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September 4, 2012

VIA HAND DELIVERY

Felicia Orth
Acting Board Administrator
Water Quality Control Commission
1190 St. Francis Dr., N2153
Santa Fe & nm 87502

Re: Petition to Amend 20.6.6 NMAC (Dairy Rule)

Dear Ms. Orth:

Enclosed please find the original plus 18 copies of the Petition to Amend 20.6.6 NMAC (Dairy Rule) and Request for Hearing. The Dairy Industry Group for a Clean Environment (DIGCE) respectfully requests your acceptance of the enclosed Petition for filing with the Water Quality Control Commission. Also, please provide this office with four endorsed copies of the enclosed Petition.

Should you have any questions, please contact me at your convenience.

Very truly yours,

GALLAGHER & KENNEDY, P.A.

By:



Contessa M. Archuleta

CMA:cma
Enclosure

STATE OF NEW MEXICO
BEFORE THE WATER QUALITY CONTROL COMMISSION



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In the Matter of:))
PROPOSED AMENDMENT))
TO 20.6.6 NMAC (Dairy Rule)))
_____))

No. WQCC 12- 09 (R)

PETITION TO AMEND 20.6.6 NMAC (DAIRY RULE)
AND REQUEST FOR HEARING

Pursuant to the New Mexico Water Quality Act (“WQA”), NMSA 1978, §§ 74-6-1 to 74-6-17 (2009), and Section 301 of the *Guidelines for Water Quality Control Commission Regulation Hearings*, the Dairy Industry Group for a Clean Environment (“DIGCE”) petitions the Commission to amend the Ground Water Protection – Supplemental Permitting Requirements for Dairy Facilities Regulations, 20.6.6 NMAC (Dairy Rule).

DIGCE represents a coalition of dairy industry representatives, including the Dairy Farmers of America, Dairy Producers of New Mexico, and various individual dairy producers, who comprise its Board of Directors. DIGCE participated as the party representing the dairy industry in the original rulemaking proceedings regarding the Dairy Rule and in proceedings held before the Commission in 2011 regarding amendments to the Dairy Rule.

I. SUMMARY OF PROPOSAL

The Dairy Rule was adopted by the Commission in December 2010 and published in the New Mexico Register on January 15, 2011. DIGCE filed an appeal of the rules in the Court of Appeals, and implementation of the Dairy Rule was postponed while the parties to the rulemaking engaged in settlement discussions. Those settlement discussions resulted in a set of

proposed amendments to the Dairy Rule which were adopted by the Commission in November 2011 and became effective on December 31, 2011.

Since the effective date of the Dairy Rule, the New Mexico Environment Department (Department) has been issuing permits under the Dairy Rule, and dairy operators have been submitting the required information and implementing the new monitoring and pollution control measures required by the Dairy Rule. Based on new information and experience regarding implementation of the Dairy Rule, DIGCE has identified some requirements that warrant amendment to the Dairy Rule. In particular, three issues are addressed by the proposed amendments: (1) allowing alternative backflow prevention devices from those specified in the Dairy Rule; (2) eliminating the requirement to conduct field calibration of flow meters; and, (3) modifying the Nutrient Management Plan requirements to focus on ground water protection.

Petitioner provided a copy of the proposed amendments to the Department. The Department has chosen not to sponsor a rulemaking on these amendments but has indicated it does not object to DIGCE filing this Petition. DIGCE anticipates that the Department will respond with its position on the Petition at the appropriate point in time. DIGCE also provided a copy of the proposed rule changes to counsel for the other parties to the prior rulemaking proceedings dealing with the Dairy Rule and has not received a response regarding their position(s).

II. STATEMENT OF REASONS & PROPOSED REGULATORY CHANGES

DIGCE hereby includes the statement of reasons for the regulatory changes within this petition instead of providing this information through a separate attachment. A copy of the proposed regulatory changes, indicating any language proposed to be added or deleted, is included as Attachment A.

