

COPY



STATE OF NEW MEXICO
WATER QUALITY CONTROL COMMISSION

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

WQCC 12-01 (R)

New Mexico Environment Department,
Petitioner.

NEW MEXICO ENVIRONMENT DEPARTMENT'S RESPONSE
IN OPPOSITION TO MOVANTS' MOTION TO DISQUALIFY
WQCC FROM DECIDING THE STAY

The New Mexico Environment Department (NMED or "the Department") hereby files this Response in Opposition to Movants' Motion to Disqualify the WQCC from Deciding the Stay because the Motion has no merit, is frivolous and constitutes a waste of the Commission's time. The Department requests that the motion be summarily denied or in the alternative stricken from the record. The Department states the following in opposition to the Movants' Motion:

- I. **The limited representation by NMED's General Counsel related to securing legal counsel for the Commission was appropriate despite Movants mischaracterization of the law.**

NMED's General Counsel, Mr. Kendall, is not prohibited from representing or providing legal advice to the Water Quality Control Commission (WQCC or "the Commission) related to obtaining legal counsel. It was appropriate for the Commission to engage Mr. Kendall because obtaining legal counsel does not constitute an exercise any of the Commission's statutory powers or duties, as is required for the limitations on representation to apply in NMSA 1978, Section 74-6-3.1.¹ See NMSA 1978, § 74-6-4, *Duties and Powers of commission*. Such representation could include, but is not limited to, interpretation of Section 74-6-3.1, clarifying who may

¹ § 74-6-3.1. Legal Advice. "In the Exercise of any of its powers and duties . . .".

represent the Commission in the hearing on the Joint Request for Stay of 20.6.7 (hereafter referred to as the “Joint Request”) and in the Copper Rule Appeal (No. 33,237), and in identifying the proper budget mechanism to pay for such legal counsel.

Presumably the Commission obtained Mr. Kendall to assist in determining how to proceed following the apparent and last minute withdrawal of legal representation by the Attorney General’s Office (AGO). See, Email correspondence dated 12-4-13 from Pam Castaneda, attached as *Exhibit A*. Indeed, it was less than four business days before the Commission’s regularly scheduled meeting and hearing on the Joint Request that the Commission’s clerk revised the Commission’s agenda. The new agenda omitted the hearing from the agenda and replaced it with “[d]iscussion and possible action on legal representation of the Commission in WQCC 12-01 (R), The Copper Rule, in the Court of Appeals, and matters related to the Motion for Stay.” See, Revised Amended Draft Agenda 12-10-13 Meeting, attached as *Exhibit B*.

Mr. Kendall is not an attorney of record for the NMED in any Copper Rule proceeding. He is the General Counsel for NMED, to which the WQCC is administratively attached. See NMSA 1978, § 74-6-3(F)². It was entirely appropriate for Mr. Kendall to aid the Commission upon their request, with former counsel present in an attorney-client privileged setting, to discuss future legal representation of the Commission, considering the pending Request for Stay and the Copper Rule on appeal. For that reason, the immediate and appropriate discussion to be had concerned how to obtain and secure legal representation and what statutory deadlines or

² NMSA 1978, § 74-6-3(F) states “The commission is administratively attached, as defined in the Executive Reorganization Act, to the department of environment.” The Executive Reorganization Act, NMSA 1978, Section 9-1-7, defines the administratively attached agency relationship, and states that the Commission shall submit its budgetary requests through NMED. In addition to assisting the Commission in finding appropriate legal representation, it would be appropriate for Mr. Kendall to assist the Commission to determine the proper method for securing budget to potentially pay for alternative legal counsel.

appellate timeframes need to be considered. The legal representation of the Commission may be limited in scope and it was entirely reasonable to do so under these circumstances. Rule 16-102(C) NMRA.³

II. It was appropriate for the Commission to enter into executive session under NMSA 1978, Section 10-15-1(H)(7), and there was no violation of the Open Meetings Act.

