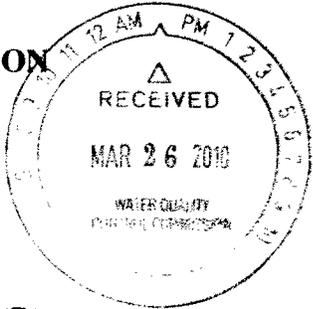


COPY

STATE OF NEW MEXICO
BEFORE THE WATER QUALITY CONTROL COMMISSION



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

No.: WQCC 09-13(R)

**RESPONSE IN OPPOSITION TO DIGCE'S MOTION FOR
A CONTINUANCE OF DEADLINES IN THE SCHEDULING ORDER**

COMES NOW Amigos Bravos, Caballo Concerned Citizens Group, Food and Water Watch and the Sierra Club Rio Grande Chapter (collectively referred to as "the Coalition"), and hereby responds in opposition to the *Motion for Continuance* filed by the Dairy Industry Group for a Clean Environment ("DIGCE"). The Hearing Officer should deny the Motion because: (1) DIGCE fails to provide any legitimate reason for a continuance; and (2) the Coalition and other parties will be unfairly prejudiced if another continuance is granted.

ARGUMENT

1. Standard of Review.

In administrative rulemakings, where there is no constitutional right of due process and the rules of civil procedure do not apply, the only question is whether a given notice or procedure substantially complies with the applicable statutory requirements. See Miles v. Board of County Comm'rs, 1998 NMCA 118, ¶14, 125 N.M. 608 ("because the County was clearly acting in a rule-making, legislative capacity, the question of notice devolves into whatever is required by statute, not the constitution"). Thus, according to our Supreme Court:

There is no fundamental right to notice and hearing before the adoption of a rule; such a right is statutory

Livingston v. Ewing, 98 N.M. 685, 688, 652 P.2d 235, 238 (1982) (citing Bi-Metallic Co. v. Colorado, 239 U.S. 441 (1915)). Therefore, the standard for deciding DIGCE's *Motion for Continuance* must be derived from the applicable statute.

The applicable statute requires in this case the Commission to hold a public hearing before adopting a regulation, NMSA 1978, § 74-6-6(A)(1993), and further requires "the commission [to] allow *all interested persons reasonable opportunity* to submit data, views or arguments orally or in writing and to examine witnesses testifying at the hearing." NMSA 1978, § 74-6-6(D)(1993) (emphasis added). Under this standard, DIGCE's Motion should be denied because: (1) DIGCE's fails to show (and cannot show) that its right to a "reasonable opportunity" to participate in this rulemaking will be prejudiced if the Motion is denied; and (2) the granting of DIGCE's Motion would unfairly prejudice the Coalition's and all other "interested persons'" right to such "reasonable opportunity."

2. DIGCE's right to a "reasonable opportunity" to participate in this rulemaking will not be prejudiced if the Hearing Officer denies its Motion.

DIGCE claims to be prejudiced by NMED's Exhibit 3217-8 regarding the groundwater pollution caused by dairy lagoons, because NMED allegedly "failed to present when each lagoon was lined, if the subject wells showing contamination were down gradient from the lined lagoon, and if there was a downward trend in the contamination since each lagoon was lined." *DIGCE Motion at 1*. DIGCE demands an indefinite continuance until "such time that NMED responds to DIGCE's request [to inspect public records] and DIGCE has been allowed a sufficient amount of time to analyze the information." *Id.* at 2. DIGCE then merely concludes, without explanation or citation to authority, that it "will be unable to adequately prepare its case before the WQCC" unless the indefinite continuance is granted. *Id.* DIGCE's claim of prejudice is not credible.

First, there is no surprise here. DIGCE and everyone interested in the issue have long known of NMED's well-supported and well-publicized position that large-scale dairy operations, more often than not, pollute groundwater above standards. Accordingly, DIGCE could have submitted its request to inspect public records on this topic months ago, and its tactical decision to delay the request until now provides no good reason to delay the entire rulemaking. Cf. State v. Aragon, 1997 NMCA 87, ¶ 22, 123 N.M. 803 (stating that, "as a general rule, a motion for a continuance filed at the last minute is not favored"). Second, this is not a court case, it is a rulemaking. In this rulemaking neither DIGCE nor any other party has a right to discovery or even a right to advance notice of the other parties' testimony and exhibits. Instead, DIGCE and all "interested persons" merely have the right to present their case and "examine the witnesses testifying at the hearing," and nothing about NMED's Exhibit 3217-8 compromises these basic statutory rights. Moreover, DIGCE's right to cross-examine NMED's witnesses is all it needs to expose NMED's alleged failure to consider or obtain relevant information. And third, the Hearing Officer can hold the record open so that DIGCE may obtain and submit relevant documents, if any, received in response to its request to inspect public records. DIGCE can also include these documents in its closing argument. Accordingly, DIGCE will not be prejudiced in the least if its Motion is denied. Cf. State v. Torres, 1999 NMSC 10, ¶ 10, 127 N.M. 20, 24 (1999) (identifying "prejudice to the movant" as one factor trial courts consider in ruling on a motion for continuance).

