Testimony and Notice of Intent to Present Rebuttal Testimony.

126. However, the mining industry also failed to present any substantial evidence in support of its conclusion that the current variance rule is burdensome on the mining industry and that NMED's proposal is necessary for the mining industry. *Id.*; Neumann Testimony, transcript volume II, pages 329-334.

127. Like NMED, the mining industry could have provided a cost and time analysis of the current and proposed rule to demonstrate its conclusions, yet it failed to do so. AB/GRIP's Closing Argument, page 21.

**H. NMED's and Industry's Proposed Removal of the Five-Year Variance Limit Does Not Satisfy the Statutory Criteria for Rule Promulgation.**

128. 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 the water before a subsequent use;
(6) property rights and accustomed uses; and
(7) federal water quality requirements.

§ 74-6-4(E).

129. NMED's and industry's proposal to remove the current five-year variance limit and replace it with a five-year variance compliance review to be conducted internally and administratively within the Department does not meet the criteria for Commission rule promulgation for the following reasons:

130. *Character and degree of injury to or interference with health, welfare, environment and property.* As proposed, NMED's and industry's rule would interfere with health, welfare, environment and property. In New Mexico, ground water is public property. Allowing the issuance of variances "for the life of a facility", or in other words in perpetuity, would result in substantial pollution to this State's most precious public resource in perpetuity. AB/GRIP's Closing Argument, page 22.

131. *The public interest, including the social and economic value of the sources of water contaminants.* 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. NMED's and industry's proposal shifts the burden of proof from the variance holder to the public to prove that groundwater standards are being exceeded and that abatement of groundwater pollution is not occurring within a reasonable period of time. Under NMED's and industry's proposal to remove the current five-year variance limit, groundwater pollution would likely be extensive, occur in perpetuity, and cause substantial harm to the public and the State through the loss of water resources. *Id.*

132. *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.* NMED and industry did not provide any evidence regarding economic reasonableness of the proposed variance rule amendments. NMED and industry also did not provide any evidence regarding economic burdens to the Department, the Commission, and industry under the current

variance rule. NMED's and industry's proposal also does not take into consideration the economic expense of abating ground water pollution that would occur under their proposal. NMED and industry also failed to demonstrate how regulated facility operations remain static over a five-year period. *Id.* at pages 22-23.

133. *Successive uses, including but not limited to domestic, commercial, industrial, pastoral, agricultural, wildlife and recreational uses.* NMED's and industry's proposed removal of the five-year variance limit and issuance of permanent variances would allow intentional pollution of ground water in perpetuity. Therefore, NMED's and industry's proposal does not protect successive uses. *Id.* at 23.

134. *Feasibility of a user or a subsequent user treating the water before a subsequent use.* NMED's and industry's proposal would allow intentional pollution of ground water in perpetuity. There is no consideration of treatment by subsequent users. *Id.*

135. *Property rights and accustomed uses.* 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. *Id.*

136. *Federal water quality requirements.* NMED's and industry's proposed variance rule amendments is proposed for adoption under state statutes for prevention of water pollution and is not directly linked to federal water quality requirements. *Id.*

## I. The Commission Does Not Have Authority to Promulgate NMED's and Industry's Proposed Removal of the Current Five-Year Variance Limit.

137. "Statutes create administrative agencies, and agencies are *limited to the power and authority that is expressly granted and necessarily implied by statute.*" In re PNM Elec. Servs., 1998-NMSC-17, ¶ 10, 125 N.M. 302.

138. The Water Quality Act does not authorize the Commission to promulgate rules that would violate the Act. § 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").

139. The Commission's rulemaking authority is limited by NMSA 1978, Section 74-6-12, which states that in adopting regulations "reasonable degradation of water quality resulting from beneficial use shall be allowed. Such degradation shall not result in impairment of water quality to the extent that water quality standards are exceeded."

140. Accordingly, the WQCC cannot adopt NMED's and industry's proposed removal of the current five-year variance limit because it would result in exceedance of water quality standards and would not result in abatement of ground water pollution within a reasonable period of time, thereby violating 1) the Water Quality Act's fundamental purpose, which is to prevent and abate water pollution, and 2) the Act's variance provision.