DIGCE proposed the regulatory changes identified in Attachment A for the reasons indicated below. DIGCE's reasons for the regulatory changes in Attachment A will be more fully supported by testimony to be submitted as part of the hearing process.

A. Reasons for Rule Changes dealing with Backflow Prevention Devices

The dairy rule requires dairies to utilize backflow prevention devices to prevent water being land applied through an irrigation system from accidentally flowing down an irrigation well connected to the irrigation system, which can occur particularly when a pumping well is shut off. The Dairy Rule allows only two types of backflow prevention devices without a variance: air gaps and reduced pressure principle devices.

Many existing dairies have installed different types of backflow prevention devices that are commonly referred to as "chemigation valves." Chemigation valves are designed to prevent pesticides and herbicides applied through irrigation systems from flowing back down irrigation wells. DIGCE proposes to amend the Dairy Rule to allow for the use of chemigation valves, as specifically described in the proposed rule language set forth in Attachment A, for backflow prevention.

In support of the rule amendment to backflow prevention devices, DIGCE will present evidence that: (1) chemigation valves are generally accepted within the agricultural industry as effective backflow prevention devices; (2) requiring the use of air gaps for backflow prevention would require costly changes to existing irrigation and pipeline systems that are designed and constructed for use with chemigation valves; and, (3) reduced pressure principle devices, allowed by the Dairy Rule as an alternative to air gaps, are designed for municipal water systems and are unsuitable for use within the dairy industry, and it would be unreasonably costly to replace

existing and effective chemigation valves. Without a rule amendment, numerous dairy operators are likely to seek variances from the dairy rule requirements for backflow prevention devices.

B. Reasons for Rule Changes dealing with Field Calibration of Flow Meters

The Dairy Rule currently requires the use of flow meters to measure certain wastewater and water flows and requires initial and annual field calibration of those flow meters along with recordkeeping and reporting of the field calibrations. DIGCE is not proposing to eliminate the rule requirements for flow meters.

Nevertheless, DIGCE will present evidence that a rule amendment is warranted to eliminate the field calibration requirement because most flow meter manufacturers conduct factory calibrations of their flow meters and do not specify any means for field calibration of the flow meters, and it has been difficult to identify practicable, safe and reliable methods of field calibration. Moreover, based on the experience of dairy operators and consultants dealing with flow meters, broken flow meters can be readily identified by simple inspections or observations of unexplained variations in flow meter readings.

C. Reasons for Rule Changes dealing with Nutrient Management Plans

The Dairy Rule requires that dairies prepare and follow nutrient management plans consistent with certain guidance issued by the Natural Resource Conservation Service (NRCS), including “comprehensive nutrient management plans” as defined by that guidance. Comprehensive Nutrient Management Plans are required for various purposes unrelated to the dairy rule and require extensive information that is not related to or necessary for ground water protection. Moreover, DIGCE understands that the NRCS is considering changes to its existing guidance.

Consequently, DIGCE proposes to change the portion of the Dairy Rule regarding nutrient management plans by eliminating the reference to “comprehensive nutrient management plans” and focusing on the information and planning requirements that are specifically related to ground water protection. As a result of the proposed rule changes set forth in Attachment A, the Dairy Rule still would require a nutrient management plan containing those components related to ground water protection, consistent with other detailed requirements that would remain in the Dairy Rule.

DIGCE also proposes to eliminate the dual requirement for certification of a nutrient management plan by both a CPAg or CCA and a person certified by the NRCS as a nutrient management planner. The reasons for this change are that: (1) any of the individuals, CPAg’s, CCA’s or NRCS certified nutrient management planners should be qualified to prepare and certify a plan; (2) dual certification imposes an undue cost on permittees; and, (3) there is limited capacity and availability of these professionals.

