

STATE OF NEW MEXICO
WATER QUALITY CONTROL COMMISSION



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

**NMED’S RESPONSE TO DIGCE’S MOTION FOR A CONTINUANCE
OF DEADLINES IN THE SCHEDULING ORDER**

The New Mexico Environment Department (“Department” or “NMED”) opposes the Dairy Industry Group for a Clean Environment’s (“DIGCE”) Motion for a Continuance of Deadlines in the Scheduling Order. The Department urges the Hearing Officer for the Water Quality Control Commission (“Commission”) to deny DIGCE’s Motion for Continuance because DIGCE is not prejudiced by the current schedule. In support of its response, the Department states as follows:

I. STANDARD OF REVIEW

Although this motion arises in the context of an administrative rulemaking process, as guidance the Hearing Officer may look at the standards courts use to review motions for continuance. A “denial of a motion for continuance is discretionary and absent a clear abuse, an appellate court will not reverse.” *Sanchez v. National Electric Supply Co.*, 105 N.M. 97, 100, 728 P.2d 1366, 1369 (1986). For an appellate court to overturn the denial, the abuse of discretion must be prejudicial. *Id.*

II. LEGAL ARGUMENT

DIGCE requests an indefinite continuance of the deadline for all parties to file Notices of Intent to Present Technical Testimony on Rebuttal, Pre-Filed Rebuttal Technical Testimony and

Exhibits which is currently set for March 29, 2010, and an indefinite continuance of the hearing currently set for April 13, 2010. The Department will address each request in turn.

A. NMED OPPOSES A CONTINUANCE OF THE MARCH 29th DEADLINE

DIGCE is not prejudiced by the March 29, 2010 Notice of Intent to Present Technical Testimony on Rebuttal deadline. DIGCE argues that it requires additional information to properly rebut NMED Exhibit 3217-8. DIGCE mischaracterizes NMED Exhibit 3217-8, claiming that it is a list of dairies with “synthetically lined” impoundments. NMED Exhibit 3217-8 makes no reference to a type of impoundment liner in the exhibit. Instead, NMED Exhibit 3217-8 simply shows dairy facilities that have a depth-to-ground water that is 50 feet or less and have nitrate contamination of ground water in monitoring wells associated with their wastewater or combination wastewater/stormwater impoundments. The Department uses the exhibit to support nothing more than the direct testimony of William C. Olson regarding proposed Subparagraph (a) of Paragraph (6) of 20.6.2.3217 NMAC of NMED’s proposed dairy rule which states that, “[c]urrently, 29 dairies located in areas where the depth to ground water is less than or equal to 50 feet have documented nitrate-nitrogen ground water contamination in excess of WQCC ground water standards.” For its rebuttal, DIGCE seeks information beyond the scope of the Department’s use of the exhibit. This is not the proper basis for a continuance. Even if DIGCE needed more information to address NMED’s use of NMED Exhibit 3217-8, DIGCE still has the opportunity to cross examine Department witnesses at the hearing regarding the exhibit.¹ Thus, denying DIGCE’s motion to continue the March 29th deadline will not prejudice DIGCE.

¹ DIGCE’s Exhibit A indicates that DIGCE faxed an Inspection of Public Records Act (“IPRA”) request to the Department for the information they seek. Thus, under IPRA, DIGCE will have access to the files for the dairies before the April 13, 2010 hearing.

Further, NMED Exhibit 3217-8 is an updated subset of a larger spreadsheet that has been in DIGCE's possession since 2008. On June 24, 2008, Mr. Bill Olson, Ground Water Bureau Chief for the Department, provided an electronic copy of the 2008 version of the larger spreadsheet to Mr. Walter Bradley of Dairy Farmers of America and to Ms. Sharon Lombardi of Dairy Producers of New Mexico, the constituent organizations of DIGCE. On July 7, 2009, Mr. Olson provided an electronic copy of a June 2009 update of the spreadsheet to Mr. Alva Carter, DIGCE's representative on Department's Advisory Committee for the dairy rule.² The spreadsheet was discussed during the Advisory Committee meetings in the summer of 2009. The Department later extracted information from the June 2009 spreadsheet for those dairy sites with depths to ground water of 50 or less to create NMED Exhibit 3217-8 and updated the ground water quality data for those sites, using the most recently available data.³ Nothing prevented DIGCE from requesting additional information about groundwater contamination at dairies with a depth-to-groundwater of 50 feet or less at an earlier date. DIGCE could have at any earlier point reviewed the Department's files of the dairies with a depth-to-groundwater of 50 feet or less.⁴ Instead, DIGCE seeks a continuance only days from the rebuttal testimony deadline in this proceeding. The fact that DIGCE has had ample opportunity to request the information it purports to need to rebut NMED Exhibit 3217-8 further demonstrates that denying DIGCE's motion to continue the March 29th deadline will not prejudice DIGCE. *See Blacker v. U-Haul Company of New Mexico, Inc.*, 113 N.M. 542, 544-545, 828 P.2d 975, 977-978 (1992) (holding that a defendant was not prejudiced by the denial of a motion for a continuance to

