

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



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

No. WQCC 12-09 (R)

December 7, 2012

**THE COALITION
MOTION AND MEMORANDUM OF LAW
FOR RECONSIDERATION AND DISMISSAL OF THE PETITION**

Amigos Bravos, Caballo Concerned Citizens, and the Sierra Club Rio Grande Chapter ("the Coalition"), respectfully move the Water Quality Control Commission ("WQCC") to reconsider the decision to take up the above captioned petition and instead dismiss it as not meeting the statutory requirements for creating dairy regulations.

The Coalition contends the plain language of the statute requires that dairy rule petitions must be created by a specific process in which the New Mexico Environment Department ("NMED") establishes "an advisory committee composed of persons with knowledge and expertise particular to the industry category and other interested stakeholders to advise the constituent agency on appropriate regulations to be proposed for adoption by the commission." NMSA 1978, Section 74-6-4.K (as amended through 2012). In addition, the statute requires that the regulations "be developed and adopted in accordance with a schedule approved by the commission" which "incorporate[s] an opportunity for public input and stakeholder negotiations." *Id.*

This statutory process was not followed in case of the pending petition. NMED did not convene an advisory committee to develop the proposed changes to the regulations, nor did it request a schedule from the Commission that allowed for an opportunity for public input and stakeholder negotiations. In fact, the NMED chose not to participate in this matter and stated so in an email to Counsel for the Coalition. Coalition Motion to Dismiss, Exhibit 'A' attached hereto.

Additionally, the subject matter of the pending petition attempts to revise the identical portions of the regulations negotiated and agreed to by petitioner (NMED, the Coalition, and approved by the WQCC with reasons for decision) less than a year ago. As a matter of honest, fair-dealing and good-faith negotiation, this petition should not be before this Commission. Moreover, it most certainly should not be before this body without NMED's use of an expert advisory committee and broad-based stakeholder process to arrive at adequate, prevention-based groundwater protection regulations.

Finally, the Coalition contends that the plain language of the statute requires the WQCC to adopt regulations for the dairy (and copper) industry that "specify...the measures to be taken to prevent water pollution and to monitor water quality." NMSA 1978, Section 74-6-4.K (as amended through 2012). This the WQCC has already done once and redone a year ago, issuing complete statements of reasons in both proceedings. The process of creating those negotiated final regulations took nearly three years. Moreover, as set forth in the two statements of reasons, point-by-point for the initial and negotiated changes in the regulations, the record supported the existing sections of the

regulations upon a consideration of each of the subsection 'E' criteria in Section 74-6-4 and the "best available scientific information" per subsection 'K'.

The first time, the NMED Water Quality Bureau's experts and the experts that the Coalition provided supported the adopted regulations which the Dairy Industry (petitioner herein) appealed. The second time, following extensive negotiations with the petitioner, NMED, the Coalition and the petition supported the proposed changes that this Commission approved after hearing. Significantly, nothing in the direct testimony the the petitioner herein (Dairy Industry) submitted to the WQCC provides a scintilla of evidence warranting changes to the regulations the Commission has twice adopted.

Finally, Coalition contends that, as a matter of law, the petition does not meet the statutory requirement that dairy regulations be arrived at in a process that utilizes the "best available scientific information." Moreover, the petition's proposed rule changes were not arrived at following the statutory process for dairy regulations (i.e., NMED convened advisory committee comprised of persons "with knowledge and expertise particular to the industry category and other interested stakeholders to advise the constituent agency on appropriate regulations to be proposed for adoption by the commission"). *Id.* at 74-6-4.K.

For the legal and factual reasons set forth above, and supported by the factual and legal argument below, the Coalition respectfully moves the WQCC to reconsider going forward on this petition and instead dismiss it without hearing.

MEMORANDUM OF LAW

The New Mexico Legislature intended the use of an NMED-initiated stakeholder process for creating and dairy (and copper) industry pollution-prevention and monitoring regulations, and stated this without limitation or reservation in the statute directing that the Commission:

[S]hall specify in regulations the measures to be taken to prevent water pollution and to monitor water quality....[S]hall adopt regulations for the dairy industry and the copper industry. The commission shall consider, in addition to the factors listed in Subsection E of this section, the best available scientific information. The regulations may include variations in requirements based on site-specific factors, such as depth and distance to ground water and geological and hydrological conditions. The constituent agency shall establish an advisory committee composed of persons with knowledge and expertise particular to the industry category and other interested stakeholders to advise the constituent agency on appropriate regulations to be proposed for adoption by the commission. The regulations shall be developed and adopted in accordance with a schedule approved by the commission. The schedule shall incorporate an opportunity for public input and stakeholder negotiations[.]

