

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO


Mark Reynolds

**AMIGOS BRAVOS AND GILA RESOURCES
INFORMATION PROJECT,**

Appellants,

vs.

**Ct. App. No. A-1-CA-37531
WQCC No. 17-03(R)**

**NEW MEXICO WATER QUALITY
CONTROL COMMISSION,**

Appellee.

THE APPELLANTS' DOCKETING STATEMENT

**APPEAL FROM THE
NEW MEXICO WATER QUALITY CONTROL COMMISSION AND
HEARING OFFICER ERIN ANDERSON**

Pursuant to NMRA 12-305(F)(4), 12-214(B)(1), and 12-213(A)(6), the Appellants request oral argument. Protection of this state's most precious public resource, ground water, is an issue of fundamental public importance.

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I. Introduction

The Appellants, Amigos Bravos and Gila Resources Information Project (collectively “AB/GRIP” or “Appellants”), hereby file their docketing statement in accordance with Rule 12-208 NMRA. This Court has jurisdiction over this matter pursuant to NMSA 1978, Section 74-6-7 (1993) and Rule 12-601 NMRA.

A. Nature of the proceeding.

This is an appeal from a rulemaking conducted by the New Mexico Water Quality Control Commission pursuant to its rulemaking authority under the Water Quality Act (“Act” or “WQA”), NMSA 1978, §§ 74-6-1 through 74-6-17 (as amended through 2013), specifically §§ 74-6-4(E) (2009) and 74-6-4(H) (2009), in which the Commission promulgated a new variance rule.

B. Date of the decision sought to be reviewed and timeliness of the filing of the appeal.

The decision of the Commission to adopt a new variance rule was made on July 10, 2018. The Commission has yet to issue public notice and a concise explanatory statement of its newly adopted variance rule. The Commission has also failed to file its newly adopted variance rule with the State Records Administrator. The Appellants’ *Notice of Appeal* was timely filed on August 9, 2018, pursuant to Rule 12-601 NMRA, NMSA 1978, § 74-6-7, and 20.1.6.400 NMAC. The docketing fee in this appeal has been paid.

II. Statement of the Case

This statement of the case sets forth the interests of the Appellants in this matter, a summary of the statutory and regulatory history of variances, a concise statement on the purpose of variances, and a summary of the administrative actions and proceedings appealed therefrom. Section III provides the facts material to each of the issues raised in Section IV, Statement of the Issues and Authorities.

A. The Interests of the Appellants.

Amigos Bravos is a statewide water conservation organization guided by social justice principles. Amigos Bravos' mission is to protect and restore the waters of New Mexico. Amigos Bravos works locally, statewide, and nationally to ensure that the waters of New Mexico are protected by the best policy and regulations possible. New Mexico's ground and surface water protection regulations found at 20.6.2 NMAC are a critical component of Amigos Bravos' work to protect clean water and the communities that depend upon clean water in New Mexico.

The Gila Resources Information Project ("GRIP") recognizes that human and environmental systems are inseparable and interdependent. GRIP works to protect and nurture human communities by safeguarding the natural resources that sustain us all and to safeguard natural resources by facilitating informed public

participation in resource use decisions. Sound state water protection regulations are essential for realizing this work.

AB/GRIP's procedural concerns with the Commission's adoption of the new variance rule are: 1) the Commission's failure to provide public notice of its action and a concise explanatory statement, and 2) the Commission's failure to file the newly adopted rule within fifteen (15) days of the rule's adoption with the State Records Administrator.

AB/GRIP's substantive concerns with the Commission's adoption of the new variance rule are that the issuance of variances "for the life of a facility" violates the 1) New Mexico Water Quality Act's ("Water Quality Act" or "Act") purpose to prevent and abate ground water pollution, 2) the Act's requirement that abatement of ground water pollution occur within a reasonable period of time, and 3) the Act's mandatory public hearing requirements for variance issuance, renewal and modification petitions. Additionally, the Commission's new variance rule may be an unlawful delegation of authority to a constituent agency and may exceed the Commission's authority under the Act.

AB/GRIP are ultimately concerned that the Commission's newly adopted variance rule would undo over thirty-six (36) years of ground water protection in New Mexico by authorizing, through rule, the issuance of life-time variances, which allow industries to pollute our most precious public resource in perpetuity.

Appellants' expert witness, Martin Testimony [11-15-17 II Tr. 287:1-10] The Commission's radical shift in its interpretation and implementation of the Act's purpose and variance provision comes at a time when it is more critical than ever to protect New Mexico's scarce water resources.

Ground water in New Mexico "belongs to the public." NMSA 1978, § 72-12-1 (2003). Our state's ground water does not belong to the owners of private property above ground water. While individuals and entities may use ground water for "beneficial use," subject to appropriate authorization from the state, *id.*, ground water in New Mexico is a public resource to be protected.

Additionally, 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. Public 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, 1243 (10th Cir. 2006). The pollution of public water in New Mexico is also a criminal public nuisance. NMSA 1978, § 30-8-2 (1993).

The great public importance of water, as evidenced at all levels of New Mexico law, led the New Mexico Supreme Court, in Kaiser Steel Corp. v. W. S. Ranch Co., to declare:

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.

1970-NMSC-043, ¶ 15, 81 N.M. 414, 417; *see also, e.g.*, NMSA 1978, § 74-1-12(A) (1999) (describing water as “the state's most precious resource”). Protection of groundwater quality in New Mexico is not mutually exclusive of economic development and, in particular, of economically viable dairy and mining industries in New Mexico. Both goals have historically been achievable under the existing statutory and regulatory framework, and continue to be achievable.

B. Statutory and Regulatory History of Variances.

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. 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.

The Commission’s statutory authority and mandate comes from the Water Quality Act, NMSA 1978, Sections 74-6-1 through 74-6-17 (1967, as amended through 2013) (“WQA” or “Act”). To carry out the Act’s broad remedial purpose, the Act requires the WQCC to “adopt, promulgate and publish regulations to

prevent or abate water pollution in the state.” NMSA 1978, Section 74-6-4(E) (2009).

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) (2009).

The Act authorizes the Commission to permit 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.* Thus, the Legislature clearly understood that water pollution may unfortunately occur given the nature of certain industries and the limits of today’s technology and sought to provide a temporary relief mechanism for regulated entities within the context of the Act’s purpose of preventing or abating water pollution.

