

STATE OF NEW MEXICO
WATER QUALITY CONTROL COMMISSION



In the Matter of:)
PROPOSED AMENDMENT) No. WQCC 12-09 (R) and
TO 20.6.6 NMAC (Dairy Rule)) No. WQCC 13-08 (R)
)

**NEW MEXICO ENVIRONMENT DEPARTMENT'S
MOTION TO EXCLUDE WILLIAM C. OLSON AND
STRIKE/LIMIT HIS TESTIMONY**

The New Mexico Environment Department (“Department”) hereby moves the Hearing Officer to exclude William C. Olson from this proceeding and to strike in full, or limit in part, his testimony and all related exhibits as presented in the Notice of Intent to Present Technical Testimony filed by the Rio Grande Chapter of the Sierra Club, Amigos Bravos, Caballo Concerned Citizens, Lea County Concerned Citizens, and the Rio Valle Concerned Citizens (collectively, the “Coalition”). William C. Olson and his testimony must be excluded in full because Mr. Olson was previously employed as the Bureau Chief of the Department Ground Water Quality Bureau (“Bureau”) and actively participated in developing the Department’s and the Bureau’s policy and legal strategy related to 20.6.6 NMAC (“Dairy Rule”). As a result, Mr. Olson has based his testimony on privileged and confidential information in violation of the Governmental Conduct Act, which unfairly prejudices the Department and misleads the Water Quality Control Commission (“Commission”).

Mr. Olson is a former employee of the Department. He worked as an employee of the Department from 1988 through 1990, and he was employed by the Department as the Bureau Chief from October 2004 to November 2011. *Written Testimony of William C. Olson*, Section I, pp. 2-3. In that capacity, he, among other things, supervised and managed personnel from the

Bureau's Pollution Prevention Section; directed permitting and enforcement of discharge permits; and, oversaw abatement and remediation of ground water pollution. *Id.* at p. 2. In particular, Mr. Olson supervised and directed the Department staff that developed the Dairy Rule, serving as the principal technical witness for the Department and a member of the negotiation team in the settlement of the Dairy Industry Group for a Clean Environment's ("DIGCE") appeal of the Dairy Rule. *Id.* Since January 2012, Mr. Olson has been working as a private consultant on water quality issues, including helping the Department to develop 20.6.7 NMAC, and subsequently testifying against the Department on 20.6.7 NMAC. *Id.* at p. 1; *See* WQCC Matter 12-01(R). Based on these experiences, Mr. Olson states that he is testifying as an expert on behalf the Coalition. *Id.*

I. ARGUMENT

A. **Mr. Olson and his testimony must be excluded because his participation creates a conflict of interest that violates the Governmental Conduct Act and compromises public confidence by permitting undue influence in this proceeding.**

In rulemaking proceedings, all interested persons have the opportunity to submit data, views, or arguments, orally or in writing, and to examine witnesses at the hearing. NMSA 1978, § 74-6-6(D) (1993). However, there are legal considerations that cannot not be ignored. Section 74-6-6(D) does not expressly supersede other areas of law, including the Governmental Conduct Act, NMSA 1978, Sections 10-16-1 to -18 (1967, as amended through 2011).

The Department of Environment Act, NMSA 1978, Sections 9-7A-1 to -15 (1991, as amended through 2005), created the Department. The Department is a state agency as defined by the Governmental Conduct Act. NMSA 1978, § 10-16-2(K) (2011). As noted above, Mr. Olson admits that he was previously an employee of the Department. This places Mr. Olson within the purview of the Governmental Conduct Act. *See* NMSA 1978, § 10-16-2(D) ("employment"

means rendering of services for compensation in the form of salary as an employee); § 10-16-2(I) (“public officer or employee” means any elected or appointed official or employee of a state agency or local government agency who receives compensation in the form of salary or is eligible for per diem or mileage but excludes legislators).

Public employees must “conduct themselves in a manner that justifies the confidence placed in them by the people, at all times maintaining the integrity and discharging ethically the high responsibilities of public service.” NMSA 1978, § 10-16-3(B) (2011). “No...employee shall use or disclose confidential information acquired by virtue of the...employee’s position with a state agency...for the employee’s or another’s private gain.” NMSA 1978, § 10-16-6 (2011). Confidential information is “information that by law or practice is not available to the public.” NMSA 1978, § 10-16-2(B). Additionally, “[a] former public employee shall not represent a person in the person’s dealings with the government on a matter in which the former public officer or employee participated *personally* and *substantially* while a public officer or employee.” NMSA 1978, § 10-16-8(B) (2011) (emphasis added).

By his own admission, Mr. Olson had access to confidential information, including legal advice, draft policies, and testimony that was not available to the public, and was personally and substantially involved in the development of the Dairy Rule while an employee of the Department. He oversaw and approved development of the Department’s testimony and positions during the 2010 hearing. This included the formation and implementation of Department policy. Indeed, Mr. Olson frequently claims to have an intimate knowledge of the Department’s abatement and enforcement programs. *See e.g. Olson*, Section III, pp. 6-7.