III. REQUEST FOR HEARING

Petitioner requests that the Commission schedule a rulemaking hearing to consider these proposed amendments as soon as possible and that the Commission appoint a hearing officer to conduct this rulemaking hearing. Upon appointment of a hearing officer, DIGCE requests the Commission grant the hearing officer authority to set a schedule for submission of written direct testimony and responses prior to the hearing. It is anticipated that the rulemaking hearing will take approximately four (4) hours. DIGCE reserves the right to supplement the statement of reasons with additional reasons in support of the proposed regulatory changes and to change the language set forth in Attachment A.

In order to avoid the need for dairies that currently have permit deadlines to install new backflow prevention, conduct field calibration of flow meters, and submit Nutrient Management Plans under the Dairy Rule, Petitioner has requested that the Department suspend enforcement of deadlines for actions that may be affected by the proposed rule amendments pending the Commission's consideration of this Petition. Suspension of enforcement pending the Commission's consideration of this Petition also will avoid the potential need for permittees to request variances from these requirements, saving substantial commitments of resources by permittees, the Department and the Commission.

Respectfully submitted,

DAIRY INDUSTRY GROUP FOR A CLEAN
ENVIRONMENT, INC



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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Petition to Amend 20.6.6 NMAC (Dairy Rule) and Request for Hearing was served on the following parties this Tuesday, September 04, 2012:

Felicia Orth
Acting Board Administrator
NMED Boards and Commissions
1190 St. Francis Dr., N2153
Santa Fe, NM 87502

Misty Braswell
Assistant General Counsel
Office of General Counsel
New Mexico Environment Department
1190 St. Francis Drive
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New Mexico Environmental Law Center
1405 Luisa St. #5
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Dalva L. Moellenberg, Esq.

ATTACHMENT A – PROPOSED REGULATORY CHANGES

**TITLE 20 ENVIRONMENTAL PROTECTION
CHAPTER 6 WATER QUALITY
PART 6 GROUND WATER PROTECTION – SUPPLEMENTAL
PERMITTING REQUIREMENTS FOR DAIRY FACILITIES**

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20.6.6.20 OPERATIONAL REQUIREMENTS FOR ALL DAIRY FACILITIES:

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J. Flow meter installation. A permittee shall employ a flow metering system that uses flow measurement devices (flow meters) to measure the volume of wastewater discharged at the dairy facility. Flow meters shall be installed in accordance with the plans submitted with the application for a new, renewed or modified discharge permit, or those submitted after issuance of a discharge permit to achieve compliance with the dairy rule, pursuant to this section, Subsection C of 20.6.6.17 NMAC, and Subsections G and H of 20.6.6.21 NMAC. Flow meters shall be physically and permanently labeled with the discharge permit number, meter identification nomenclature as specified in a discharge permit, and the month and year of meter installation. All flow meters shall be calibrated in accordance with the manufacturer’s requirements prior to installation or reinstallation following repair. The permittee shall maintain copies of the manufacturer’s certificate of calibration and the manufacturer’s recommended maintenance schedule. Confirmation of installation shall include a description of the device type, manufacturer, meter identification, location, record drawings, and ~~the results of the initial field~~ a copy of the manufacturer’s certificate of calibration and a copy of the manufacturer’s recommended maintenance schedule completed pursuant to Subsection E of 20.6.6.24 NMAC.

(1) An applicant or permittee for a new dairy facility shall install flow meters and submit confirmation of flow meter installation to the department before discharging at the dairy facility.

(2) An applicant or permittee for an existing dairy facility shall install flow meters within 150 days of the effective date of the discharge permit and submit confirmation of flow meter installation to the department within 180 days of the effective date of the discharge permit.

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M. Authorized use of existing flow meters. An applicant or permittee proposing to use an existing flow meter(s) shall submit documentation demonstrating that the existing flow meter(s) is installed consistent with this section, and Subsections G and H of 20.6.6.21 NMAC, as appropriate. The proposal shall be submitted with an application for a new, renewed and modified discharge permit and shall include the following documentation.

(1) The location of each existing flow meter indicated on the scaled map required by Subsection U of this section and the identification of the wastewater discharge, or wastewater or stormwater application it is intended to measure.