The Commission followed all statutory requirements to enter into an executive session under the Open Meetings Act, NMSA 1978, Section 10-15-1 to -4. In the agenda published in advance of the WQCC's December 10, 2013 public meeting, item 6 read: "Discussion and possible action on legal representation of the Commission in WQCC 12-01 (R), The Copper Rule, in the Court of Appeals, and matters related to the Motion for Stay. The Commission may vote to adjourn into Closed Executive Session to discuss the matter pursuant to Section 10-15-1(H)(7), NMSA 1978 of the Open Meetings Act." Also, Chairman Tongate read the agenda item in open session, stating the grounds for the closure with reasonable specificity. Then, Commissioner Woods moved that the Commission go into executive session to discuss the agenda item, stating the authority for the closure and the subject to be discussed, which was then seconded by Commissioner Waters. Therefore, all of the requirements for entering into an executive session per Section 10-15-1(H)(7) were satisfied under NMSA 1978, Section 10-15-1(I)(1).

Mr. Kendall was invited to the session for purposes stated in the agenda and specified in the oral motion, that is, the *legal representation* of the Commission in the Joint Request hearing before the Commission and representation of the Commission in the Court of Appeals, (No. 33,237). When Mr. Frederick objected to Mr. Kendall's participation, he responded that his role

³ Commentary Note [6]. The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client . . . A limited representation may be appropriate because the client has limited objectives for the representation

in the discussion was “limited to procuring counsel for the Commission” *WQCC Draft Meeting Minutes, Dec. 10, 2013* (recording device not working prior to executive session), and for “non-substantive matters.” *Movants’ Motion* at ¶ 11. Chairman Tongate, properly denied the motion by Mr. Frederick, and the Commission met with its former legal counsel, Mr. Cuniff, and NMED’s General Counsel, Mr. Kendall. It is inappropriate for the Movants to speculate as to what was discussed in the executive session. Those discussions are subject to the attorney-client privilege as explained in Part I, *supra*. The records supports that the executive session occurred and Mr. Kendall was present for the purposes indicated, that is, to assist the Commission in securing counsel, which is a non-substantive matter and not related to the substance of Joint Request or the Copper Rule appeal.

When the closed session ended, Chairman Tongate stated that “the matters discussed in executive session were limited only to those specified in the motion for closure.” Then, there was a motion from Commissioner Woods that “in light of the correspondence from the Attorney General’s Office,” the Chair should be authorized to designate legal counsel for future proceedings regarding the Copper Rule, which Commissioner Brooks then seconded, and the Commission passed.

After passage, Mr. Frederick put his objection on the record. He inaccurately and inappropriately stated that the Commission went into executive session to discuss the motion for stay with the Environment Department’s General Counsel, and that the conversation was “ex parte.” Mr. Frederick’s characterization ignores the agenda item, the motion and the grounds that were given to enter into executive session, the statement by Chairman Tongate ensuring that the matters discussed were limited to those specified in the motion for closure, and the definition of prohibited ex parte discussions: at no time after the initiation and before the conclusion of a

proceeding under this part shall any person discuss ex parte the *merits* of the proceeding with any commissioner or hearing officer. 20.1.3.11 NMAC. Mr. Frederick's reference to improper ex parte discussions must be considered an error, as discussion of legal representation of the WQCC is not a discussion about the merits of the Joint Request proceeding.

III. The Movants motions is frivolous meritless, constitutes a waste of time and should be denied or stricken in its entirety.

It is inappropriate for the Movants to speculate as to what occurred in the executive session, claim foul play by the Commission, then move the Commission to be disqualified from making a decision on the Stay Motion before the 90 day time limit for a decision expires. The assertions contained in the Movants' Motion are pure conjecture and rooted in insecurity. Such claims are inappropriate before any tribunal, judicial or administrative. The Motion violates the ethical obligations that a lawyer shall not engage in conduct intended to disrupt a tribunal or assert an issue unless there is a basis in law and fact for doing so that is not frivolous. Rule 16-305 NMRA; Rule 16-301 NMRA.

In addition to the frivolous assertions of fact and baseless legal arguments, the Movants' Motion also contains, at ¶¶ 15-20, additional attacks on the Commission, assertions of Commission bias in light of adopted 20.6.7 NMAC, claims that the Commission intended to create a disadvantage to the Movants supporting the stay, allegations that the NMED acted improperly during the rule making, and allegations that NMED's General Counsel and Cabinet Secretary acted inappropriately, all of which amount to inflated rhetoric. None of the allegations are relevant to the Motion and they only serve to confuse the issues and waste time.