Having had access to this information, Mr. Olson now uses it as the basis of his testimony on behalf of the Coalition in the present proceeding. Although the Department has not employed

Mr. Olson for nearly three years, he is nonetheless currently engaged in a business and has been hired, contracted, or engaged to provide technical testimony on behalf of the Coalition on a matter over which he had substantial, personal, direct, and immediate participation and authority as a former Department employee. Such an impropriety and conflict of interest could reasonably be interpreted by the public and the regulated community as a violation of the Governmental Conduct Act and ethical standards. Such actions cut to the heart of revolving door legislation, the purpose of which is “to enhance public trust and confidence in our governmental agencies by prohibiting conduct which may permit or appear to permit undue influence or a conflict of interest.” *Ortiz v. Taxation & Revenue Dep’t, Motor Vehicle Div.*, 1998-NMCA-027, ¶ 9, 124 N.M. 677, 680, 954 P.2d 109, 112.

B. Mr. Olson and his testimony must be excluded because his participation and testimony are prejudicial to the Department, and have the potential to mislead the finder of fact in suggesting that Mr. Olson is testifying with the authority of the Department.

Although the rules of evidence do not apply to this hearing, they will be looked to for guidance. Procedural Order, Part IV, Section 401.A. Rule 11-403 NMRA provides substantial support and guidance on why Mr. Olson’s testimony must be excluded. A court or tribunal may exclude relevant evidence if the danger of unfair prejudice to the opposing party or misleading the finder of fact substantially outweighs its probative value. Rule 11-403.

The Department administers the laws and exercises the functions relating to the environment. NMSA 1978, § 9-7A-3 (1991). As such, the Secretary of the Environment (“Secretary”) is solely responsible for the management and operation of the Department as well as administration and enforcement of environmental laws. NMSA 1978, § 9-7A-6(A) (1991). The Legislature gave the Department broad and extensive powers 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).

Mr. Olson bases his testimony on confidential information he obtained while an employee of the Department. By using this information he attempts to state the Department’s position for it, namely that the Department’s position, as he helped to establish in 2010 as Bureau Chief, has not changed. Additionally, Mr. Olson states that he is providing testimony for the Coalition, but then testifies as though he were still the Bureau Chief, frequently relying on his “experience as Bureau Chief” for authoritative assertions. *See e.g. Olson*, Section VII(E)(2), p. 26. Mr. Olson is using his former position in an effort to usurp the Department’s legislatively established authority and expertise as outlined in the statutory authority, provided *supra*, to improperly influence and mislead the Commission.

Mr. Olson’s testimony implies that he is testifying in his former capacity as Bureau Chief. However, Mr. Olson’s tenure as Bureau Chief ended nearly three years ago. He provides enforcement and contamination statistics without citation to outside authority, instead relying on the information he obtained in his position directing and overseeing enforcement and permitting at the Bureau. *See e.g. Olson*, Section III, pp. 6-7. He states prior policy underlying ground water permitting and enforcement and bases this statement on his history as Bureau Chief and employee of the New Mexico Oil and Conservation Division. *Olson*, Section VII(C), pp. 18-19. Using this, he attempts to authoritatively state to the Commission what its and the Department’s policies currently are based on a time long ago when he was intimately and personally involved in developing those policies. He provides underlying Department reasoning for proposing certain

criteria in the Tyrone Mine permit hearings, reasoning that he is familiar with because he personally developed it, then uses the information to support the Coalition's testimony in opposition to DIGCE's proposed amendments. *Olson*, Section VII(E)(1), pp. 20-21, 24.

Mr. Olson states without citation to authority that adoption of DIGCE's proposals may harm other water quality protection programs. *Olson*, Section VII(E)(2), p. 26. This statement is given as though Mr. Olson currently manages ground water quality protection programs in the state and may confuse the finder of fact and lead them to believe that Mr. Olson maintains some authority when it comes to implementing policy and enforcement, when in reality he does not.

Mr. Olson states with certainty that 57% of dairies have caused extensive ground water pollution and that 72% of these cases were caused by wastewater impoundments. *Olson*, Section VIII, p. 28. This statement relies on outdated data and statistics that were researched and developed during his time as Bureau Chief and under his direction. *See Coalition Exhibit WCO-4 McGrath Testimony*. Throughout his testimony, Mr. Olson relies on previous Department testimony that was developed at his direction and, in some cases, by him. Such statements may confuse the Commission and imply that the Department supports Mr. Olson's opinions, or may inaccurately suggest that Mr. Olson speaks for the Department. He does not.

By revealing the Department's strategy in administrative proceedings, Mr. Olson has demonstrated that his participation and testimony is based on confidential and privileged information he obtained while employed by the Department. He uses that information to misrepresent what the Department's current position is and portray his position authoritatively to the Commission. Mr. Olson is not employed by the Department and in no way, shape, or form does he speak for the Department or any of the Department's programs.

The Department reserves its right to file evidentiary motions regarding Mr. Olson's testimony pursuant to the dates and directions provided by the Hearing Officer in the Procedural Order issued on October 3, 2014.

II. CONCLUSION

For these reasons, the Department respectfully requests that the Hearing Officer exclude William C. Olson from this proceeding and strike in full all testimony and related exhibits of William C. Olson. In the alternative, the Department requests that the Hearing Officer strike or limit Mr. Olson's testimony to the extent that it is based on confidential information obtained during his former employment with the Department. In light of the nature of this motion, concurrence from the other parties was not sought.

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 Exclude William C. Olson and Strike/Limit His Testimony was delivered to the following via electronic mail.

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