

STATE OF NEW MEXICO
WATER QUALITY CONTROL COMMISSION



In the Matter of:)
)
PROPOSED AMENDMENT)
TO 20.6.2 NMAC (Dairy Rules))
)

WQCC 09-13R

**DIGCE'S REPLY IN SUPPORT OF ITS MOTION FOR STAY OF DAIRY
RULES AND REQUEST FOR HEARING**

The Dairy Industry Group for a Clean Environment, Inc. (DIGCE) filed a motion petitioning the Water Quality Control Commission (Commission) for a stay of its action adopting the dairy rules, 20.6.6.1 *et seq.* NMAC (Dairy Rule), and/or for a stay of the effective date of the Dairy Rule, pending the outcome of judicial review sought by DIGCE. The New Mexico Environment Department filed a response which took no position on DIGCE's motion. The "Coalition" filed an Opposition to Motion for Stay which, in essence, contends that the Commission should deny a stay without holding a hearing. This reply address the points made in the Coalition's Opposition.

I. LEGAL REQUIREMENTS FOR A STAY

DIGCE's request for a stay is based upon NMSA 1978, section 74-6-7.C which requires a showing of "good cause" for a stay. That is the legal standard for the Commission's consideration of a stay, and there is no case law that interprets the criteria established under the Water Quality Act. The Coalition's Opposition cites to and quotes a number of court cases that address a court's consideration of a stay. For example, the Coalition cites *Tenneco Oil Co. v. New Mexico Water Quality Control Commission*, 105 N.M. 708, 736 P.2d 986 (Ct. App. 1986) as stating the criteria now found in the Guidelines for Water Quality Control Commission Regulation Hearings (Guidelines),

section 502. That case, however, addresses an application to the Court of Appeals—not to the Commission—for a stay, and indicates that at the time of the case, the Water Quality Act was silent on stays. *Id.*, 105 N.M at 709, 736 P.2d at 987. Indeed, the Court of Appeals in *Tenneco* pointed out that it was adopting a standard in the absence of a specific statute or rule governing the granting of a stay, and the courts in other jurisdictions have applied various standards. *Id.* Moreover, the decision specifically identified the test adopted a test which “. . . should guide an appellate court in determining whether its discretion should be exercised in the granting of a stay from an order or regulation adopted by an administrative agency.” *Id.*

According to the legislative history, subsection C of section 74-6-7 was added in 1993. It also appears that the last version of the Guidelines was adopted on June 8, 1993, before the 1993 Water Quality Act amendments became effective on June 18, 1993, so it is unclear whether the Commission sought to attempt to modify the statutory “good cause” standard for a stay through the Commission guidelines, or whether the Commission was attempting to address the *Tenneco* decision or some other case apart from the 1993 statutory changes. At any rate, the Commission has no authority to change the “good cause” criteria set forth in the Water Quality Act, although it obviously can give its own interpretation of that criteria, subject to court review.

Importantly, the Commission has never adopted the Guidelines as a rule. Under the Water Quality Act, no regulation of the Commission can be effective until after compliance with the hearing and other procedural requirements. NMSA 1978, § 74-6-6. Under the State Rules Act, no rule can be effective until it is filed with the State Records

Center. NMSA 1978, § 14-4-5. Without being adopted as a rule, the guidelines are not law, and cannot be binding upon DIGCE.

The *Tenneco* case, and all of the other cases cited by the Coalition, address the criteria for a court's stay of an action taken by an administrative agency or another tribunal below. None of them address an administrative agency's consideration of a stay of its own action. Had the Legislature intended to require the Commission to consider the four factors stated in the *Tenneco* case and the Commission's guidelines, it would have so stated. For example, the Legislature set detailed criteria for the Commission to consider in adopting a rule, and set specific criteria for court review of Commission actions. NMSA 1978, § 74-6-7. Yet, for a stay by the Commission, the standard set is simply a finding of "good cause" following a hearing on the request.

Indeed, the Commission asserted authority to set an effective date for the dairy rule of January 31, 2011. The Commission could just as well have set an effective date of July 1, 2011 or any other date. Notably, the effective date purportedly specified by the Commission was not the subject of a hearing and did not consider input from the parties; indeed DIGCE's counsel attended the December Commission meeting where the Commission voted to adopt the dairy rule and cannot recall or find any record of the Commission setting an effective date during the public meeting. Consequently, if the Commission somehow validly set a January 31, 2011 effective date for the dairy rule during or after its December meeting, it should be able to change the effective date at a meeting now.

