

STATE OF NEW MEXICO  
WATER QUALITY CONTROL COMMISSION



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

**WQCC 09-13(R)**

**MOTION TO DISMISS FOR FAILURE MEET STATUTORY CRITERIA**

The Dairy Industry Group for a Clean Environment (hereinafter, "DIGCE"), by and through undersigned counsel, hereby submits this Motion to Dismiss for Failure to Meet Statutory Criteria.

The New Mexico Environment Department (hereinafter, "NMED") carries the burden of proof for the rulemaking. In order to meet this burden of proof, NMED submitted written testimony of William Olson which attempts to address certain statutory criteria set forth in Section 74-6-4(E) NMSA 1978. *See* NMED NOI Attachment 1 at 16-21. When reviewing evidence relevant to the statutory criteria set forth in Section 74-6-4(E) NMSA 1978, the Water Quality Control Commission (hereinafter, "WQCC") shall give such evidence the weight the WQCC deems appropriate.

By contrast, 2009 amendments to the Water Quality Act created a new statutory requirement that this rulemaking will be the first to apply. In particular, Section 74-6-4(K) NMSA 1978 requires the WQCC to consider "the best available scientific information" in addition to the criteria set forth in Section 74-6-4(E) NMSA 1978. The difference between these two statutory provisions is that Subsection K has a non-discretionary requirement to use "the best available scientific information" as opposed to Subsection E allowing the WQCC to use its discretion in giving the appropriate weight to the relevant criteria.

In this rulemaking, NMED attempted to meet its statutory burden under Section 74-6-4(K) NMSA 1978 by simply stating that NMED “relied upon the best scientific information available to it.” *See* NMED NOI Attachment 1 at 21. However, this cursory statement fails to meet the mandatory statutory requirement.

First, the statute requires NMED to use “the best available scientific information,” as opposed to just the information available to the NMED. In other words, NMED has a duty in proposing the regulations to go beyond its internal resources and evaluate other sources of scientific information to determine the soundness of the underlying science. NMED has failed to make such a showing.

Second, NMED’s cursory statement that it “relied upon the best scientific information available to it” does not meet the threshold statutory requirement set forth in Section 74-6-4(K) NMSA 1978. NMED failed to give any meaningful analysis or explanation as to how it determined which scientific positions and information were better than others. The advisory committee process set forth in Section 74-6-4(K) NMSA 1978 was intended to elicit this type of exchange, analysis, and dialogue, but NMED failed to engage in such meaningful consideration in its rush to regulate and premature rulemaking activities. Consequently, NMED has failed to demonstrate that its regulations rely upon the best available scientific information.

**WHEREFORE**, DIGCE respectfully requests that the WQCC dismiss this rulemaking for NMED failing to comply with Section 74-6-4(K) NMSA 1978.

Respectfully Submitted,



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Anthony (P.J.) J. Trujillo, Esq.  
Attorney for DIGCE  
Gallagher & Kennedy, P.A.  
1233 Paseo de Peralta  
Santa Fe, NM 87501  
Phone: (505) 982-9523  
E-Mail: [ajt@gknet.com](mailto:ajt@gknet.com)

-and-

Dalva Moellenberg, Esq.  
Attorney for DIGCE  
Gallagher & Kennedy, P.A.  
2575 E. Camelback Road  
Phoenix, AZ 85016  
E-Mail: [d1m@gknet.com](mailto:d1m@gknet.com)

**Certificate of Service:**

I hereby certify that a true and accurate copy of the foregoing pleading was served upon the following parties this, Tuesday, April 06, 2010:

Adolfo Mendez, II, Asst. General Counsel  
Office of General Counsel  
New Mexico Environment Department  
Runnels Building Room N4050  
1190 St. Francis Drive  
Santa Fe, NM 87505  
Adolfo.mendez@state.nm.us

Michael Jensen  
Amigos Bravos  
PO Box 238  
Taos, NM 87571  
mjensen@amigosbravos.org

Alva Carter, Jr.  
DIGCE  
214 W. 2nd Street  
Portales, NM 88130  
alva@yucca.net

Dalva Moellenberg  
Gallagher & Kennedy, P.A.  
2575 E. Camelback Road  
Phoenix, AZ 85016  
DLM@gknet.com

Walter Bradley  
Dairy Farmers of America  
3500 William D. Tate Ave., Suite 100  
Grapevine, TX 76051  
wbradley@dfamilk.com

Sharon Lombardi  
Dairy Producers of New Mexico  
PO Box 6299  
Roswell, NM 88202  
dpm1@juno.com

Jerry Nevins

Caballo Concerned Citizens  
PO Box 131  
Caballo, NM 87931  
jerry@caballonm.com

Dan Lorimier  
Sierra Club, Rio Grace Chapter  
142 Truman NE  
Albuquerque, NM 87108  
Daniel.lorimier@sierraclub.org

Kathy Martin  
3122 Tall Oaks Circle  
Norman, OK 73072  
Kjm2@aol.com

Daniele Diamond  
ddiamond@iccw.org

Jana Hughes  
Citizens for Dairy Reform  
302 Stiles Road  
Hobbs, NM 88242  
Hjana48@yahoo.com

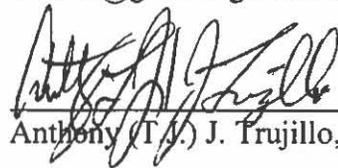
Deb Turner  
13101 N. Calle Bonita  
Hobbs, NM 88242  
Turnerdj1980@hotmail.com

Jo Ann King  
13100 N. Calle Bonita  
Hobbs, NM 88242  
Joannking10@leoco.net

Lonny Ashcraft  
Ashcraft Consulting, Inc.  
PO Box 623  
Roswell, NM 88202  
loneyashcraft@cableone.net

Bruce Frederick  
NM Environmental Law Center  
1405 Luisa Street, Suite 5  
Santa Fe, NM 87505  
bfrederick@nmelc.org

Jay Lazarus  
Glorieta Geoscience, Inc.  
PO Box 5727  
Santa Fe, NM 87502  
lazarus@glorietageo.com



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Anthony (T.J.) J. Trujillo, Esq.