Variations allow regulated facilities to temporarily avoid strict compliance with regulations, but only when necessary and justified by site-specific circumstances. Under the Act, variance proceedings are adjudicatory. *Id.* This assures that due process is provided not only to the regulated entity who wants to temporarily avoid regulation, but also to others who may be adversely affected if the variance is granted.

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.* 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.

The Commission first promulgated implementing regulations for the Act in 1967. In 1968, Regulation No. 5, “Procedure for Requesting a Variance,” was promulgated, providing the variance mechanism to regulated entities.¹ A few years

¹ New Mexico Commission of Public Records; New Mexico State Records Center and Archives series 5; Administrative Law Division Formerly Known as Rules Division subseries 5.1; Agency Historic Rules Collection sub-series 5.1.177; Rules – Water Quality Control Commission, Box no. 267. See Exhibit A of AB/GRIP’s Motion to Dismiss in Part.

later, the Commission amended Regulation No. 5 to limit variances to one year.² 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) (now 20.6.2.1210.C NMAC).³ The five-year variance limit is therefore consistent with the Act's purpose, with the Act's requirement that abatement be effected within a reasonable period of time, and with the Act's expressly mandated five-year limit for discharge permits. NMSA 1978, Section 74-6-5(I) (2009). The five-year variance limit has remained in effect since 1981. 1-210(D)(9) NMAC (1981) (now 20.6.2.1210.C NMAC).

C. The Purpose of a Variance is to Permit Temporary Pollution of Ground Water and to Facilitate Abatement of Ground Water Pollution within a Reasonable Period of Time.

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

² New Mexico Commission of Public Records; New Mexico State Records Center and Archives series 5; Administrative Law Division Formerly Known as Rules Division subseries 5.1; Agency Historic Rules Collection sub-series 5.1.177; Rules – Water Quality Control Commission, Box no. 267. *See* Exhibit B of AB/GRIP's Motion to Dismiss in Part.

³ New Mexico Commission of Public Records; New Mexico State Records Center and Archives series 5; Administrative Law Division Formerly Known as Rules Division subseries 5.1; Agency Historic Rules Collection sub-series 5.1.177; Rules – Water Quality Control Commission, Box no. 267. *See* Exhibit D of AB/GRIP's Motion to Dismiss in Part.

Under this plain language, 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.*; Appellants' expert witness, Martin Testimony [11-15-17 II Tr. 245:1-7]. Therefore, the purpose of a variance is to allow the regulated entity a reasonable period of time to determine how to become compliant with Commission regulations pertaining to ground water. Appellants' expert witness, Martin Testimony [11-14-17 I Tr. 195:4-19].

NMED, in support of its proposed variance rule, which the Commission adopted on July 10, 2018, argued that variances “for the life of a facility” were necessary to grant regulated facilities permanent variances from the prescriptive requirements of the Dairy and Copper Rules⁴ 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”. NMED’s expert witness, Vollbrecht Testimony [11-14-17 I Tr. 75:13-20]; Appellants’ expert witness, Martin Testimony [11-14-17 I Tr. 195-199]. However, the statutory and regulatory framework for variances

⁴ The Legislature amended the Water Quality Act in 2009, specifically directed the Commission to promulgate rules for the copper mining industry and the dairy industry. NMSA 1978, Section 74-6-4(K) (2009). The Dairy Rule provides a variance mechanism for regulated facilities to avoid compliance with the rule’s prescriptive requirements beyond five years. 20.6.6.18.D NMAC. The Copper Rule, however, does not provide a variance mechanism for the prescriptive requirements of that rule. 20.6.7 NMAC.

makes clear that this was not the Legislature's intent for the variance mechanism.

Id.; § 74-6-4(H); 20.6.2.1210.C NMAC.

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

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. Appellants' expert witness, Martin Rebuttal Testimony, pp. 4-6, referencing Exhibits F1, F2 and F5. Administrative Record ("AR") No. 77. Evidence submitted by Appellants in this proceeding demonstrates that the legal pathway for a variance is a discharge permit. *Id.*

The Commission has historically required NMED to incorporate conditions and requirements of an approved variance into the associated discharge permit. *Id.* at p. 5:16-21; p. 6:1-3, referencing Exhibit F5. The Commission also 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." 20.6.7.10.H NMAC. The discharge permit then becomes the enforcement mechanism for any violation of the variance conditions and requirements. *Id.*; Appellants' expert witness, Martin Testimony, [11-14-17 I Tr. 190:8-20].

E. Relevant Administrative Actions and Proceedings.

The following is an account of the relevant administrative actions and proceedings regarding the newly adopted variance rule in the matter of WQCC No. 17-03(R).

1. NMED'S Petition to Amend 20.6.2 NMAC and Pre-Hearing Proceedings.

NMED filed its *Petition to Amend the Ground and Surface Water Protection Regulations* (20.6.2 NMAC) ("*Petition*") on May 1, 2017, in which it proposed a new variance rule. AR No. 1. On August 7, 2017, the Commission set a hearing on NMED's *Petition* for November 14, 2017, and appointed Erin Anderson as Hearing Officer. AR No. 4.

The following parties filed *Entries of Appearance* in this matter: City of Roswell; Laun-Dry (AR No. 2); Los Alamos National Security, LLC (AR No. 3); Amigos Bravos and the Gila Resources Information Project (collectively, "AB/GRIP") (AR No. 5); the New Mexico Environmental Law Center ("NMELC") (AR Nos. 8, 12)⁵; the New Mexico Mining Association ("NMMA") (AR No. 7); William C. Olson (AR No. 9); the Dairy Producers of New Mexico ("DPNM") and the Dairy Industry Group for a Clean Environment ("DIGCE") (collectively, "the Dairies" or "Dairy industry") (AR No. 6); the New Mexico

⁵ NMELC first entered an appearance on its own behalf. NMELC then filed an Amended Entry of Appearance, on behalf of Amigos Bravos and GRIP.