The Commission was created to carry out certain statutory duties and powers: adopt water quality standards for surface and ground waters of the state based on credible scientific data and other evidence; to adopt regulations to prevent or abate water pollution in the state; and

to adopt regulations for the copper industry. NMSA 1978, §§ 74-6-4(D), (E) and (K). The Commission was not created as a platform for participants to scare the public with false characterizations, leverage media attention, or raise money for certain interested parties. The Commission should hedge off any attempts by the Movants, or any other party before it, to do so.

Though the New Mexico Rules of Evidence and the Rules of Civil Procedure are not binding on the Commission, and instead provide guidance for procedural issues that arise, the Commission should maintain and demand from the attorneys practicing before it a level of professionalism, both between counselors, and between counselors and the Commission. Just because the Commission is an administrative body does not mean attorneys should not be reined in when their actions do not meet the standards established by and demanded from the Commission. The Commission is empowered to make decisions in this instance, and that includes tasking to task those parties that make speculative statements and frivolous assertions to the Commission.

IV. Conclusion

The presence of the Commission counsel being withdrawn, and the presence of NMED's General Counsel in the executive session for the purposes of identifying and securing counsel to represent the Commission in the stay proceeding and in the Copper Rule appeal was entirely appropriate, and such action did not violate the Open Meeting Act. For the reasons stated herein, the NMED respectfully asks that the WQCC deny the Movants' Motion or strike it from the record in its entirety.

Respectfully submitted,

NEW MEXICO ENVIRONMENT DEPARTMENT



Andrew P. Knight
Kathryn S. Becker
Assistants General Counsel
Office of General Counsel
Post Office Box 5469
Santa Fe, New Mexico 87502-5469
Telephone: (505) 222-9540

CERTIFICATE OF SERVICE

I certify that a copy of the Department's Motion to Strike was served by email on the following on this 24th day of December, 2013:

Tannis L. Fox, Assistant Attorney General
Water, Environmental and Utilities Division
Office of the New Mexico Attorney General
P.O. Box 1508
Santa Fe, New Mexico 87504
Phone: 505-827-6695
E mail: tfox@nmag.gov
For the New Mexico Attorney General

Bruce Frederick, Staff Attorney
Doug Meiklejohn
Jon Block
Eric Jantz
N.M. Environmental Law Center
1405 Luisa St. #5
Santa Fe, NM 87505-4074
Phone: 505-989-9022
Email: bfrederick@nmelc.org
For the Gila Resources Information Project and
Turner Ranch Properties

Dalva Moellenberg
Anthony J. Trujillo
Gallagher and Kennedy P.A.
1233 Paseo de Peralta
Santa Fe, NM 87501-2758
Phone: 505-982-9523

Email: d1m@gknet.com
Email: Trujillo, TJ <ajt@gknet.com>
For Freeport-McMoRan Chino Mines Company, Freeport-McMoRan Tyrone, Inc.
And Freeport-McMoRan Cobre Mining Company

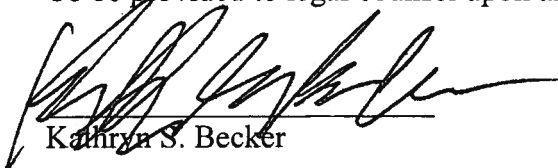
Tracy Hughes
High Desert Energy and Environmental Law
P.O. Box 8201
Santa Fe, New Mexico 87504
Phone: 505.819.1710
Email: hughes@energyenvironmentlaw.com
For Amigos Bravos

Louis W. Rose
Montgomery & Andrews
P.O. Box 2307
Santa Fe, NM 87504-2307
Phone: 505-986-2506
Email: lrose@montand.com
For the New Mexico Mining Association

Jon Indall
Comeau, Maldegen, Templeman & Indall
P.O. Box 669
Santa Fe, New Mexico 87504-0669
Phone: 505-982-4611
Email: jindall@cmtisantafe.com
For the New Mexico Mining Association

William C. Olson
14 Cosmic Way
Lamy, New Mexico 87540
Phone: 505-466-2969
Email: billjeanie.olson@gmail.com

WQCC, Hearing Clerk
Pam Castaneda
To be provided to legal counsel upon assignment