The "good cause" standard appears in other New Mexico statutes regarding agency stays of their own actions, but we have not found any reported case defining

“good cause” in this context. Courts in other states, however, have found that the “good cause” standard establishes a much lower burden for the party seeking a stay. For example, the Arizona Court of Appeals evaluated a “good cause” standard for a district court to stay an administrative action pending appeal and specifically rejected the four-part test discussed in *Tenneco* above. The Arizona court, following a line of Oregon decisions, found that there should be a “colorable claim of error,” rather than a “likelihood of success on the merits,” to support good cause for a stay. *P&P Mehta LLC v. Jones*, 211 Ariz. 505, 510 123 P.3d 1142, 1147 (Ct. App. 2005). The same court found that while there should be a component of harm to the petitioner, the “irreparable harm” requirement goes too far, and the court considering the stay should balance the harm to the petitioner against the harm that would accrue to the agency or other parties to the proceedings. *Id.* Even this decision was for a court reviewing an agency action rather than an agency considering a stay of its own action, where the agency arguably should have even broader discretion. Considering that the 1993 amendments to the Water Quality Act adopted a “good cause” standard for granting a stay rather than the four-part test of *Tenneco*, the interpretation of “good cause” by the Arizona court is a reasonable interpretation of the meaning of “good cause” as used in the Water Quality Act.

II. PRIMA FACIE SHOWING FOR A STAY

The Coalition contends that the Commission should deny DIGCE a hearing on the grounds that DIGCE’s request for a stay does not make a *prima facie* showing regarding each of the four factors stated in the Commission’s Guidelines. As discussed above, the statute, not the Guidelines, sets the legal standard for the showing needed for the Commission to grant a stay. Nevertheless, the Coalition’s argument that DIGCE must

make a *prima facie* showing on the merits in order to obtain a hearing on its request is without merit.

The Coalition does not cite to any provision of the Water Quality Act, the Commission's rules, the Guidelines, or New Mexico cases relating to administrative law for its proposition that DIGCE must make a *prima facie* case in its motion in order for the Commission to grant a hearing. The Coalition cites to court cases regarding a *prima facie* showing, but provides not context for those cases, none of which relate to this case. Indeed, undersigned counsel has not been able to identify anything in the Water Quality Act, the Commission's regulations, or even the Guidelines that requires a *prima facie* showing to obtain a hearing, and none of the cases cited by the Coalition would mandate the Commission's denial of a hearing. Indeed, if anything, DIGCE's motion provides more information than is required in order to request a hearing.

The hearing is the place where evidence and other information needed to make a showing would be presented. Obviously, at the hearing, sufficient evidence would need to be presented to support a finding of "good cause" for the Commission to grant a stay. The Coalition's citations to cases related to court proceedings, entirely outside the context of Commission proceedings, are not applicable here.

More specifically, the Coalition contends that DIGCE must make a *prima facie* showing in its motion regarding the likelihood of prevailing on the merits of the appeal. Again, while the hearing would be the proper place for such a showing to be made, if required, attached hereto as "Exhibit "A" is DIGCE's Docketing Statement filed with the Court of Appeals describing the issues it will raise and brief on appeal. This is offered as a good faith showing to the Commission that DIGCE has raised legitimate issues on

appeal that have reasonably likelihood of success on the merits. It more than meets the “colorable claim of error” standard for good cause as set forth in the Arizona case cited above. DIGCE may supplement this information at the hearing, and certainly will supplement its arguments and support therefore as the appeal is briefed to the Court of Appeals.

The Coalition also contends that DIGCE has not made a *prima facie* showing of harm to its members in the request for a stay. Once again, the Coalition cites to no authority that such a showing must be made in the motion filed by DIGCE, rather than at the hearing. The information provided by DIGCE in its motion, however, provides ample information to the Commission that DIGCE and its members will be able to make a showing of good cause, including harm to dairy owners and operators, who would incur costs to comply with the dairy rule and would have no recourse if the dairy rule is set aside as a result of the appeal.