Municipal League Environmental Quality Association (AR No. 20); United States Air Force, Department of Defense (“DOE”) (AR No. 16); the New Mexico Energy, Minerals and Natural Resources Department (“EMNRD”) (AR No. 13); Rio Grande Resources Corporation (AR No. 43); American Magnesium, LLC (AR No. 44); and the New Mexico Copper Corporation (AR No. 45).

AB/GRIP filed a *Motion to Dismiss in Part* on September 29, 2017 regarding the proposed variance rule. AR No. 64. NMED filed a *Response in Opposition to AB/GRIP’s Motion to Dismiss in Part* on October 16, 2017. AR No. 69. LANS filed a *Response in Opposition to AB/GRIP’s Motion to Dismiss in Part* on October 16, 2017. AR No. 68. NMMA filed a *Response in Opposition to AB/GRIP’s Motion to Dismiss in Part* on October 16, 2017. AR No. 70. AB/GRIP filed a *Consolidated Reply to NMED, LANS and NMMA Responses* on October 24, 2017. AR No. 73.

The Commission denied AB/GRIP’s *Motion to Dismiss in Part* on November 14, 2017, and then held a four-day hearing on NMED’s *Petition* on November 14, 2017 through November 17, 2017. *Commission Hearing Transcript, Volumes I through IV [11-14-17 to 11-17-17 I-IV Tr.]*. The Commission issued its written decision denying AB/GRIP’s *Motion to Dismiss in Part* on November 21, 2017. AR No. 94.

2. Commission Hearing on the New Variance Rule.

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. **[11-14-17 to 11-17-17 I-IV Tr.]**. During the Commission's rulemaking hearing on NMED's proposed variance rule, one witness presented technical testimony on behalf of NMED (Kurt Vollbrecht); one witness presented technical testimony on behalf of AB/GRIP (Kathy J. Martin); one witness presented technical testimony on behalf of NMMA (Michael Neumann); William C. Olson presented technical testimony on his own behalf; and one witness presented non-technical testimony on behalf of the Dairy industry (Eric Palla). **[11-14-17 I Tr. 69-206]; [11-15-17 II Tr. 212-356]**.

3. Commission's July 10, 2018 Decision to Adopt New Variance Rule.

The Commission began deliberations on NMED's proposed variance rule on July 10, 2018. The Commission decided to adopt NMED's proposed variance rule, removing the current five-year limit on variances and the mandatory public hearing held every five years for variance renewals and modifications. **[7-10-18 I Tr. 49:18-21]**.

The Commission has not yet issued public notice and a concise explanatory statement of its decision adopting a new variance rule, and has not yet filed its newly adopted variance rule with the State Records Administrator. *See generally,*

New Mexico Register, Volume XXIX, Issues 15 (August 14, 2018) and 16 (August 28, 2018).

The Commission adopted the following regulatory changes to the variance rule at issue in this appeal:

20.6.2.1210.C NMAC:

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]~~ If the variance is granted in whole or in part, or subject to conditions, the commission shall [not grant a] specify the length of time that the variance [for a period of time in excess of five years] shall be in place.⁶

And,

20.6.2.1210.E NMAC:

For variances granted for a period in excess of five years, the petitioner shall provide to the department for review a variance compliance report at five year intervals to demonstrate that the conditions of the variance are being met, including notification of any changed circumstances or newly-discovered facts that are material to the variance. At such time as the department determines the report is administratively complete, the department shall post the report on its website, and mail or e-mail notice of its availability to those person on general and facility-specific list maintained by the department who have requested notice of discharge permit applications, and any person who participated in the variance process. If such conditions are not being met, or there is evidence indicating changed circumstances or newly-discovered facts or conditions that were unknown at the time the variance was initially granted, any person, including the department, may request a hearing before the commission to revoke, modify, or otherwise reconsider the variance within 90 days of the issuance of the notice of availability of the report.

⁶ See Appellants' *Notice of Appeal*, Exhibit B (August 9, 2018). Underlined language is new language adopted by the Commission. Strikethrough language is current regulatory language removed by the Commission.

See Appellants' Notice of Appeal, Exhibit B (August 9, 2018).

III. Facts Material to Issues Presented

The following are facts material to issues presented in this appeal. The first section contains facts material to the Commission's adoption of a new variance rule and its failure to 1) provide public notice of the Commission's action, 2) provide a concise explanatory statement of its action, and 3) file the new rule within fifteen (15) days of its July 10, 2018 adoption with the State Records Administrator.

The second section contains facts material to the newly adopted variance rule's violation of the Water Quality Act. The third section contains facts material to the newly adopted variance rule not being supported by substantial evidence in the record.

Because the Commission has yet to issue findings of fact and conclusions of law in support of its July 10, 2018 decision to adopt a new variance rule, the Appellants must rely on the administrative record, including but not limited to pre-hearing filings, statements made at the four-day evidentiary hearing, post-hearing filings, and the July 10, 2017 Commission deliberations hearing.

The Appellants reserve the right to amend their Docketing Statement once the Commission issues public notice and a concise explanatory statement of its

newly adopted variance rule, and when the new variance rule is filed with the State Records Administrator.

A. Facts material to whether the Commission erred by failing to provide public notice and a concise explanatory statement of its newly adopted rule, and by failing to file the newly adopted rule within fifteen (15) days of its adoption with the State Records Administrator.

1. NMED filed its *Petition to Amend the Ground and Surface Water Protection Regulations (20.6.2 NMAC)* (“*Petition*”) on May 1, 2017, proposing a new variance rule. AR No. 1.
2. On August 7, 2017, the Commission set a hearing on NMED’s *Petition* for November 14, 2017, and appointed Erin Anderson as Hearing Officer. AR No. 4.
3. AB/GRIP filed a *Motion to Dismiss in Part* on September 29, 2017 regarding NMED’s and industry’s proposed variance rule. AR No. 64. NMED filed a *Response in Opposition to AB/GRIP’s Motion to Dismiss in Part* on October 16, 2017. AR No. 69. LANS filed a *Response in Opposition to AB/GRIP’s Motion to Dismiss in Part* on October 16, 2017. AR No. 68. NMMA filed a *Response in Opposition to AB/GRIP’s Motion to Dismiss in Part* on October 16, 2017. AR No. 70. AB/GRIP filed a *Consolidated Reply to NMED, LANS and NMMA Responses* on October 24, 2017. AR No. 73.