NMSA 1978, Section 74-6-4.K (as amended through 2012) (emphasis added). The Coalition contends that the *plain language* of the statute *requires* the above described process for making dairy (and copper) industry pollution-prevention and monitoring regulations.

Plain language is the standard for interpreting the Legislature's intentions in statutory enactments. *Winston v. New Mexico State Police Board*, 80 N.M. 310, 454 P.2d 967 (1969) (construing a statute the Court must give words their ordinary meaning); *State v. Hubble*, 2009 NMSC 14, ¶ 10, 146 N.M. 70, 206 P.3d 579 ("Under the plain meaning rule, when a statute's language is clear and unambiguous, [a reviewing Court]

will give effect to the language and refrain from further statutory interpretation").

"When reviewing a statute, [the Court] must give effect to the Legislature's intent by first looking at 'the plain language of the statute, giving the words their ordinary meaning, unless the Legislature indicates a different one was intended.'" *Schuster v. State of New Mexico Department of Taxation and Revenue*, 2012 NMSC 25, ¶ 9; 283 P.3d 288, 293 (quoting *N.M. Indus. Energy Consumers v. N.M. Pub. Regulation Comm'n*, 2007 NMSC 53, ¶ 20, 142 N.M. 533, 168 P.3d 105); see also *Jolley v. AEGIS*, 2010 NMSC 29, ¶ 8, 148 N.M. 436, 438; 237 P.3d 738, 740 (when interpreting a statute, the Court's "primary goal is to ascertain and give effect to the intent of the legislature"); *Oldham v. Oldham*, 2011 NMSC 7, ¶ 10, 149 N.M. 215, 218; 247 P.3d 736, 739; see also *DeWitt v. Rent-A-Center, Inc.*, 2009 NMSC 32, ¶ 29, 146 N.M. 453, 212 P.3d 341.

Where a Court confronts statutory language that is "clear and unambiguous" it must give effect to that language and refrain from further statutory interpretation. *Quynh Truong v. Allstate Ins. Co.*, 2010 NMSC 9, ¶ 37, 147 N.M. 583, 227 P.3d 73. Moreover, the reviewing court will look at the language the Legislature used in the context of the purpose to be achieved and the wrong to be remedied. *Hovet v. Allstate Insurance Co.*, 2004-NMSC-10, ¶10, 135 N.M. 397, 89 P. 3d 69.

The Coalition contends that the unambiguous intent of the Legislature in amending the Water Quality Act, section 74-6-4, subsection 'K' is a policy shift requiring the Water Quality Control Commission to develop and utilize prophylactic measures for the prevention and monitoring of water pollution due to the dairy and copper industries (and

perhaps others). The Legislature's purpose is accomplished using a new method of creating such regulations. Under the statute, NMED utilizes a broad-based stakeholder process and an expert advisory committee to initiate and develop regulations based upon the "best available scientific information." Moreover, the regulations are intended to be vetted, prior to presentation to the Commission, in a public process that includes all stakeholders under a Commission issued schedule that "incorporates an opportunity for public input and stakeholder negotiations." NMSA 1978, Section 74-6-4.L (as amended through 2012).

As a matter of law, the pending petition does not comport with either the Legislature's purpose or means of achieving pollution-prevention and monitoring regulations for the dairy industry utilizing the "best available scientific information" and the above described subsection 'K' public process. The Legislature plainly intended that regulations for the dairy (and copper) industries be different from prior water quality regulations and arrived at by a unique, Legislatively-mandated process.

Previously--and for all other industries--the Legislature merely mandated the imposition of limitations on the amounts of specific pollutants such industries would be permitted to discharge into New Mexico's waters and required the creation of a system of discharge permitting. However, for the copper and dairy industries, the Legislature chose to require more. Under the current statute, the Water Quality Control Commission must implement regulations that NMED creates using the Section 74-6-4.K process described above to arrive at appropriate prophylactic pollution-prevention measures and monitoring

to assure that these measures are effective. The regulations, in addition to being created via the statutory process, must also be based upon the "best available scientific information." The Legislature's plain language intent is have the WQCC enact pollution prevention and monitoring regulations for the dairy (and copper) industry .

At the same time, the Legislature provided the Commission with a required method for creating these pollution-prevention and monitoring regulations. This process brings affected communities, industries and the regulatory experts at NMED together in a negotiated, stakeholder process using the "best available scientific information" to create regulations. *See generally*, NMSA, Section 74-6-4.K. The pending Dairy Industry petition was not developed this way.

Significantly, the Legislature chose not to limit the use of the subsection 'K' process to a single set of regulations. The plain language of the statute describes the process for creating regulations for the dairy (and copper) industry. Given the Legislature's major, substantive policy shift to the use of prophylactic, pollution-prevention-and-monitoring regulations based on the "best available scientific information," had the legislature intended that the process described in subsection 'K' be used only once it would have so stated in plain language.

