

STATE OF NEW MEXICO  
WATER QUALITY CONTROL COMMISSION



In the Matter of:  
PROPOSED AMENDMENT  
TO 20.6.6 NMAC (Dairy Rule)

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No. WQCC 12-09 (R) and  
No. WQCC 13-08 (R)

**MOTION TO STRIKE ENTRY OF APPEARANCE OF  
NEW MEXICO ATTORNEY GENERAL**

The New Mexico Environment Department (“Department”) hereby moves the Hearing Officer to strike the Entry of Appearance of the New Mexico Attorney General (“Attorney General”), entered on October 17, 2014. The Attorney General has improperly entered into the current rulemaking now before the Water Quality Control Commission (“Commission”) which is contrary to the laws of the State of New Mexico.

**I. BACKGROUND**

**A. New Mexico Environment Department**

The Department of Environment Act, NMSA 1978, Sections 9-7A-1 to -15 (1991, as amended through 2005) (“Act”), creates the New Mexico Environment Department. The Act’s purpose is to “*establish a single department to administer the laws and exercise the functions relating to the environment* formerly administered and exercised by the health and environment department.” NMSA 1978, § 9-7A-3 (1991) (emphasis added).

As set forth by the New Mexico Legislature, the Secretary of the Department (“Secretary”) is the sole official responsible for the management and operation of the Department and has the responsibility “to administer and enforce the laws with which he or the department is charged.” NMSA 1978, § 9-7A-6(A) (1991). The Secretary has every power

expressly enumerated in the law(s), whether granted to the Secretary, the Department or any division of the Department. § 9-7A-6(B). The Secretary may delegate specific duties, obligations, and responsibilities; however, the Secretary at all times retains full authority of the Department. § 9-7A-6(B)(1)-(2).

The Secretary's express duties include the legislative directive to "take administrative action by issuing orders and instructions . . . to assure implementation of and compliance with the provisions of law for which administration or execution he is responsible and to enforce those orders and instructions by appropriate administrative action or actions in the courts." § 9-7A-6(B)(5). Additional authority granted the Secretary includes the authority to "make and adopt such reasonable and procedural rules and regulations as may be necessary to carry out the duties of the department and its divisions." § 9-7A-6(D).

#### **B. New Mexico Environment Department Jurisdiction**

The Legislature also enacted the Environmental Improvement Act, NMSA 1978, Sections 74-1-1 to -17 (1971, as amended through 2013) ("EIA"). Its purpose "is to create a *department that will be responsible for environmental management . . . in order to ensure an environment that in the greatest possible measure will confer optimum health, safety, comfort and economic and social well-being on its inhabitants; will protect this generation as well as those yet unborn from health threats posed by the environment; and will maximize the economic and cultural benefits of a healthy people.*" NMSA 1978, § 74-1-2 (1997). The Department was given broad and extensive powers by the Legislature including, but not limited to, the right to sue and be sued, to make contracts, to "enforce the rules, regulations and orders promulgated by the board and environmental management and consumer protection laws for which the department is responsible by appropriate action in courts of competent jurisdiction," and to maintain "such

other powers as may be necessary and appropriate for the exercise of the powers and duties delegated to the department.” NMSA 1978, § 74-1-6 (2009); *see also State ex rel. Norvell v. Arizona Pub. Serv. Co.*, 1973-NMSC-051, 85 N.M. 165 (state district court action brought by Attorney General for injunctive relief and abatement of public nuisance caused by a power plant was improper since the environmental improvement agency, now the Environment Department, had primary jurisdiction over pollution control).

New Mexico law recognizes the common law doctrine of “primary jurisdiction.” *Id.* ¶ 34. As the New Mexico Supreme Court reasoned, “the legislature has created the agency in order to afford a systematic method of factfinding . . . and the agency's jurisdiction should be given priority.” *Id.* ¶ 35.

### **C. Water Quality Control Commission**

As part of its overall goal to protect New Mexico’s environment, the Legislature also enacted the Water Quality Act, NMSA 1978, Sections 74-6-1 to -17 (1967, as amended through 2013) (“WQA”). The WQA in turn authorized the creation of the Commission, comprised of the heads of nine state government entities, or their designees, a representative for the municipalities and county governments, and four appointed members. NMSA 1978, § 74-6-3(A) (2007). It is the Commission’s duty and power to, among other things: (1) adopt a comprehensive water quality management program; and (2) adopt water quality standards for surface and ground waters that protect, at minimum, the public health and welfare, enhance the quality of water, and serve the purposes of the WQA. NMSA 1978, § 74-6-4 (2009). The Commission has the authority to adopt regulations, issue ground water discharge permits, and issue civil and criminal orders and penalties. NMSA 1978, § 74-6-6 (1993); NMSA 1978, § 74-6-5 (2009); NMSA 1978, §§ 74-6-10, -10.1, and -10.2 (1993). Constituent agency determinations may be appealed to the

Commission and then to the New Mexico Court of Appeals. *See generally* §§ 74-6-6 and -7 (1993).