4. The Commission denied AB/GRIP's *Motion to Dismiss in Part* on November 14, 2017, and then held a four-day hearing on NMED's *Petition* on November 14, 2017 through November 17, 2017. The Commission issued its written decision denying AB/GRIP's *Motion to Dismiss in Part* on November 21, 2017. AR No. 94.
5. 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.
6. During the Commission's rulemaking hearing on NMED's and industry's proposed variance rule, one witness presented technical testimony on behalf of NMED (Kurt Vollbrecht); one witness presented technical testimony on behalf of AB/GRIP (Kathy J. Martin); one witness presented technical testimony on behalf of NMMA (Michael Neumann); William C. Olson presented technical testimony on his own behalf; and one witness presented non-technical testimony on behalf of the Dairy industry (Eric Palla). **[11-14-17 I Tr. 69-206]; [11-15-17 II Tr. 212-356].**
7. The Commission began deliberations on NMED's *Petition* on July 10, 2018, continuing through July 11, 2018. **[7-10-18 I Tr.].**

8. At the July 10, 2018 meeting, the Commission decided to adopt NMED's and industry's new variance rule, removing the current five-year limit on variances and the mandatory public hearing held every five years for variance renewals and modifications. **[7-10-18 I Tr. 49:18-21]**.
9. The Commission has not yet issued public notice of its newly adopted variance rule.
10. The Commission has not yet issued a concise explanatory statement of its decision adopting a new variance rule.
11. The Commission has not yet filed the newly adopted variance rule with the State Records Administrator. *See generally, New Mexico Register*, Volume XXIX, Issues 15 (August 14, 2018) and 16 (August 28, 2018).
12. The Commission's rulemaking procedures require the Commission to provide public notice of its action adopting a new variance rule, along with a concise explanatory statement. 20.1.6.307(A) NMAC; 20.1.6.306(E) NMAC.
13. The New Mexico State Rules Act requires the Commission to file the newly adopted variance rule within fifteen (15) days of its adoption

with the State Records Administrator. NMSA 1978, Section 14-4-5(D) (2017).

B. Facts material to whether the newly adopted variance rule violates the Water Quality Act.

1. Facts material to whether the Commission’s newly adopted variance rule, on its face, violates the Water Quality Act’s purpose to prevent and abate pollution of ground water.

- a. The Petitioner, NMED, proposed a new variance rule, which would remove the Commission’s current five-year limit on variances under Section 20.6.2.1210 NMAC and allow variances to be issued “for the life of a facility”. Vollbrecht Testimony, [11-14-17 I Tr. 73:21-24].
- b. Industry groups supported NMED’s proposed removal of the five-year variance limit. Dairy industry’s *Notice of Intent to Present Technical Testimony*, p. 3 (September 11, 2017) (AR No. 49); NMMA’s *Notice of Intent to Present Technical Testimony*, p. 5 (September 11, 2017) (AR No. 54).
- c. NMED 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 NMED’s “Hit List”, attached as Exhibit C of AB/GRIP’s *Motion to Dismiss in Part* (September 29, 2017) (AR No. 64); NMED’s *Notice of Intent to*

Present Technical Testimony, Exhibit 13, p. 14: 11-12 (September 11, 2017) (AR No. 53); and NMED's *Response to AB/GRIP's Motion to Dismiss in Part*, p. 6 (October 16, 2017) (AR No. 69).

- d. When deliberating whether to maintain the existing water quality standards for chromium, fluoride, and total xylenes, Commissioner Hutchinson stated that regulated facilities could utilize the Commission's newly adopted variance rule to avoid compliance with these particular standards. **[11-14-17 I Tr. 62:12-25; 63:1]**
- e. 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. §§ 74-6-1 through 74-6-17.
- f. The Commission's imposition of a five-year variance limit for the past thirty-six (36) years is consistent with 1) the purpose of the Act; 2) the purpose of a variance, 3) the Act's requirement that abatement be effected within a reasonable period of time, 4) the link between variances and discharge permits, and 5) the Act's expressly mandated five-year limit for discharge permits. 1-210(D)(9) NMAC (1981) (now 20.6.2.1210.C NMAC); § 74-6-5(I); § 74-6-4(H); 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, pp. 7-9 (October 24, 2017) (AR No. 73).

- g. NMED, in support of its proposed variance rule, which the Commission adopted on July 10, 2018, also argued that variances “for the life of a facility” were necessary 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”. NMED’s expert witness, Vollbrecht Testimony [11-14-17 I Tr. 75:13-20]; Appellants’ expert witness, Martin Testimony [11-14-17 I Tr. 195-199].
- h. However, § 74-6-4(H) makes clear that this was not the Legislature’s intent for the variance mechanism. § 74-6-4(H).
- i. NMED’s expert witness conceded that the Department’s proposed regulatory change is unnecessary for variances from the Dairy Rule’s prescriptive requirements (NMED’s expert witness, Vollbrecht Testimony, [11-14-17 I Tr. 93:3-8]), and that the Copper Rule could be amended to allow for variances from its prescriptive

requirements in lieu of amending 20.6.2.1210 NMAC. [Id. at 93:23-25, 94:1-12].

2. Facts material to whether the Commission’s newly adopted variance rule, on its face, violates the Water Quality Act’s requirement to conduct abatement within a “reasonable period of time”.

- a. The Commission first promulgated implementing regulations for the Water Quality Act in 1967. NMSA 1978, §§ 74-6-1 through 74-6-17 (as amended through 2009).
- b. In 1968, Regulation No. 5, “Procedure for Requesting a Variance,” was promulgated, providing the variance mechanism to regulated entities. New Mexico Commission of Public Records; New Mexico State Records Center and Archives series 5; Administrative Law Division Formerly Known as Rules Division subseries 5.1; Agency Historic Rules Collection sub-series 5.1.177; Rules – Water Quality Control Commission, Box no. 267.
- c. A few years later, the Commission amended Regulation No. 5 to limit variances to one year. New Mexico Commission of Public Records; New Mexico State Records Center and Archives series 5; Administrative Law Division Formerly Known as Rules Division subseries 5.1; Agency Historic Rules Collection sub-series 5.1.177; Rules – Water Quality Control Commission, Box no. 267.

