

STATE OF NEW MEXICO
WATER QUALITY CONTROL COMMISSION

IN THE MATTER OF PROPOSED AMENDMENTS
TO 20.6.2, THE COPPER MINE RULE,

No. WQCC 12-01(R)

New Mexico Environment Department,
Petitioner.

ATTORNEY GENERAL'S MOTION TO STRIKE

The Attorney General hereby moves to strike the New Mexico Environment Department's ("NMED") Notice of Objection to William C. Olson's Notice of Intent to Present Technical Testimony ("Notice of Objection") as a frivolous and improper pleading filed for the purpose of prejudicing Mr. Olson's case before the Water Quality Control Commission ("Commission"). As grounds for this motion, the Attorney General states:

1. On March 12, 2013, NMED filed its Notice of Objection, which asserts that Mr. Olson violated his professional services contract with NMED by filing a Notice of Intent to Present Technical Testimony ("Notice of Intent") in this rulemaking proceeding. Notice of Objection, p. 1. NMED states that Mr. Olson was retained by NMED to assist NMED in preparing for the public hearing on the Copper Mine Rule, that Mr. Olson gained confidential information as a contractor, and that "[n]otwithstanding the duties and obligations of his professional services contract with the Department, Mr. Olson filed a Notice of Intent . . . as a member of the public." *Id.* While NMED does not move to strike Mr. Olson's testimony, NMED states that it wishes "to be on record" that it objects to Mr. Olson's "violation of the professional services contract." *Id.*; *see also id.* ("The basis for the Department's objection is Mr. Olson's violation of his professional services contract with the Department.")

2. In its objection, NMED does not attach a copy of the contract, nor does it identify a specific provision or provisions of the contract that Mr. Olson allegedly violated.

3. NMED's Notice of Objection should be struck on a number of grounds. First, NMED asserts, without providing a basis in law or fact, that Mr. Olson violated his contract with NMED by filing a Notice of Intent.

4. Neither the Commission's *Guidelines for Regulation Hearings* nor the Procedural Order in this matter directly addresses the filing of frivolous pleadings. However, the Commission may rely upon the Rules of Civil Procedure for the District Courts for guidance in this matter. Procedural Order, § 401.A. Under Rule 1-011.A, a lawyer or party must have "good ground to support" a pleading. *See also* Rule 16-301 NMRA (a lawyer may not assert an issue "unless there is a basis in law and fact for doing do that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law"). A pleading filed in violation of Rule 1-011 may be stricken. Rule 1-011.A NMRA.

5. The primary goal of Rule 1-011 is "to deter baseless filings" "by testing the conduct of counsel." *Rivera v. Brazos Lodge Corp.*, 111 N.M. 670, 674, 808 P.2d 955, 959 (1991). The objectives sought by the rule and the words of the rule primarily place a moral obligation upon the lawyer to satisfy him- or herself that there are good grounds for a pleading. This requires honesty and good faith in pleading. *Id.*

6. NMED's claim that Mr. Olson violated his contract by filing a Notice of Intent -- without supplying the contract, citing specific provisions of the contract allegedly violated, or citing specific testimony that represents an alleged violation -- has no legal or factual basis. NMED's objection, therefore, should be struck. *Accord* Rule 1-011.A NMRA.

7. Second, if NMED believes there is a legal basis to object to the testimony, the proper procedural vehicle is for NMED to move to strike the testimony or portions thereof, or to

move to disqualify Mr. Olson as a witness. NMED, however, does neither. NMED does not ask the Commission to take any action, except to note NMED's dissatisfaction that Mr. Olson has filed testimony in opposition to it. A notice stating such dissatisfaction is not a proper pleading, and should be struck on this ground as well.

8. The Notice of Objection is also improper because a pleading that makes factual allegations should be supported with affidavits or other documentary evidence in support of those allegations. *Accord* Rule 1-007.1.C (motions requiring consideration of facts not of record must be supported with affidavits, depositions or other documentary evidence in support). As stated, NMED does not provide any evidentiary support for its irresponsible allegation that Mr. Olson violated his contract.

9. Third, the Water Quality Act and the Procedural Order provide a right to members of the public to participate in the rulemaking, including the right to present technical testimony. NMSA 1978, §74-6-6.D; Procedural Order, § 302. Furthermore the Commission's *Guidelines* require that a "fair and impartial" proceeding be conducted and allow the admission of only "relevant" evidence. *Guidelines*, §§ 102.A, -C, -D, 104.B, 402.B; *see also* Procedural Order, § 402.B.

10. Mr. Olson has a right under the Water Quality Act and the Commission's Procedural Order to participate as a public member in this rulemaking and to present technical testimony, unless there is a legitimate legal basis to disqualify him or strike his testimony. NMED, as stated above, has not set forth any legitimate legal basis to disqualify him or strike testimony. NMED's Notice of Objection discourages Mr. Olson's right to participate in this proceeding, represents an unfair legal tactic designed to prejudice the Commission against him

and his testimony, and is not relevant to this proceeding.¹ NMED's Notice of Objection should be struck on these grounds as well.

Based on the foregoing, the Attorney General respectfully requests that NMED's Notice of Objection to be struck.

Respectfully submitted,

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Certificate of Service

I certify that the following were served with the foregoing pleading by email on March 15, 2013:

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¹ The Commission's *Guidelines* and Procedural Order allow only "relevant" evidence to be admitted. The Attorney General recognizes that the Notice of Objection contains no evidence; however, the principle of relevance applies to the pleading. The pleading – essentially stating dissatisfaction that Mr. Olson filed testimony in opposition – is irrelevant to the issues before the Commission in this rulemaking.

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