In the case of this petition, despite the plain language of subsection 'K', NMED did not create an advisory committee. NMED did not initiate a stakeholder process. NMED has not involved itself in the technical side of the petition, did not submit any technical, expert testimony, and has stated that it will not participate in the hearing. See Coalition

Motion to Dismiss, Exhibit 'A', attached hereto.

That fact should give the Commission pause about going forward to hearing on the pending Dairy Industry petition.

It is less than a year since the renegotiated dairy rules went into effect with changes to the same portions of the rules now at issue in the Dairy Industry petition. Yet, NMED, the agency mandated by the statute to convene and expert advisory committee, provide its expertise and direction, and be involved in a broad-based negotiated stakeholder process to make such regulations, is not participating.

Not only did NMED not convene a stakeholder process, but, despite being the agency that would enforce any regulations this Commission adopts under the petition, NMED is not offering its technical expertise or expert opinion on effects the rule changes in the Dairy Industry petition, if adopted, would have on prevention and monitoring of dairy industry groundwater pollution.

The Coalition contends that this failure to participate and provide expert technical opinion is a further indication that the Legislature's statutory intent is being ignored and that going forward on this petition is a patent violation of law.

Finally, as noted above, it is also extremely significant that this Commission has twice reviewed the same set of regulations. The second time was less than a year ago. At that time, this Commission approved the same sections of the rules that the Dairy Industry--a signatory to the settlement agreement this Commission accepted prior to receiving those rule--now wants to change yet again. The Dairy Industry petitioner

provided this Commission with its pre-filed, direct testimony to support its proposed rule-changes. That testimony in no way disturbs this Commission's two previous statements of reasons supporting the very sections of the regulations at issue. The Dairy Industry petition has not and cannot provide "best available scientific information" to support an iota of change in the existing regulations--and it has not done so anywhere in the face of its direct testimony. Thus, in addition to this petition not comporting with the statutory requirements in terms of requisite process, it also does not meet the statute's requirements for providing the "best available scientific information" warranting the proposed changes to the regulations.

In fine, the Dairy Industry petition is defective on its face. It is offered up in bad faith, as the negotiation and settlement process addressed the same sections of the rules this petition attacks. These same sections of the rules were previously approved by the WQCC following hearing with factual and statutory reasons stated in the record and the statement of reasons for approval of the negotiated revisions to the regulations. Thus, beyond legality, the Dairy Industry petition is a waste of the precious time and resources of the members of this Commission, the Coalition and the public at large. The Dairy Industry petition violates the Water Quality Act. The petition should be dismissed.

CONCLUSION

The law and facts as set forth above require that there be a stakeholder process initiated by NMED to create new dairy regulations and that dairy regulations be based upon the best available scientific information to arrive at regulations that will prevent and

monitor groundwater contamination from dairies. The petition before the Commission must be rejected because it was not arrived at via the requisite process and does not meet the statutory requirements of providing regulations that will prevent and monitor for pollution in groundwater.

Wherefore, the Coalition respectfully requests the Commission to grant this motion, reconsider the petition in the light of the law and facts set forth above, and dismiss the petition.

Respectfully submitted:

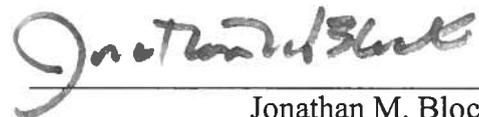
THE COALITION

By: 

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CERTIFICATE OF SERVICE

I hereby certify that on 7th day of December, 2012, an original and fourteen (14) copies of the foregoing Motion and Memorandum with attached Exhibit 'A' were served on the office of the Commission Administrator and a copy mailed, Priority U.S. Postage prepaid to counsel for Petitioners. As NMED informed me that it will not participate in this case, no service was not made on NMED.


Jonathan M. Block

**COALITION MOTION TO DISMISS
EXHIBIT 'A'**

**STATE OF NEW MEXICO
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December 7, 2012

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EXHIBIT 'A'

Subject: Dairy Rule proposed amendments

Date: Thu, 8 Nov 2012 16:15:39 +0000

From: Braswell, Misty, NMENV <Misty.Braswell@state.nm.us>

To: Jon Block <jblock@nmelc.org>

Hi Jon – thanks for the call. To the best of my knowledge the Department will not participate in the December hearing on the Dairy Rule. There is no need to serve us with a copy of your NOI.

Thanks,

Misty Braswell
Assistant General Counsel
New Mexico Environment Department
Office of General Counsel
(505) 827-2982