- d. 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); New Mexico Commission of Public Records; New Mexico State Records Center and Archives series 5; Administrative Law Division Formerly Known as Rules Division subseries 5.1; Agency Historic Rules Collection sub-series 5.1.177; Rules – Water Quality Control Commission, Box no. 267.
- e. The current five-year variance limit is consistent with the purpose of a variance, 2) the Act’s requirement that abatement be effected within a reasonable period of time, 3) the link between a variance and a discharge permit, and 4) the Act’s expressly mandated five-year limit for discharge permits. *Id.* (now 20.6.2.1210.C NMAC); § 74-6-4(H); § 74-6-5(I).
- f. 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).
- g. Variances therefore provide a temporary relief mechanism for regulated entities to avoid strict compliance with regulations. *Id.*

- h. Ground water pollution generally occurs through a discharge of water contaminants to ground water pursuant to a discharge permit. Appellants' expert witness, Martin Testimony, **[11-14-17 I Tr. 195:4-19]**; AB/GRIP's *Motion to Dismiss in Part*, p. 7 (September 29, 2017) (AR No. 64).
- i. Ground water pollution may also occur by an unauthorized discharge of water contaminants to ground water. *Id.*
- j. However, NMED 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. NMED's expert witness, Vollbrecht Testimony, **[11-14-17 I Tr. 70-128]**.
- k. Because a discharge permit is limited to five years, it is reasonable that a variance from Commission regulations applicable to a regulated facility through its discharge permit (such as ground water quality standards) would be for the duration of the discharge permit. § 74-6-5(I).
- l. AB/GRIP 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. Appellants' expert witness, Martin Rebuttal Testimony, pp. 4-6, referencing Exhibits F1, F2 and F5 (AR No. 77).

- m. Evidence submitted by AB/GRIP demonstrates that the legal pathway for a variance is a discharge permit. *Id.*
- n. The Commission has historically required NMED to incorporate conditions and requirements of an approved variance into the associated discharge permit. *Id.* at p. 5:16-21; p. 6:1-3, referencing Exhibit F5.
- o. 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." 20.6.7.10.H NMAC.
- p. The discharge permit then becomes an enforcement mechanism for any violation of the variance conditions and requirements. *Id.*; Appellants' expert witness, Martin Testimony, **[11-14-17 I Tr. 190:8-20]**.
- q. NMED's expert witness failed to provide in his direct and rebuttal written testimony and exhibits, as well as in his 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. NMED's expert witness, Vollbrecht Testimony, **[11-14-17 I Tr. 70-128]**.

- r. The Commission has never been asked to grant a variance for a facility or entity that did not already have a discharge permit. Appellants' expert witness, Martin Rebuttal Testimony, p. 5: 9-15, referencing Exhibit E; Appellants' expert witness, Martin Testimony, **[11-14-17 I Tr. 193:21-25, 194:1-19]**.
- s. AB/GRIP's expert 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." Appellants' expert witness, Martin Rebuttal Testimony, p. 5, footnote 4.
- t. NMED's expert witness, however, 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 § 74-6-4(H) and 20.6.2.1210 NMAC.
- u. Therefore, a situation where a variance is not associated with a discharge permit remains purely hypothetical. NMED's expert witness, Vollbrecht Testimony, **[11-14-17 I Tr. 70-128]**.

3. Facts material to whether the Commission's newly adopted variance rule, on its face, violates the Water Quality Act's public participation requirements.

- a. The Act provides that any type of variance cannot be granted without the holding of a public hearing. § 74-6-4(H).
- b. Therefore, when a facility submits a petition for an initial variance, renewal, extension, continuance, or variance modification, a public hearing must be held. *Id.*; Appellants' expert witness, Martin Testimony, [11-14-17 I Tr. 248:14-18].
- c. The Commission's newly adopted variance rule removes the five-year variance limit and the mandatory public hearing for variance renewals, extensions, continuances or modifications, and instead provides that NMED will conduct an internal administrative review of a variance issued for the "life of a facility" every five years to determine compliance and continuance of the variance. NMED's expert witness, Vollbrecht Testimony, [11-14-17 I Tr. 73:21-25, 74:1-9]; Commission's newly adopted variance rule, 20.6.2.1210.E NMAC (*see* Appellants' *Notice of Appeal*, Exhibit B).

- d. The Commission's newly adopted variance rule does not require a mandatory public hearing be held on the five-year variance compliance report. *Id.*
- e. The Commission's proposed five-year variance internal review would be the functional equivalent of a variance renewal, continuance, extension, or modification, and therefore a public hearing must be held on any decisions to continue, renew or extend a variance. *Id.*
- f. Under the Act and its current 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 on variance issuance, renewals, extensions, continuances and modifications. § 74-6-4(H); Section 20.6.2.1210.B NMAC.
- g. The current five-year variance limit results in an automatic public hearing every five years, without the public having to request a public hearing. *Id.*
- h. Under the Commission's new variance rule, a new burden would be placed on the public to hold variance petitioners accountable. Appellants' expert witness, Martin Testimony, [11-14-17 I Tr. 185:2-18]; [11-15-17 II Tr. 310:21-25, 311:1-4]; Commission's

newly adopted variance rule, 20.6.2.1210.E NMAC (*see* Appellants' *Notice of Appeal*, Exhibit B).

- i. The Commission's new variance rule would have the NMED 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." [11-15-17 I Tr. 303:10].
- j. The Commission's new rule, therefore, would place a new burden on the public to evaluate the technical completeness of a five-year variance compliance report. *Id.*; Commission's newly adopted variance rule, 20.6.2.1210.E NMAC (*see* Appellants' *Notice of Appeal*, Exhibit B).
- k. 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 the Commission's new variance rule, automatic public hearings would become discretionary. NMED's expert witness, Vollbrecht Testimony, [11-14-17 I Tr. 94:16-19, 94:23-25, 95:1, 97:13-19]; Commission's

newly adopted variance rule, 20.6.2.1210.E NMAC (*see Appellants' Notice of Appeal*, Exhibit B).