Kathryn S. Becker

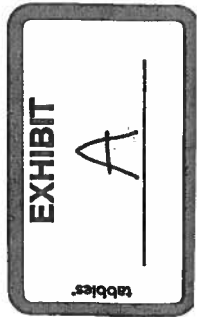
Becker, Kathryn, NMENV

From: Castaneda, Pam, NMENV
Sent: Wednesday, December 04, 2013 11:14 AM
To: Bruce Frederick; Tracy Hughes; Bill Olson; Becker, Kathryn, NMENV; Knight, Andrew, NMENV; Moellenberg, Dalva L.; Jon J. Indall; Louis W. Rose; Trujillo, T.J.; Tannis Fox; c-m-k@msn.com
Cc: Orth, Felicia, NMENV
Subject: FW: Stay Motion Hearing Removed from 12 10 13 Agenda

The Chair of the Commission has removed the hearing on the Joint Request for Stay from the December 10, 2013 draft meeting agenda. This decision follows discussions with the Attorney General's Office, and their identification of a potential conflict; the Commission plans to resolve the question of its legal representation in the appeal of the Copper Rule prior to considering the merits of the Request for Stay.

Thank you.

Felicia Orth, Hearing Officer
New Mexico Environment Department



Becker, Kathryn, NMENV

From: Castaneda, Pam, NMENV
Sent: Friday, December 06, 2013 5:01 PM
To: Bruce Frederick; Tracy Hughes; Bill Olson; Becker, Kathryn, NMENV; Knight, Andrew, NMENV; Moellenberg, Dalva L.; Jon J. Indall; Louis W. Rose; Trujillo, TJ; Tannis Fox; c-m-k@msn.com
Cc: Orth, Felicia, NMENV
Subject: Revised Amended Draft Agenda 12-10-13 Meeting
Attachments: WQCC 12-10-2013 Revised Amended Draft Agenda.rtf

Good afternoon. See attached.

Pam Castaneda

Administrator to Boards and Commissions

Environmental Improvement Board

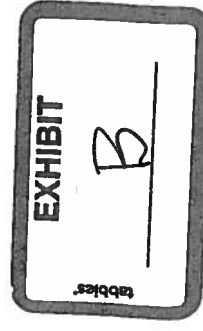
Water Quality Control Commission

1190 St. Francis DriveRoom S2102/PO Box 5469

Santa Fe, NM 87502

(505) 827-2425

[E.mail, pam.castaneda@state.nm.us](mailto:pam.castaneda@state.nm.us)





**STATE OF NEW MEXICO
WATER QUALITY CONTROL COMMISSION
1190 St. Francis Drive
P.O. Box 5469
Santa Fe, New Mexico 87502**

CONSTITUENT AGENCIES:

**Environment Department
State Engineer & Interstate Stream Commission
Game and Fish Department
Oil Conservation Division
Department of Agriculture
Department of Health
State Parks Division
Soil and Water Conservation Commission
Bureau of Mines and Mineral Resources
Members-at-Large**

**REVISED
AMENDED
DRAFT AGENDA
NM WATER QUALITY CONTROL COMMISSION MEETING
December 10, 2013
9:00 a.m.
State Capitol Building, Room 309
490 Old Santa Trail
Santa Fe, New Mexico 87501**

The following items are for discussion and possible action:

1. Roll Call
2. Approve the Agenda
3. Approve minutes of September 10, 2013 meeting
4. Update on dairy permitting. Jerry Schoeppner, Chief, NMED Ground Water Bureau. Time estimate: 10 minutes
5. Request for Hearing in WQCC 13-09 (PISC), Petition by the Department of Game and Fish for the use of piscicides to restore the native fish community in the Las Animas Creek Watershed, Sierra County, New Mexico. Kirk Patten, NM Department of Game and Fish. Time Estimate: 20 minutes

6. Discussion and possible action on legal representation of the Commission in WQCC 12-01 (R), The Copper Rule, in the Court of Appeals, and matters related to the Motion for Stay. The Commission may vote to adjourn into Closed Executive Session to discuss the matter pursuant to Section 10-15-1(H)(7), NMSA 1978 of the Open Meetings Act.
7. Next meeting: January 14, 2014
8. Adjournment

If you are an individual with a disability who needs a reader, amplifier, qualified sign language interpreter, or any other form of auxiliary aid or service to attend or participate in the hearing or meeting, contact Pam Castañeda at least ten days prior to the meeting or as soon as possible at 505.827.2425 or pam.castaneda@state.nm.us. Public documents can be provided in various accessible formats. Contact Pam Castañeda if accessible format is needed.