The Commission “shall assign responsibility for administering its regulations to constituent agencies so as to assure adequate coverage and prevent duplication of effort.” § 74-6-4(F). The Commission also “may adopt regulations requiring notice to it or a constituent agency of intent to introduce or allow the introduction of water contaminants into waters of the state.” NMSA 1978, § 74-6-4(J). According to the WQA, a “constituent agency” includes the Department, but does not include the Attorney General. § 74-6-2(K).

NMSA 1978, Section 74-6-11 (1993) describes the broad authority of constituent agencies such as the Department. “If a constituent agency determines upon receipt of evidence that a pollution source or combination of sources over which it has been delegated authority by the commission poses an imminent and substantial danger to public health, it may bring suit in the district court for the county in which such a source is located to ... take such other action as deemed necessary and appropriate.” Section 74-6-11(A). “If it is not practicable to assure prompt protection of public health solely by commencement of a civil action ... the constituent agency may issue such orders as it deems necessary to protect public health.” Section 74-6-11(B).

## **II. ARGUMENT**

The Department requests that the Hearing Officer exclude the Attorney General from participating in this matter, as the Department has primary jurisdiction in effecting the laws of the State in this instance. As such, entry of the Attorney General is contrary and ultra vires to his statutory authority and jurisdiction as found in NMSA 1978, Section 8-5-2 (1975) (giving Attorney General authority to prosecute and defend civil or criminal actions in courts or tribunals in certain instances).

This is an administrative matter before the Commission related to issues specifically within the expertise and legislative authority of the Department, as outlined *supra*. Indeed, Section 8-5-2 has not been amended since 1975, at which point the Department had not been created. Section 8-5-2 provides “[e]xcept as otherwise provided by law, the attorney general shall ... prosecute and defend in any other court or tribunal all actions and proceedings, civil or criminal, in which the state may be a party or interested when, in his judgment, the interest of the state requires such action or when requested to do so by the governor.” (emphasis added). Therefore, when other statutes provide the authority to another part of state government (such as the Department) the duty and authority to represent the state, and the public interest, those laws supersede Section 8-5-2 based on that introductory clause. Cases upholding the Attorney General’s authority to represent the public interest are all limited to cases where there is no other state agency with the authority to do so. *See, e.g., State ex rel. Bingaman v. Valley Sav. & Loan Ass’n*, 1981-NMSC-108, 97 N.M. 8. Given the Department’s involvement in the present rulemaking, as well as its authority described *supra*, that is not the case here.

An administrative rulemaking such as this one specifically contemplates participation by the general public. Procedural Order, Part III, Section 303. Indeed, a consortium of public interests is already represented in this matter by the New Mexico Environmental Law Center. The Attorney General purports to represent the public, but it is unclear how the participation of that office represents the public better than the public itself. While the Attorney General may cite the WQA’s “all interested persons” provision, Section 74-6-6(D), given the active participation of the Department as well as the citizen groups and the general public who will most assuredly participate at the hearing, it is not clear what interests the Attorney General hopes to represent. The participation of the Attorney General in this matter will therefore be duplicative at best,

confusing and misleading at worst. It is also of note that the Attorney General filed an entry of appearance on the last possible day, and has filed no Notice of Intent to present technical testimony. This adds further confusion to the proceeding, increases the potential for unnecessary or undue delay, while raising questions as to what value the Attorney General can add.

It is inappropriate, where the Department and Commission are actively engaged in a rulemaking authorized by the WQA, for the Attorney General to supersede legislative directive and the primary jurisdiction of the Department and enter into an active rulemaking. *See, e.g., State ex rel. Attorney Gen. v. Reese*, 1967-NMSC-172, 78 N.M. 241 (Court found that entry of Attorney General to displace District Attorney who was actively pursuing the case was improper). Further, rulemaking hearings where a petitioner faces representation on behalf of the State of New Mexico by both the Department and the Attorney General creates a conflict that must be avoided for the Department to execute its statutory and regulatory requirements.

### III. CONCLUSION

For these reasons, the Department respectfully requests that the Hearing Officer exclude the Attorney General from the current proceedings.

Respectfully submitted,

GROUND WATER QUALITY BUREAU  
NEW MEXICO ENVIRONMENT DEPARTMENT



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**CERTIFICATE OF SERVICE**

I hereby certify that on October 27, 2014 a copy of the Department's Motion to Strike Entry of Appearance of New Mexico Attorney General's Office was served on the following parties of record via e-mail and/or regular first-class mail:


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