- l. The Commission's new variance rule 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. Commission's newly adopted variance rule, 20.6.2.1210.E NMAC (*see Appellants' Notice of Appeal*, Exhibit B).
- m. For example, under the Commission's new variance rule, 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. NMED's expert witness, Vollbrecht Testimony, [11-14-17 I Tr. 100:2-11]; Commission's newly adopted variance rule, 20.6.2.1210.E NMAC (*see Appellants' Notice of Appeal*, Exhibit B).
- n. Under the Commission's new variance rule, a variance holder would be given unlimited discretion to determine what it considers to be a new fact or changed circumstance. NMED's expert witness, Vollbrecht Testimony, [11-14-2017 I Tr. 99:18-25, 100:1-

11]; Commission's newly adopted variance rule, 20.6.2.1210.E NMAC (*see* Appellants' *Notice of Appeal*, Exhibit B).

- o. Under the Commission's new variance rule, NMED would not be determining what information in the proposed variance compliance report constitutes a new fact or changed circumstance. *Id*; Commissioner Dunbar statement, [11-15-17 II Tr. 303:10].
- p. 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. Appellants' expert witness, Martin Testimony, [11-14-17 I Tr. 185:19-25, 191:21-25, 192:1-11]; NMED's expert witness, Vollbrecht Testimony, [11-14-17 I Tr. 99:2-17].
- q. 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*.
- r. Under the Commission's new variance rule, 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, [11-14-17 I Tr. 251:2-22, 252:16-21].

- s. By giving the variance holder unfettered discretion regarding information to be included in the variance compliance report, the Commission would be enabling industry's efforts to preclude public participation and monitoring. Appellants' expert witness, Martin Testimony, [11-14-17 I Tr. 261:19-25, 262:1-4]; NMED's expert witness, Vollbrecht Testimony, [11-14-17 I Tr. 100:2-16].
 - t. The Commission's new variance rule would also undermine NMED's ability to determine whether to request a public hearing on the variance compliance report. [Id. at p. 97: 20-25, p. 98: 1-8].
 - u. The Commission's new variance rule would also undermine its ability to determine whether to grant NMED's or a member of the public's request for a variance compliance hearing. [Id].
- 4. Facts material to whether the Commission's newly adopted variance rule, on its face, exceeds the Commission's authority under the Water Quality Act.**
- a. Under the Commission's new variance rule, NMED would be reviewing and approving the proposed five-year variance compliance report – the functional equivalent of a variance

continuance, renewal, extension, or modification decision – and not the Commission. Commission’s newly adopted variance rule, 20.6.2.1210.E NMAC (*see* Appellants’ *Notice of Appeal*, Exhibit B).

- b. § 74-6-4(H) makes clear that only the Commission has review and approval authority for variance issuance, extension, continuance, renewal, or modification. *Compare* § 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).
- c. The Act does not authorize the Commission to delegate its review and approval authority for any variances to NMED. §§ 74-6-4(F), (H).

C. Facts material to whether the Commission’s newly adopted rule is not supported by substantial evidence in the record.

- 1. NMED failed to provide any evidence in support of its proposed removal of the current five-year variance limit. NMED’s expert witness, Vollbrecht Testimony, [11-14-17 I Tr. 70-128].
- 2. NMED did not carry its burden as Petitioner in the rulemaking

proceeding. **[Id.]**

3. 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.” **[11-14-17 I Tr. 23:12-14].**

4. NMED’s expert 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.

NMED’s expert witness, Vollbrecht Testimony, **[11-14-17 I Tr. 74:22-25, 75:1-17].**

5. NMED’s expert witness 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) that the time and effort associated with a variance hearing specific to

variance requests from the prescriptive requirements of the Dairy Rule under 20.6.6.18 NMAC is a burden on the Commission, the entity requesting the variance and the Department. NMED's expert witness, Vollbrecht Testimony, [11-14-17 I Tr. 70-128].

6. NMED's witness 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 variance rule, but the Department's expert witness failed to do so. [Id.]; see generally, NMED Notice of Intent to Present Technical Testimony (AR No. 53), NMED Notice of Intent to Present Rebuttal Testimony (AR No. 81).
7. NMED's expert witness'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. NMED's expert witness, Vollbrecht Testimony, [11-14-17 I Tr. 93:3-8]; 20.6.6.18 NMAC.
8. 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. 20.6.6.18 NMAC.

9. NMED's expert witness conceded that the Department's proposed regulatory change is unnecessary for variances from the Dairy Rule's prescriptive requirements (NMED's expert witness, Volbrecht Testimony, [11-14-17 I Tr. 93:3-8]), and that the Copper Rule could be amended to allow for variances from its prescriptive requirements in lieu of amending 20.6.2.1210 NMAC. **[Id. at p. 93:23-25, p. 94:1-12].**
10. 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. Dairy industry's expert witness, Palla Testimony, [11-14-17 I Tr. 134-161].
11. The dairy industry supported NMED's proposed variance rule amendments and 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* (AR No. 49) and *Notice of Intent to Present Rebuttal Testimony* (AR No. 78).
12. However, the dairy industry's expert witness also failed to present any substantial evidence in support of his 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.*; Dairy

industry's expert witness, Palla Testimony, **[11-14-17 I Tr. 134-168]**.

13. Like NMED's expert witness, the dairy industry's expert witness could have provided a cost and time analysis of the current and proposed rule to demonstrate his conclusions, yet he failed to do so. *See generally*, dairy industry's *Notice of Intent to Present Technical Testimony* (AR No. 49) and *Notice of Intent to Present Rebuttal Testimony* (AR No. 78); Dairy industry's expert witness, Palla Testimony, **[11-14-17 I Tr. 134-168]**.
14. Like NMED's expert witness, Mr. Palla conceded that the Department's proposed regulatory change is unnecessary for variances from the Dairy Rule's prescriptive requirements. Dairy industry's expert witness, Palla Testimony, **[11-14-17 I Tr. 149:23-25, 150:1-12, 151:5-12]**.
15. The New Mexico Mining Association ("NMMA" or "mining industry") presented Michael Neumann as its expert witness on the proposed variance rule at the hearing. Neumann Testimony, **[11-15-17 II Tr. 329-334]**.
16. The mining industry's expert witness also supported NMED's proposed removal of the five-year variance limit and 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* (AR No. 54) and *Notice of Intent to Present Rebuttal Testimony* (AR No. 82).

