

**STATE OF NEW MEXICO
BEFORE THE WATER QUALITY CONTROL COMMISSION**



_____)
In the Matter of:)
)
PROPOSED AMENDMENT)
TO 20.60.2 NMAC (Dairy Rule))
)
_____)

No. WQCC 12-09(R)

**DIGCE’S RESPONSE TO MOTION AND MEMORANDUM OF LAW
FOR RECONSIDERATION AND DISMISSAL OF THE PETITION**

The Dairy Industry Group for a Clean Environment (DIGCE) hereby responds to the Coalition’s motion dated December 7, 2012 for the Commission to reconsider its decision to accept and to set a hearing on DIGCE’s petition to amend the Dairy Rules. As the Commission previously ruled, DIGCE’s petition was filed and accepted under DIGCE’s statutory right to “petition in writing to have the commission adopt, amend or repeal a regulation or water quality standard.” NMSA 1978 § 74-6-6.B. The Coalition’s motion and memorandum of law fail entirely to address this statutory right to petition the Commission for amendment or repeal of a rule. Consequently, the Commission’s prior decision to set a hearing on the petition should stand.

In reviewing and interpreting a statute, a court or, in this instance, the Commission, must consider all parts of a statute as a whole and interpret the statute to give effect to all parts and not to render one part to be meaningless or surplusage. *International Association of Firefighters v. City of Carlsbad*, 2009-NMSA-097, ¶ 11, 147 N.M. 6, 216 P.3d 256 (“we seek to give meaning to all parts of the statute, such that no portion is rendered surplusage or meaningless”). Related statutes are to be read in harmony, where possible. *State v. Smith*, 2004-NMSC-032, ¶ 10, 136 N.M. 372, 98 P.3d 1022.

The Coalition’s legal argument, if accepted by the Commission, could eliminate the right of DIGCE or any other person to petition the Commission for amendment or repeal of the Dairy Rules,

rendering the right to petition the Commission under Section 74-6-6.B meaningless surplusage. This is because under the plain language of NMSA 1978, Section 74-6-4.K, on which the Coalition's argument rests, only the constituent agency, in this case the Environment Department, has the authority to establish an advisory committee. Another person, such as DIGCE, has no ability to convene an advisory committee. Consequently, if the Commission accepted the Coalition's argument that no person may petition the Commission to amend or repeal the Dairy Rules without first having gone through the advisory committee process, and if the Department declined to establish an advisory committee to consider the rule amendment, the Department could effectively veto a proposed rule amendment.

When Section 74-6-4.K was amended in 2009, there was no corresponding amendment of then statutory right of any person to petition the Commission under Section 74-6-6. If the Legislature had intended that its amendment of Section 74-6-4.K should reduce the rights of a person to petition the Commission under Section 74-6-6.B, particularly as to eliminate the right of a person to petition the Commission to amend the dairy rule without being vetoed by the Department, the Legislature should have amended Section 74-6-6, but it did not.

Moreover, there already is precedent for the Commission to consider a petition to amend the Dairy Rules in the absence of formation of an advisory committee and the establishment of a schedule by the Commission as specified in Section 74-6-4.K. In 2011, the Department, DIGCE and the Coalition filed a joint petition to amend the Dairy Rules. No advisory committee was established to consider those amendments and no schedule was established by the Commission. Nevertheless, without objection by any party, including the Coalition, the Commission considered the petition and adopted the amendments to the Dairy Rules. This precedent and a common sense reading of the Water Quality Act as a whole supports the Commission's previous conclusion that Section 74-6-4.K applied to the initial adoption of the Dairy Rules as proposed by the Department,

but does not apply to subsequent petitions to amend the Dairy Rules submitted pursuant to Section 74-6-6.B as proposed in this matter.

The Coalition's motion to reconsider also is untimely. The hearing already has begun, in that both DIGCE and the Coalition already have submitted written direct testimony for the hearing of this matter.

While, admittedly, the Department did not formally establish an advisory committee to address DIGCE's proposed amendments to the Dairy Rules, and the Commission did not set a schedule for the activities as specified in Section 74-6-4.K, DIGCE did seek input on the proposed amendments from the Department and from the Coalition. DIGCE met with the Department beginning in February 2012 to discuss its concerns regarding portions of the Dairy Rules and provided a copy of the proposed amendments to NMED in May 2012. On July 23, 2012, undersigned counsel provided the Coalition's counsel with a copy of the proposed dairy rule amendments and received an acknowledgment of that communication from the Coalition's counsel. A copy of that email exchange is attached as Exhibit A. The Coalition did not respond to DIGCE's invitation for them to discuss or comment on the proposed amendments other than as part of the hearing process.

The Coalition also argues that, somehow, the lack of an advisory committee process does not meet the "statute's requirements for provision of the 'best available scientific information' warranting the proposed changes to the regulations." The Coalition misreads the statute on this point. Section 74-6-4.K adds consideration of the "best available scientific information" along with the other factors that the Commission must consider in making regulations as listed in Section 74-6-4.D. The Commission should consider all of the evidence submitted in the hearing in light of all of the factors in Section 74-6-4.D and Section 74-6-4.K, weigh the evidence in consideration of those factors, and reach a decision regarding the proposed amendments.

For the foregoing reasons, DIGCE respectfully requests that the Commission deny the Coalition's motion and proceed with the hearing on DIGCE's petition.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of this pleading was served via U.S. mail to the following parties this Friday, December 21, 2012:

Ryan Flynn, General Counsel
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Moellenberg, Dalva L.

From: Jon Block <jblock@nmelc.org>
Sent: Monday, July 23, 2012 11:21 AM
To: Moellenberg, Dalva L.
Cc: Trujillo, Anthony J.
Subject: Re:

Hello, Dal:

Hope you and T.J. and families have been having a good summer. Mine has been good. I will pass this onto my clients and hopefully something constructive will come from that process.

Best to you both.

Jon

On 7/23/12 11:16 AM, Moellenberg, Dalva L. wrote:
Jon,

It's been awhile since we spoke--I hope you are having a nice summer.

It's been about a year since we negotiated amendments to the dairy rules, and as permits are being issued, DIGCE has identified some additional proposed rule amendments. Attached is a set of proposed amendments relating to three issues:

1. Elimination of field calibration of flow meters.
2. Alternative backflow prevention devices.
3. Changes to nutrient management plan requirements.

DIGCE intends to file a petition with the WQCC in the near future to initiate a rulemaking process regarding these changes. Based on our prior discussions, we are providing these to you and your clients as a courtesy in advance of the rulemaking process. If you and your clients would like to discuss any of these changes, please let us know.

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