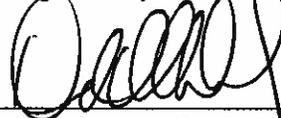
While the Coalition claims that DIGCE’s motion does not address the issues of “harm to others” and public impacts, these, again, are points that should be addressed at a hearing, to the extent that the Commission believes they relate to the “good cause” standard for a stay under the Water Quality Act. Nothing in the Coalition’s Opposition identifies any specific harm to others or adverse public impacts that would warrant the Commission’s denial of DIGCE’s request for a stay, particularly a denial without even an opportunity for a hearing. The Coalition’s brief identifies testimony of persons who presented public testimony at the hearing, but does not identify how or why a stay of the dairy rule would harm those persons. In particular, if a stay is granted, dairies will continue to be regulated under the Water Quality Act in accordance with the terms of the

Act, the existing Commission rules, and their permits, all of which were adopted to protect groundwater quality. The public interest also will be served by avoiding unnecessary expense to dairies that may affect their ability to retain employees, the payment of taxes, and other economic activity that ultimately benefits the public. Of course, the Coalition may seek to participate at the hearing and itself may offer evidence on these points.

Conclusion

For the foregoing reasons, and the reasons stated in its motion, DIGCE respectfully requests that the Commission set a date for a hearing on this Motion at its earliest convenience, and that the Commission grant a stay of the Dairy Rule as requested herein. At the hearing, DIGCE will present additional evidence and arguments in support of a finding of good cause for the Commission to grant a stay.

Respectfully Submitted,



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I hereby certify that a true and accurate copy of the foregoing pleading was served upon the following parties this 21st day of February, 2011 by electronic mail:

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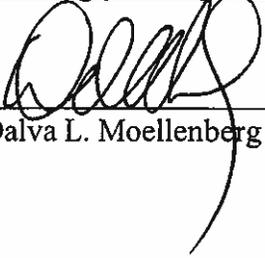
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IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

**DAIRY INDUSTRY GROUP FOR A
CLEAN ENVIRONMENT, INC.,**

Appellants,

vs.

Docket No. 31012

**WATER QUALITY CONTROL COMMISSION
(IN THE MATTER OF PROPOSED AMENDMENT
TO 20.6.2 NMAC (Dairy Rule)),**

Appellee.

DOCKETING STATEMENT

On Appeal from the
New Mexico Water Quality Control Commission

In the Matter of the Proposed Amendment to 20.6.2 (Dairy Rule)
WQCC No. 09-13(R)

GALLAGHER & KENNEDY, P.A.

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EXHIBIT

A



I. STATEMENT OF THE NATURE OF THE PROCEEDING

The Dairy Industry Group for a Clean Environment, Inc. (DIGCE or Appellant) appeals new rules adopted by the Water Quality Control Commission (“Commission”) under the Water Quality Act. These new rules establish requirements for dairy permits. DIGCE was a party to the Commission rulemaking proceedings and represented the interests of dairy owners, operators and trade organizations, persons who are adversely affected by the adoption of the new rules. The appeal is brought under the Water Quality Act, NMSA 1978, § 74-6-7 and NMRA Rule 12-601.

II. STATEMENT SHOWING THE APPEAL WAS TIMELY FILED

On, December 23, 2010 the Commission filed the dairy rule with the State Records Center. The Water Quality Act requires that a notice of appeal be filed within thirty days following the filing of a rule with the State Records Center. NMSA 1978, § 74-6-7.A. Appellant filed a notice of appeal on January 21, 2011, within the thirty-day period, with the Court of Appeals and served the Notice of Appeal on the Commission. Therefore, this appeal was timely filed.

III. STATEMENT OF THE CASE

The Water Quality Act provides that a person who is adversely affected by a regulation adopted by the Commission may appeal to the Court of Appeals for further relief. Appellant asks the Court to review the Commission’s actions in adopting the dairy rule and to set aside the Commission’s adoption of the dairy rule under the standard of review set forth in the Water Quality Act, NMSA 1978, § 74-6-7(B). Under this standard, the Court of Appeals shall set aside the Commission’s action if the court finds it 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.

Under amendments to the Water Quality Act enacted in 2009, the Commission is required to adopt rules to specify the measures to be taken to prevent water pollution and to monitor water quality for the dairy industry. NMSA 1978, § 74-6-4.K. On December 22, 2009, the Environment Department (“Department”) filed a Petition for Regulatory Change and Request for Hearing. Commission’s Statement of Reasons (SOR) ¶ 1¹. The Commission conducted a hearing on the Department’s Petition beginning on April 13 and concluding on June 11, 2010. SOR ¶¶ 22 and 28. Following post-hearing briefing, the Hearing Officer filed his Final Report on December 10, 2010, and on December 11, 2010, the Commission met to consider the Hearing Officer Report and to deliberate on the final rule. SOR ¶¶ 34 and 36. The final rule was filed with the State Records Center on December 23, 2010. However, the Commission did not meet to deliberate on a Statement of Reasons until January 11, 2011, and the State of Reasons was signed on behalf of the Commission on January 14, 2011.