141. The Commission may reject any petition, or parts thereof, regardless of whether NMED or another party submits it. NMSA 1978, Section 74-6-6(B) (the Commission's "denial of...a petition shall not be subject to judicial review"); NMSA 1978, Section 74-6-9(F) (providing that constituent agencies, such as NMED, may "on the same basis as any other person, recommend and propose regulations and standards for promulgation by the commission").

AB/GRIP presented their proposed revisions to NMED's and industry's proposal in their pre-hearing filings and at the evidentiary hearing. AB/GRIP's proposed Section 20.6.2.1210 NMAC is as follows:

20.6.2.1210 VARIANCE PETITIONS:

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

(1) state the petitioner's name and address;
(2) state the date of the petition;
(3) describe the facility or activity for which the variance is sought;
(4) state the address or description of the property upon which the facility is located;
(5) describe the water body, watercourse, or aquifer affected by the discharge for which the variance is sought;
(6) identify the regulation of the commission from which the variance is sought;
(7) state in detail the extent to which the petitioner wishes to vary from the regulation;
(8) state why the petitioner believes that compliance with the regulation will impose an unreasonable burden upon his activity; and
(9) state in detail how any water pollution above standards will be abated; and

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

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

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

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

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

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

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

F. No variance shall be granted until the commission has considered the relative interests of the applicant, other owners of property likely to be affected, and the general public.

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

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

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

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

AB/GRIP, in their Statement of Reasons, provided the following justification for the Commission's adoption of their proposed revisions to Section 20.6.2.1210 NMAC:

**JUSTIFICATION FOR ADOPTING AB/GRIP'S PROPOSED AMENDMENTS TO THE VARIANCE RULE, SECTION 20.6.2.1210 NMAC.**

1. AB/GRIP has presented substantial evidence in support of its proposed amendments to Section 20.6.2.1210 NMAC. AB/GRIP's Statement of Position with Proposed Changes, page 39-43; AB/GRIP's Notice of Intent to Present Rebuttal Testimony; Martin Testimony, transcript volume I, pages 173-204; Martin Testimony, transcript volume II, pages 325.

2. AB/GRIP's proposal meets the criteria for Commission rule promulgation for the following reasons:

3. *Character and degree of injury to or interference with health, welfare, environment and property.* AB/GRIP's proposal would protect health, welfare, environment and property. In New Mexico, ground water is public property. Maintaining the current five-year variance limit and clarifying the criteria by which the Commission may grant a variance request will result in the protection of this State's most precious public resource. AB/GRIP's Corrected Statement of Position with Proposed Changes, pages 39-43.

4. *The public interest, including the social and economic value of the sources of water contaminants.* 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 maintains the current variance holder's burden of proof to demonstrate that ground water standards are not being exceeded and that abatement of groundwater pollution is occurring within a reasonable period of time. AB/GRIP's proposal protects the social and economic value of public participation in the permitting process and protects the social and economic value of this state's most precious public resource – ground water – by maintaining the current five-year variance limit and public participation requirements. *Id.*

5. *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.* The Commission has previously found that the five-ear variance limit is technically practicable and economically reasonable. AB/GRIP's proposal relies on the Commission's previous findings of technical practicability and economic reasonableness of the five-year variance limit.

6. *Successive uses, including but not limited to domestic, commercial, industrial, pastoral, agricultural, wildlife and recreational uses.* AB/GRIP's proposal would protect successive uses of ground water by maintaining the current five-year variance limit,

which requires abatement of ground water pollution within a reasonable period of time and protects public participation in variance petition proceedings. *Id.*

7. *Feasibility of a user or a subsequent user treating the water before a subsequent use.* AB/GRIP's proposal protects the future user of ground water by maintaining the current five-year variance limit, which requires abatement of ground water pollution within a reasonable period of time and protects public participation in variance petition proceedings. *Id.*

8. *Property rights and accustomed uses.* 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.