17. The mining industry's expert witness also failed to present any substantial evidence in support of his conclusion that the current variance rule is burdensome on the mining industry and that NMED's proposal is necessary for the mining industry. *Id.*; Mining industry's expert witness, Neumann Testimony, [11-15-17 II Tr. 329-334].

18. Like NMED's expert witness, the mining industry's expert witness could have provided a cost and time analysis of the current and proposed rule to demonstrate his conclusions, yet he failed to do so. [Id].

IV. Statement of Issues and Authorities

1. Whether the Commission erred by failing to provide public notice of the Commission's action adopting a new variance rule?

Authorities:

The Water Quality Act requires the Commission to provide notice of any commission action. NMSA 1978, Section 74-6-6(D) (1993).

The State Rules Act requires the Commission to provide to the public a concise explanatory statement regarding the adopted rule. NMSA 1978, Section 14-4-5.5 (2017).

The Commission's rulemaking procedures implement both § 74-6-6(D) and § 14-4-5.5 by requiring the Commission to provide public notice and a concise explanatory statement of adopted regulations. 20.1.6.307(A) NMAC; 20.1.6.306(E) NMAC.

The Appellants are not aware of any New Mexico authority indicating that administrative agencies do not need to provide public notice of its decision to adopt a new regulation.

2. Whether the Commission erred by failing to provide a concise explanatory statement of its July 10, 2018 decision to adopt a new variance rule?

Authorities:

New Mexico courts have held on several occasions that administrative agencies must explain the reasons for their decisions so that reviewing courts may be able to conduct a meaningful review. Atlixco Coalition v. Maggiore, 1998-NMCA-134, ¶ 19; 125 N.M. 786, 792. The New Mexico Supreme Court has stated, "Although elaborate findings are not necessary...administrative findings should be sufficiently extensive to show ...the basis of the commission's order." Fasken v. Oil Conservation Commission, 1975-NMSC-009, ¶ 8, 87 N.M. 292, 294. (*Internal citations omitted.*) Additionally, this Court, in Roswell v. N.M. Water Quality Control Comm'n, reversed the adoption of regulations by the WQCC

because the Commission had not indicated why it made the decision at issue. 1972-NMCA-160, ¶ 14; 84 N.M. 561, 565.

The Appellants are not aware of any New Mexico authority indicating that administrative agencies do not need to provide a concise explanatory statement of its decision to adopt a new regulation.

3. Whether the Commission erred by failing to file its newly adopted variance rule within fifteen (15) days of its adoption with the State Records Administrator?

Authorities:

The State Rules Act requires the Commission to file a newly adopted rule within fifteen (15) days of the rule's adoption with the State Records Administrator. NMSA 1978, Section 14-4-5(D) (2017).

The Commission's rulemaking procedures expressly state that an adopted rule "shall not take effect *unless* within 15 days of adoption of the rule, the commission delivers the final rule to the state records administrator, accompanied by a concise explanatory statement..." 20.1.6.307(B) NMAC.

The Appellants are not aware of any New Mexico authority indicating that an agency rule is not required to be filed with the State Records Administrator within fifteen (15) days of its adoption in order to be valid.

4. Whether the Commission’s new variance rule, on its face, violates the Water Quality Act’s purpose to prevent and abate ground water pollution by allowing regulated facilities to exceed water quality standards and avoid abatement of pollution in perpetuity?

Authorities:

The objective of the Water Quality 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.

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”). “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-0 17, ¶ 10, 125 N.M. 302.

Furthermore, the Commission’s rulemaking authority is limited by NMSA 1978, Section 74-6-12 (1999), 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.” *Id.*

Legislative intent is to be determined primarily by the language of the statute, and words will be given their plain and ordinary meaning unless a different

intent is clearly indicated. When no contrary intent is indicated and the words are free from ambiguity, no other means of interpretation should be resorted to and there is no room for construction. Foster v. Board of Dentistry, 1986-NMSC-009, ¶ 7, 103 N.M. 776, 777 (internal citation omitted).

The Appellants are not aware of any New Mexico authority indicating that the Commission may promulgate rules that would violate the Water Quality Act.

5. Whether the Commission’s new variance rule, on its face, violates the Water Quality Act’s requirement that ground water pollution be abated within a “reasonable period of time”?

Authorities:

Legislative intent is to be determined primarily by the language of the statute, and words will be given their plain and ordinary meaning unless a different intent is clearly indicated. When no contrary intent is indicated and the words are free from ambiguity, no other means of interpretation should be resorted to and there is no room for construction. Foster v. Board of Dentistry, 1986-NMSC-009, ¶ 7, 103 N.M. 776, 777 (internal citation omitted).

The Legislature 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.” § 74-6-4(H).

Additionally, variances are linked with discharge permits. 1-210(D)(9) NMAC (now 20.6.2.1210.C NMAC); 20.6.7.10.H NMAC.

The Water Quality Act expressly limits discharge permits to five year periods. § 74-6-5(I).

The rules of statutory construction require §§ 74-6-5(I) and 74-6-4(H) to be 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. Therefore, variances must be limited to five years to be consistent with discharge permit limits and to effectuate the Act's purpose of preventing and abating ground water pollution within a reasonable period of time.

The Appellants are not aware of any New Mexico authority indicating that sections of a statute are not to be interpreted in harmony with each other, as a whole, in order to effectuate the statute's purpose.

The Appellants are also not aware of any New Mexico authority indicating that variances may be issued for periods longer than the period of time statutorily mandated for discharge permits.

6. Whether the Commission’s new variance rule, on its face, violates the Water Quality Act’s public participation requirements?

Authorities:

Legislative intent is to be determined primarily by the language of the statute, and words will be given their plain and ordinary meaning unless a different intent is clearly indicated. When no contrary intent is indicated and the words are free from ambiguity, no other means of interpretation should be resorted to and there is no room for construction. Foster v. Board of Dentistry, 1986-NMSC-009, ¶ 7, 103 N.M. 776, 777 (internal citation omitted).

The Water Quality Act requires the Commission to hold a public hearing before “any variance may be granted”, which applies to new variance petitions, variance renewal, extension or continuance petitions, and variance modification petitions. § 74-6-4(H).

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”). “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-017, ¶ 10, 125 N.M. 302.