DIGCE participated throughout the hearing before the Commission and a number of dairy owners and operators also presented public comments. DIGCE’s evidence and arguments were presented through pre-filed testimony, live hearing testimony, cross-examination of witnesses, post-hearing arguments and proposed reasons, and exceptions to the hearing officer’s report. During the hearing, DIGCE proposed several changes to the dairy rule as proposed by the Department, some of which were accepted by the Commission, but many of which were not. DIGCE now appeals the Commission’s adoption of the dairy rule on procedural grounds, based

¹ Although the record has not yet been filed and specific citations to the facts are not necessarily required for a docketing statement, this statement references a document entitled “Proposed [sic] Statement of Reasons and Order” signed on behalf of the Commission on January 14, 2011. The record in the case is extensive, and in the interest of brevity for purposes of the docketing statement, more specific citations to additional evidence in the record will be presented in the briefs after the record is filed.

upon the lack of substantial evidence for many of the Commission's overarching findings regarding the statutory criteria for adoption of the dairy rule, and regarding several changes proposed by DIGCE that were rejected by the Commission.

IV. STATEMENT OF THE ISSUES

A. Whether the dairy rule as filed with the State Records Center on December 23, 2010, should be set aside because it was filed before the rule was properly adopted by the Commission in accordance with its guidelines for action on regulations.

The rule as filed with the State Records Center on December 23, 2010, should be set aside because it was not properly adopted by the Commission in accordance with its own guidelines for rulemaking. The rules were filed before the Commission concluded its deliberations on the reasons for adoption of the rules, which took place at a Commission meeting on January 11, 2011, and issued a Statement of Reasons, which was not signed until January 14, 2011. The Commission's guidelines for rulemaking state: "The Commission shall issue its decision on the proposed regulatory change in a suitable format, which shall include its reasons for the action taken." *Guidelines for Water Quality Control Commission Hearings* § 407.D (hereinafter "Guidelines"). Other procedural irregularities with the Commission's adoption of the dairy rules include lack of service of the Commission's Statement of Reasons on the parties until February 10, 2011. The Guidelines require that "The Administrative Secretary shall provide notice of the Commission's action to each of the participants, and to all other persons who have made a written request to the Commission for notification of the action taken."

Guidelines § 408.

B. Whether the Commission acted arbitrarily and capriciously, without substantial evidence and not in accordance with law in basing provisions of the dairy rule on an unscientific contention by the Department that approximately 57% of dairies in New Mexico have caused groundwater contamination.

The Department, as proponent of the dairy rule, relied heavily on its contention that provisions in the dairy rule were necessary because a majority of existing dairies have caused groundwater contamination. The Commission relied upon evidence of this contention in adopting the dairy rule, as indicated by paragraph 405 of the SOR and elsewhere. The Water Quality Act requires that the dairy rule be adopted by the Commission based upon its consideration of the best available scientific evidence. NMSA 1978, § 74-6-4.K. Appellants' expert witness testified that the evidence presented by the Department on this point was not scientific, and testimony of the Department's witnesses on cross-examination further support Appellant's contention.

C. Whether the Commission acted arbitrarily and capriciously, without substantial evidence, and not in accordance with law in rejecting DIGCE's proposal to allow clay-lined wastewater impoundments.

DIGCE proposed a rule provision that would allow for clay-lined impoundments that meet certain specifications to limit seepage and presented testimony in support of that proposal. The Department opposed clay-liners, but the Commission found that it presented no scientific studies of groundwater contamination from clay-lined lagoons. SOR ¶ 168. Despite its finding that the Department presented no scientific evidence relating to clay liners, the Commission's 171 page Statement of Reasons does not contain any findings or rationale supporting the Commission's rejection of DIGCE's clay liner proposal or specifications.

D. Whether the Commission acted arbitrarily, without substantial evidence, and not in accordance with law in rejecting DIGCE's proposal to allow vadose zone monitoring at impoundments in lieu of a monitoring well for each impoundment and soil sampling in lieu of a monitoring well for each land application field.