² The June 2009 version of the larger spreadsheet was widely disseminated. The Coalition of citizen and environmental groups even attached a copy of the June 2009 version as Exhibit C-4 of their direct testimony filed in this rulemaking.

³ The 2008 and June 2009 versions of the larger spreadsheet provided a concentration range for nitrate-nitrogen in ground water that occurred over time.

⁴ The Department will respond to DIGCE's IPRA request and expeditiously make its files available for review.

depose an expert witness about plaintiff's earlier industrial accident when the defendant had knowledge of an earlier industrial accident, and had a full opportunity to investigate the effects of an earlier accident but failed to do so).

B. NMED OPPOSES A CONTINUANCE OF THE APRIL 13th HEARING

Although the Department is sympathetic to Mr. Anthony (T.J.) Trujillo's family situation, DIGCE will not be prejudiced by denial of its motion to continue the April 13th hearing.

First, under the Scheduling and Procedural Orders in this rulemaking, by April 13th all of the parties involved will have presented the bulk of their case because both direct and rebuttal testimony will have been filed with the Commission. The parties have already filed substantial volumes of direct testimony. Under the Scheduling Order, the parties will submit rebuttal testimony on March 29, 2010. Mr. Trujillo's stated period of unavailability, from April 10th through the 14th, does not conflict with these dates. The hearing itself, which begins on April 13th, is limited to brief 15 minute summaries of the direct and rebuttal testimony from each witness, surrebuttal (which is limited to the scope of rebuttal testimony), and cross examination. Mr. Trujillo is co-counsel, thus DIGCE will not be without counsel for April 13th and 14th, the dates of Mr. Trujillo's stated period of unavailability that overlap with the hearing schedule.

Second, the Department would support accommodations during the hearing to minimize the effect of Mr. Trujillo's absence. For example, the Department would support opening the hearing with the public comment period, followed by the summaries presented by all of the witnesses. These accommodations and others could be considered and finalized at the pre-hearing conference, now scheduled for March 30th at 3:00 pm.

Third, continuing the hearing would prejudice the Department because its witnesses may not be available at later dates. The Department has agreed to earlier delays of the hearing date

for this statutorily required dairy rule. On April 14, 2009, when the Department updated the WQCC about the changes to the Water Quality Act, the Department initially proposed an October 13, 2009 hearing date. On July 14, 2009, DIGCE objected to that hearing date and requested that the hearing date be delayed. The Department and DIGCE agreed to a March 9, 2010 hearing date. To accommodate the current procedure of pre-filed direct and rebuttal testimony, the Department, DIGCE and the coalition of citizen and environmental groups agreed to postpone the hearing date to April 13, 2010. Relying on the Scheduling Order that set that date, the Department's witnesses planned their schedules around an April 13th hearing. Finding another period of time when all of the Department's witnesses are available will be very difficult. The Department will be prejudiced if its witnesses are unavailable.

Finally, continuing the hearing would prejudice the Department because there is an urgent need to implement the dairy rule and resume permitting of dairies. As of March 6, 2010, 53.5% of discharge permits are expired. The hiring freeze coupled with the budget cuts has resulted in a severely understaffed Ground Water Quality Bureau. The remaining staff develop, administer and evaluate compliance with all of the Department's discharge permits and have been working relentlessly on developing and proposing an appropriate dairy rule to the Commission, including the testimony necessary to support the rule. The best regulatory tool for preventing groundwater pollution is an effective ground water discharge permit. Implementing the new rule is necessary to resume permitting and preventing ground water pollution. Delaying the hearing indefinitely as requested by DIGCE will prejudice the Department.

WHEREFORE, the New Mexico Environment Department respectfully requests that the Hearing Officer for the Commission deny DIGCE's Motion for a Continuance of Deadlines in the Scheduling Order because DIGCE will not be prejudiced by a denial.

Respectfully Submitted,



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Certificate of Service:

I hereby certify that a true and accurate copy of the foregoing pleading was served upon the following parties this 25th day of March 2010:

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