(2) A copy of the record drawings or manufacturer plans and technical specifications specific to each existing flow meter, if available.

~~(3) A field calibration report for each existing flow meter, completed pursuant to Subsection E of 20.6.6.24 NMAC.~~

O. Flow meter inspection and maintenance. A permittee shall visually inspect flow meters on a weekly basis for evidence of malfunction. If a visual inspection indicates a flow meter is not functioning to measure flow, the permittee shall initiate repair or replacement of the meter within 30 seven days of discovery. The repaired or replaced flow meter shall be installed and calibrated pursuant to ~~the dairy rules~~ subsection J of this section.

(1) For repaired meters, the permittee shall submit a report to the department with the next quarterly monitoring report following the repair that includes a description of the malfunction; a statement verifying the repair, and a copy of the manufacturer's or repairer's certificate of calibration; ~~and a flow meter field calibration report completed pursuant to Subsection E of 20.6.6.24 NMAC.~~

(2) For replacement meters, the permittee shall submit a report to the department with the next quarterly monitoring report following the replacement that includes plans for the device pursuant to Subsection C of 20.6.6.17 NMAC, a copy of the manufacturer's certificate of calibration, and a copy of the manufacturer's recommended maintenance schedule, ~~and a flow meter field calibration report completed pursuant to Subsection E of 20.6.6.24 NMAC.~~

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[20.6.6.20 NMAC - N, 01/31/2011; A, 12/31/2011]

20.6.6.21 ADDITIONAL OPERATIONAL REQUIREMENTS FOR DAIRY FACILITIES WITH A LAND APPLICATION AREA:

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I. Nutrient management plan. Nutrients and other constituents required to be monitored under section 20.6.6.25.C and present in wastewater and stormwater shall be applied to irrigated cropland under cultivation in accordance with the requirements of a nutrient management plan (NMP) submitted to the department with the application for a new, renewed, or modified discharge permit. The NMP shall provide for development of a nutrient budget for nitrogen on an annual basis that accounts for the amount of nitrogen from all combined nitrogen sources, including but not limited to wastewater, stormwater, manure solids, composted material, irrigation water and other additional fertilizer(s), along with residual soil nitrogen and nitrogen credits from leguminous crops and that considers estimated and measured nitrogen removal by harvested crops and other losses, considering the monitoring data required to be collected under section 20.6.6.25 NMAC. The NMP shall describe how planned total nitrogen application rates shall be determined each year based upon realistic yield goals for the planned crops. The information used to set the crop yield goals shall be identified in the NMP. The NMP shall address how nitrogen application rates will be adjusted based upon the results of soil tests required by section 20.6.6.25, subsections K and L, consistent with applicable Natural Resource Conservation Service guidance for normal, high and excessive soil nitrogen levels. The NMP

shall specify the maximum application rates for wastewater applied through irrigation so as not to exceed the soil intake/infiltration rate. shall be applied toThe application of nitrogen to each field within the land application area shall be in accordance with the NMP, and any departures from the NMP due to growing conditions or other factors shall be addressed in the update to the NMP for the following year. ~~The NMP shall be developed through utilization of the U.S. department of agriculture natural resources conservation service (USDA NRCS) national comprehensive nutrient management plan development templates as adopted by the New Mexico office of the USDA NRCS and in accordance with the USDA NRCS *conservation practice standard for New Mexico, nutrient management code 590.*~~ The NMP shall be developed, signed and dated annually by an individual certified by the American society of agronomy as a certified crop advisor (CCA) or certified professional agronomist (CPAg) and by an individual certified by the New Mexico office of the USDA NRCS as a nutrient management planner. Plant material and soil sampling protocols in the NMP shall be, at a minimum, equivalent to the requirements of Subsections I, K and L of 20.6.6.25 NMAC. The NMP shall identify the method(s) of crop removal to be employed. The NMP shall be developed for the term of the discharge permit; and updated annually, and implemented pursuant to the dairy rule. The NMP shall be developed, signed and dated annually by an individual certified by the American society of agronomy as a certified crop advisor (CCA) or certified professional agronomist (CPAg) or by an individual certified by the New Mexico office of the USDA-NRCS as a nutrient management planner. The permittee may elect to submit an NMP meeting the requirements of this subsection that is incorporated into a broader plan, such as a comprehensive nutrient management plan or a nutrient management plan prepared to meet the requirements of a permit issued by EPA, in which case only the portions of such plan required by this subsection and section 20.6.6.25 NMAC shall be considered for purposes of the dairy rule. For a renewed permit where the NMP was not submitted in an application, The permittee shall submit the initial NMP by May 1 of the first year the permit is in effect, and the permittee shall submit annual updates to the NMP to the department in the monitoring reports due by May 1 of each year.