DIGCE proposed rule provisions that would allow monitoring of impoundments to detect leaks or seepage using vadose zone monitoring and that would allow monitoring of fields for excess nutrient application using soil sampling, and to reduce, but not eliminate, groundwater

monitoring if these methods are used. The Commission rejected these proposals based upon an interpretation that the Water Quality Act limits the means of monitoring to groundwater monitoring wells only based upon the language in section 74-6-4.K NMSA 1978 that states that the Commission "shall specify in regulations the measures to be taken to prevent water pollution and to monitor water quality." SOR ¶¶ 267, 295. The Commission's interpretation of this language as stated in SOR ¶ 267, that it can require monitoring only of groundwater quality, is inconsistent with other monitoring requirements imposed by the Commission in the dairy rule. The Water Quality Act does not specify groundwater monitoring through a well as the only suitable method of determining that a facility is working as designed to limit discharges. Based upon its incorrect interpretation of the Water Quality Act, the Commission improperly rejected the evidence offered by DIGCE of the reasons why the monitoring methods it proposed should be preferred over monitoring wells.

F. Whether the Commission acted arbitrarily, without substantial evidence, and not in accordance with law in rejecting DIGCE's proposal to allow blending of wastewater and fresh water in wastewater impoundments.

The Commission rejected a proposal by DIGCE to eliminate a prohibition of blending wastewater and irrigation water in an impoundment as long as mixing or agitation are used and the irrigation water is removed within a specific time period. SOR ¶ 226. The Commission found, however, that mixing and agitation will achieve a uniform blend. SOR ¶ 228. Consequently, the Commission acted unreasonably in rejecting DIGCE's proposal, which addressed the concerns identified by the Commission.

G. Whether the Commission acted contrary to law in adopting additional public notice requirements for certain dairy permit applications and requirements to request hearings on dairy permits.

The Commission adopted additional public notice requirements for certain dairy permit applications, which DIGCE opposed at the hearing. SOR ¶¶ 126-128. The Commission also adopted additional requirements to request public hearings on permitting actions, which DIGCE also opposed. SOR ¶¶ 129-130. The Commission's general regulations, 20.6.2.3108 NMAC, already address these requirements. The statutory provision upon which the Commission relies to adopt the dairy rules requires the Commission to "specify in regulations the measures to be taken to prevent water pollution and to monitor water quality." NMSA 1978, § 74-6-4.K. That provision does not address public notice or public hearing requirements and, consequently, does not authorize industry-specific public notice and public hearing provisions in the dairy rule.

H. Whether the Commission acted arbitrarily and capriciously and without substantial evidence in adopting the dairy rule because key findings made by the Commission in support of its adoption of the dairy rule are not supported by substantial evidence.

The Commission's Statement of Reasons includes a number of findings specific to the factors required to be considered under the Water Quality Act in the adoption of the dairy rule under NMSA 1978, section 74-6-4.E. See SOR ¶¶ 404-414. Several of these findings are not supported by substantial evidence or are arbitrary and capricious. For example, in paragraph 408 and 409 of the SOR, the Commission concludes that the cost of compliance with the rules is far less than the cost of remediating groundwater contamination once it has occurred, yet the Department presented no evidence of any analysis showing either the costs of compliance or the costs of remediation. In paragraph 411, the Commission concluded that the costs of treatment by successive users is higher than the cost of prevention, but there is no evidence in the record regarding the feasibility or cost of groundwater treatment by successive users. In paragraph 414, the Commission finds that the dairy rule is based on the best available scientific evidence available to it, yet scientific evidence on many points was lacking.

I. Whether the dairy rule should be set aside because it was not developed in compliance with the procedural requirements of the Water Quality Act.

The dairy rules were required under amendments to the Water Quality Act enacted in 2009. The statutory requirements include establishing 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,” development and adoption of the rules “in accordance with a schedule approved by the commission,” and “incorporation of an opportunity for public input and stakeholder negotiations.” NMSA 1978, § 74-6-4.K. The Department started the process of rule development, including briefing the Commission, proposing a schedule, releasing a draft set of rules, and conducting public meetings on the rules before the amendments to the Water Quality Act governing those requirements had gone into effect. See SOR ¶ 44. The schedule adopted by the Commission for development of the rules was not adopted by the Commission until July 14, 2009, but included rule development activities conducted before the governing statutory requirements were in effect and before the schedule was adopted. SOR ¶ 47. There is no substantial evidence in the record that the Department received, considered or acted on any advice from the advisory committee regarding appropriate regulations to proposed for adoption by the Commission.

V. LIST OF AUTHORITIES

1. An action is arbitrary and capricious if it is “unreasonable, irrational, willful, and does not result from a sifting process.” *Regents of the Univ. of Cal. v. N.M. Water Quality Control Comm’n*, 2004-NMCA-073, ¶ 35, 94 P.3d 788, 796.