DIGCE also claims that Mr. Trujillo's presence at "the hearing is critical" and that "DIGCE will be prejudiced in its ability to participate in this rulemaking" if the hearing is not continued while Mr. Trujillo responds to a family emergency. *Motion for Continuance at 2*. Although the Coalition certainly empathizes with Mr. Trujillo's need to be with his family at this

time, the claim that DIGCE will be “prejudiced” by his temporary absence is also not credible. DIGCE is represented by at least two attorneys in this rulemaking—Mr. Trujillo and Mr. Moellenberg—and in administrative rulemakings there is no right to representation by even one attorney, much less two. Moreover, attorneys have an obligation to find substitute counsel when scheduling conflicts arise. Parker-Sedillo v. Sedillo, 2009 N.M. App. Unpub. LEXIS 382, 10-11 (Ct. App. Sept. 22, 2009) (“[Our] Supreme Court has stated long ago that counsel may occasionally need to arrange for another attorney to assist when court conflicts arise, rather than simply not to appear in one of the cases”) (*citing* Territory v. Lobato, 17 N.M. 666, 680-81, 134 P. 222, 226 (1913)). Mr. Moellenberg is no mere substitute. He is an excellent attorney and has fully participated throughout this proceeding; and he has extensive experience with similar New Mexico administrative proceedings in which he and co-counsel made multiple-pronged arguments on various issues of New Mexico law. And finally, the Coalition would not object to minor adjustments in the order of presentation, such as allowing public testimony on the first day of hearing, so as to minimize the effect of Mr. Trujillo’s temporary absence.

Accordingly, neither NMED Exhibit 3217-8 nor Mr. Trujillo’s temporary absence from this proceeding prejudices DIGCE’s statutory right to have a “reasonable opportunity to submit data, views or arguments orally or in writing and to examine witnesses testifying at the hearing.” NMSA 1978, § 74-6-6(D). Indeed, the Commission and Hearing Officer have admirably provided DIGCE and all parties with far more opportunity to participate in this rulemaking than is required by the applicable statute. Therefore, DIGCE’s Motion for Continuance should be denied.

3. A continuance would unfairly prejudice the Coalition and other parties' right to a reasonable opportunity to participate in the rulemaking.

In civil court cases "continuances are not favored." Beyale v. Arizona Pub. Serv. Co., 105 N.M. 112, 116, 729 P.2d 1366, 1370 (Ct. App. 1986). Moreover, in deciding whether to grant a motion for continuance:

There are a number of factors that trial courts should consider in evaluating a motion for continuance, including [1] the length of the requested delay, [2] the likelihood that a delay would accomplish the movant's objectives, [3] the existence of previous continuances in the same matter, [4] the degree of inconvenience to the parties and the court, [5] the legitimacy of the motives in requesting the delay, [6] the fault of the movant in causing a need for the delay, and [7] the prejudice to the movant in denying the motion.

See Torres ¶ 10. Application of factors 1-5 in this case show that the other parties will unfairly be prejudiced if DIGCE's Motion is granted.¹

Factor 1: DIGCE is not requesting a short delay but is instead demanding an *indefinite* stay, which precludes the parties, the Commission and public from planning and would likely cause a delay of several months given the Commission's busy schedule. Factor 2: As NMED points out in its response, there is little likelihood that delay would result in any additional relevant information (which is the only legitimate reason for delay). Factor 3: The April 13th hearing date has long been fixed and published in accordance with law, and the Coalition, the other parties and interested members of the public have adjusted their calendars accordingly. This hearing date was fixed by agreement and compromise of the parties, after being twice continued already. Factor 4: The Coalition has technical witnesses coming to the hearing from other states and from Taos, New Mexico. All of these witnesses have busy professional schedules and all have had to make special arrangements to attend the hearing at the scheduled

¹ Application of factor 6 (the fault of the movant in causing a need for the delay) and factor 7 (the prejudice to the movant in denying the motion), are discussed above, also show that DIGCE's Motion should be denied.

and published date. It is manifestly unfair and prejudicial to the Coalition to make all of these witnesses—as well as all of the other parties and their witnesses, the public and the Commission—rearrange their schedules once again to accommodate just one party to this proceeding—DIGCE. And Factor 5: It is especially unfair to allow DIGCE to further delay these proceedings given the fact that it was DIGCE who demanded industry-specific regulations in the first place, yet it has inexplicably and continually acted to impede the process as if it were adamantly opposed to industry-specific regulations. Accordingly, DIGCE's Motion should be denied.

CONCLUSION

The denial of DIGCE's Motion for Continuance will not cause any prejudice to its statutory right to reasonably participate in this rulemaking. In contrast, the granting of its Motion would unfairly and substantially prejudice the rights of the Coalition, the other parties, the public and the Commission, causing them all to rearrange their schedules and expend more time and money on this already long-delayed rulemaking. Accordingly, DIGCE's Motion should be DENIED.

Respectfully submitted,

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Certificate of Service

I certify that the foregoing document was emailed on the 16th day of March 2010
to the persons identified on the attached service list and that the original and appropriate number
of copies was filed with the WQCC.


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