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M. Backflow prevention. A permittee shall protect all water wells used within the land application distribution system from contamination by wastewater or stormwater backflow by installing and maintaining backflow prevention methods or devices. Backflow prevention shall be achieved by a total disconnect (physical air gap separation of at least two times the pipe diameter or complete piping separation when wastewater is being pumped) or by the installation of, at a minimum, a reduced pressure principal backflow prevention assembly (RP) air/vacuum relief valve and a low pressure drain valve located immediately upstream of a check valve between the fresh irrigation water supply discharge head of the well pump and wastewater and stormwater delivery systems.

(1) A permittee for a new dairy facility shall install backflow prevention methods or devices and submit written confirmation of installation to the department before discharging at the dairy facility.

(2) A permittee for an existing dairy facility that lacks backflow protection as required by this subsection shall install backflow prevention methods or devices within 90 days of the effective date of the discharge permit. The permittee shall submit written confirmation of installation to the department within 180 days of the effective date of the discharge permit.

N. ~~Backflow prevention by reduced pressure principle check valve backflow prevention assembly device - inspection and maintenance.~~ A permittee shall inspect each check valve device at least monthly when the well is operating. ~~have each reduced pressure principle backflow prevention assembly (RP) check valve device inspected and tested by a person qualified by the manufacturer at the time of installation, repair, or relocation, and at least on an annual schedule thereafter.~~ A malfunctioning RP check valve device shall be repaired or replaced within 30 days of discovery, and use of all wastewater supply lines associated with the RP check valve device shall cease until repair or replacement has been completed. Copies of the inspection and maintenance records ~~and test results~~ for each RP check valve device associated with the backflow prevention program for the previous year shall be submitted to the department annually in the monitoring reports due by May 1.

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[20.6.6.21 NMAC - N, 01/31/2011; A, 12/31/2011]

20.6.6.24 MONITORING REQUIREMENTS FOR ALL DAIRY FACILITIES:

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~~E. — Flow meter field calibration.~~ All flow meters shall be capable of having their accuracy ascertained under actual working (field) conditions. ~~A field calibration method shall be developed for each flow meter and that method shall be used to check the accuracy of each respective meter. Field calibrations shall be performed upon installation and, at a minimum, annually thereafter. Flow meters shall be calibrated to within plus or minus 10 percent of actual flow, as measured under field conditions. Field calibrations shall be performed by an individual knowledgeable in flow measurement and in the installation/operation of the particular device in use. The permittee shall submit the results of annual field calibrations to the department annually in the monitoring reports due by May 1. The flow meter calibration report shall include the following.~~

- ~~_____ (1) The location and meter identification nomenclature identified by the department through a discharge permit.~~
- ~~_____ (2) The method of flow meter field calibration employed.~~
- ~~_____ (3) The measured accuracy of each flow meter prior to adjustment indicating the positive or negative offset as a percentage of actual flow as determined by an in-field calibration check.~~
- ~~_____ (4) The measured accuracy of each flow meter following adjustment, if necessary, indicating the positive or negative offset as a percentage of actual flow of the meter.~~
- ~~_____ (5) Any flow meter repairs made during the previous year or during field calibration.~~

[20.6.6.24 NMAC - N, 01/31/2011]