2. “An agency action is arbitrary and capricious if it is unreasonable, if it provides no rational connection between the facts found and the choices made, or if it entirely omits consideration of important aspects or relevant factors of the issue at hand.” *New Mexico Mining Association v. New Mexico Water Quality Control Commission*, 141 N.M. 41, 2007 NMCA 10, ¶ 22, 150 P.3d 991 (Ct. App. 2006); *Rio Grande Chapter of the Sierra Club v. N.M. Mining Comm’n*, 2003 NMSC 5, ¶ 17, 133 N.M. 97, 61 P.3d 806.
3. “Substantial evidence supporting administrative agency action is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.” *Oil Transp. Co. v. N.M. State Corp. Comm’n*, 110 N.M. 568, 571, 798 P.2d 169, 172 (1990). “Substantial evidence is evidence that a reasonable mind would recognize as adequate to support the conclusions reached by a fact-finder.” *New Mexico Mining Association v. New Mexico Water Quality Control Commission*, 141 N.M. 41, 2007 NMCA 10, ¶ 30, 150 P.3d 991 (Ct. App. 2006).
4. “A ruling that is not in accordance with law should be reversed ‘if the agency unreasonably or unlawfully misinterprets or misapplies the law.’” *New Mexico Mining Association v. New Mexico Water Quality Control Commission*, 141 N.M. 41, 2007 NMCA 10, ¶ 11, 150 P.3d 991 (Ct. App. 2006)(quoting *Archuleta v. Santa Fe Police Dep’t*, 2006 NMSC 6 ¶18, 137 N.M. 161, 108 P.3d 1019.

5. The Court of Appeals is not bound by an agency's interpretation of a statute, since it is a matter of law that is reviewed de novo. *New Mexico Mining Association v. New Mexico Water Quality Control Commission*, 141 N.M. 41, 2007 NMCA 10, ¶ 11, 150 P.3d 991 (Ct. App. 2006); *Rio Grande Chapter of the Sierra Club v. N.M. Mining Comm'n*, 2003 NMSC 5, ¶ 17, 133 N.M. 97, 61 P.3d 806.
6. "[I]t is required that the record disclose the Board's reasoning and the basis on which it adopted the regulations." *Rivas v. Board of Cosmetologists*, 101 N.M. 592, 594, 686 P.2d 934, 936 (1984). "[I]n adopting regulations, administrative agencies must give some indication of their reasoning and of the basis upon which the regulations were adopted in order for the courts to be able to perform their reviewing function." *New Mexico Municipal League, Inc. v. New Mexico Environmental Improvement Board*, 88 N.M. 201, 539 P.2d 221, 229 (Ct. App. 1975).
7. The Commission's past practice has been to adopt the reasons for a rule before filing it as a rule. *See Tenneco Oil Company v. New Mexico Water Quality Control Commission*, 107 N.M. 469, 760 P.2d 161, 1987 N.M. App. LEXIS 811, cert. denied, *Navajo Ref. Co. v. New Mexico Water Quality Control Comm'n*, 106 N.M. 714, 749 P.2d 99, 1988 N.M. LEXIS 4 (N.M. 1988).
8. A violation of procedural requirements of a statute is sufficient to grant a plaintiff standing to sue, so long as the procedural requirement was "designed to protect some threatened concrete interest" of the plaintiff,

so party challenging a rule for failure to conduct a required cost benefit analysis had standing to raise the issue. *City of Waukesha v. Environmental Protection Agency*, 320 F.3d 228 (D.C. Cir. 2003)(quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 n.8, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992)).

VI. STATEMENT WHETHER PROCEEDINGS WERE TAPE RECORDED

The hearing was transcribed by Kathy Townsend Court Reporters.

VII. RELATED OR PRIOR APPEALS

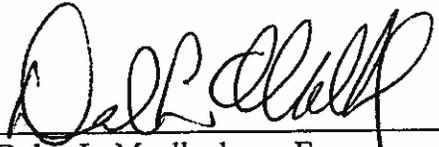
There are no related or prior appeals regarding this matter.

Respectfully Submitted,

Respectfully Submitted,

GALLAGHER & KENNEDY, P.A.

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CERTIFICATE OF MAILING:

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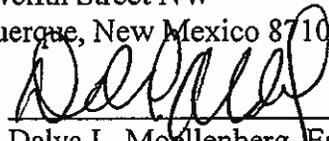
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