9. *Federal water quality requirements.* AB/GRIP's proposal improves upon the current variance regulation by clarifying that a variance must comply with existing federal regulations. *Id.*

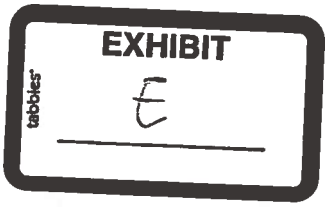
10. AB/GRIP's proposal also provides uniformity of the variance mechanism among New Mexico Statutes by incorporating language from the New Mexico Solid Waste Act variance regulations. *Id.*

~~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.~~

240. Alternative abatement standards are not a type of variance under Section 74-6-4(H) of the Water Quality Act. NMED 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). However, NMED failed 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. 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. "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. 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. 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. 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). 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.* 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.* 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. 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. 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.**

## Section 20.6.2.4103 NMAC

*NMED and other interested parties will be submitting their exceptions to the HOR with a proposed revised HOR pursuant to the May 31, 2018 Scheduling Order issued in this matter. Therefore AB/GRIP are not providing a complete proposed reorganization of this section, but rather a proposed reorganization of AB/GRIP's position on NMED's and industry's proposed amendments to Section 20.6.2.4103 NMAC. The Hearing Officer could then incorporate AB/GRIP's proposed reorganization with NMED's and industry's proposed revisions to this section of the HOR. AB/GRIP reserve the right to file exceptions to NMED's and industry's proposed revised HOR. AB/GRIP recommends that this section of the HOR be organized as follows: NMED's proposed amendments first as NMED is the petitioner, industry's position and proposed revisions to NMED's proposal, William Olson's position and proposed revisions to NMED's proposal, and concluding with AB/GRIP's position and proposed revisions to NMED's proposal.

Additionally, all references to NMED's and NMMA's new jointly proposed rule for Section 20.6.2.4103.A, -.B NMAC must be removed from the HOR as this rule violates the logical outgrowth doctrine and was not properly noticed or subject to public hearing. *See* AB/GRIP's exceptions # 6, 10, and 11, and attached Exhibit C.

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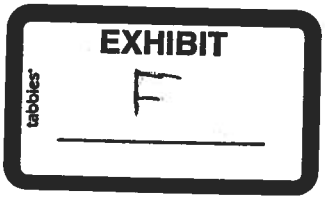
## Section 20.6.2.4103.F(1) NMAC

AB/GRIP provided the following procedural history regarding NMED's proposed revisions to Section 20.6.2.4103.F(1) NMAC in their Proposed Statement of Reasons filed on February 16, 2018:

1. NMED's proposed substantive change to Section 20.6.2.4103.F(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. 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. Vollbrecht Testimony, transcript volume IV, page 832: 6-8.

2. 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.



3. 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.

AB/GRIP has proposed the following changes to Section 20.6.2.4103.F NMAC for the Commission to adopt:

> F. Alternative Abatement Standards: If a responsible person abating water pollution pursuant to an approved abatement plan is unable to fully meet the abatement standards set forth in Subsections A, B and C of this section the responsible person may propose alternative abatement standards.
>
> (1) At any time after the implementation of an approved Stage 2 abatement plan, a responsible person may file a petition with the commission seeking approval of an alternative abatement standard based on compliance with the standard set forth in Subsections A, B and C of this section is technically infeasible, as demonstrated by a statistically valid extrapolation of the decrease in concentration of any water contaminant over the remainder of a twenty (20) year period, such that projected future reductions during that time would be less than 20 percent of the concentration at the time technical infeasibility is proposed. A statistically valid decrease cannot be demonstrated by fewer than ten (10) consecutive sampling events. Sampling events demonstrating a statistically valid decrease shall be collected with a minimum of ninety (90) days between sampling events, and shall not span a time period greater than four (4) years, and at least one of the following criteria:

AB/GRIP's Justification for their proposal is as follows:

4. 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.

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

6. 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.

7. 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.

8. 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.

9. 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.

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

11. 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).

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

13. *Character and degree of injury to or interference with health, welfare, environment and property*. 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). AB/GRIP's Proposed Statement of Reasons, page 35, paragraph 183.

14. *The public interest, including the social and economic value of the sources of water contaminants*. 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.* at paragraph 184.

15. *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.* 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. *Id.* at paragraph 185.

16. *Successive uses, including but not limited to domestic, commercial, industrial, pastoral, agricultural, wildlife and recreational uses.* 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. *Id.* at page 36, paragraph 186.

17. *Feasibility of a user or a subsequent user treating the water before a subsequent use.* 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. Id. at paragraph 187.

18. *Property rights and accustomed uses.* 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. *Id.* at paragraph 188.

19. *Federal water quality requirements*. AB/GRIP's proposal has no negative impact on federal water quality requirements for regulated facilities. *Id.* at paragraph 189.