The statutory requirement of holding a public hearing for variance issuance, renewal, extension, continuance or modification 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. Jones v. Empl. Serv. Div. of Human Serv. Dep’t, 1980-NMSC-120, ¶ 3, 95 N.M. 97, 98.

New Mexico Courts have made clear that agency attempts to chill public participation in agency proceedings will not withstand legal challenge. In re Rhino Env’tl. 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, 2018-NMCA-024, 413 P.3d 877.

The Appellants are not aware of any New Mexico authority indicating that an agency may abrogate statutory requirements or amend statutory requirements through promulgation of regulations.

7. Whether the Commission’s new variance rule, on its face, exceeds the Commission’s authority under the Water Quality Act?

Authorities:

Legislative intent is to be determined primarily by the language of the statute, and words will be given their plain and ordinary meaning unless a different intent is clearly indicated. When no contrary intent is indicated and the words are free from ambiguity, no other means of interpretation should be resorted to and

there is no room for construction. Foster v. Board of Dentistry, 1986-NMSC-009, ¶ 7, 103 N.M. 776, 777 (internal citation omitted).

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”). “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.

§ 74-6-4(H) makes clear that only the Commission has review and approval authority for variance issuance, continuance, extension, renewal, and modification. *Compare* § 74-6-4(H) (which authorizes only the Commission to review and approve any type of variance petition) *with* § 74-6-5(A) (which authorizes the Commission to delegate its review and approval authority of discharge permits to constituent agency NMED).

The Commission cannot engage in an unlawful delegation of authority to a constituent agency. 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.

The Appellants are not aware of any New Mexico authority indicating that an agency may abrogate statutory requirements, amend statutory requirements through promulgation of regulations, promulgate rules that would violate the Water Quality Act, or engage in unlawful delegation of authority to a constituent agency.

8. Whether the Commission's new variance rule is supported by substantial evidence in the record?

Authorities:

This Court, in Tenneco Oil Co. v. N.M. Water Quality Control Comm'n, has provided that agency decisions must be supported by substantial evidence in the record:

For administrative appeals, the substantial evidence rule is supplemented with the whole record standard for judicial review of findings of fact made by administrative agencies. In a whole record review, the review is 'not...limited to those findings most favorable to the agency order.' The reviewing court must also look to evidence that is contrary to the findings and then decide whether, on balance, the agency's decision was supported by substantial evidence. When the agency's decision is supported by substantial evidence the reviewing court does not reweigh evidence to reach a contrary result; however, when the evidence as a whole does not support the agency's decision, that decision cannot be upheld.

1987-NMCA-153, ¶39; 107 N.M. 469, 477. (Internal citations omitted).

The New Mexico Supreme Court further elaborated that, "Substantial evidence means relevant evidence that a reasonable mind would accept as adequate to support a conclusion." Paule v. Santa Fe County Bd. of County Comm'rs, 2005-NMSC-021, ¶ 32; 138 N.M. 82, 92.

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, 1990-NMSC-072, ¶ 12, 110 N.M. 568, 571. Additionally, the Commission's decision may be overturned when the decision is not supported by substantial evidence in the record. §74-6-7(B).

The Appellants are not aware of any New Mexico authority indicating that an agency's decision need not be supported by substantial evidence in the record.

V. How the Issues Were Preserved

The procedural issues identified above, Issues No. 1-3, could not be raised by the Appellants until after the Commission failed to provide public notice and a concise explanatory statement of its decision to adopt a new variance rule, and after the fifteen-day filing requirement with the State Records Administrator had passed.

The substantive issues regarding the new variance rule's violation of the Water Quality Act and the Commission's decision not being supported by substantial evidence in the record, Issues No. 4-8, were raised by Appellants in their pre- and post- hearing filings with the Commission, and at the evidentiary hearing on the proposed variance rule. *AB/GRIP's Statement of Position on*

NMED's Petition to Amend 20.6.2 NMAC, pp. 39-43 (July 27, 2017) (This document has erroneously been excluded from the administrative record); *AB/GRIP's Notice of Errata and Corrected Proposed Changes*, pp. 41-43 (August 8, 2017) (AR No. 38); *AB/GRIP's Motion to Dismiss in Part*, pp. 4-7 (September 29, 2017) (AR No. 64); *AB/GRIP's Consolidated Reply to Responses Filed by the NMED, NMMA, and LANS, LLC on AB/GRIP's Motion to Dismiss in Part*, pp. 7-11 (October 24, 2017) (AR No. 73); *AB/GRIP's Notice of Intent to Present Rebuttal Testimony*, Exhibit A, pp. 1-13, Exhibit E, Exhibit F (October 27, 2017) (AR No. 77); *AB/GRIP's expert witness, Martin Testimony*, [11-14-17 I Tr. 4-66, 173-204]; *AB/GRIP's Closing Argument*, pp. 4-27 (February 16, 2018) (AR No. 99); *AB/GRIP's Proposed Statement of Reasons*, pp. 7-45, 49-69 (February 16, 2018) (AR No. 100).

VI. Standard of Review

The Water Quality Act provides that “[u]pon appeal, the court of appeals shall set aside the Commission’s adoption of a regulation only if it is found to be:

- (1) arbitrary, capricious or an abuse of discretion;
- (2) not supported by substantial evidence in the record; or
- (3) otherwise not in accordance with law.

NMSA 1978, Section 74-6-7(B) (1993).

VII. Recording of the Proceedings

Both the four-day evidentiary hearing held on November 14, 2017 through November 17, 2017 and the July 10, 2018 WQCC deliberations were transcribed by a court reporter.

VIII. Related or Prior Appeals

There are no prior or related appeals.

IX. Appointment of Appellate Counsel

Counsel for the Appellants in this appeal, the New Mexico Environmental Law Center, represented Appellants in the administrative proceeding. There has been no appointment of separate appellate counsel.

Dated: September 10, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of AB/GRIP's Docketing Statement has been sent via U.S. Postal Service First Class Mail, postage pre-paid, and via email, by the undersigned counsel to the following parties and counsel on September 10, 2018:

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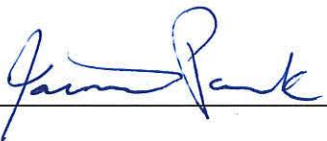
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