

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 STRIKE TESTIMONY FOR
A VIOLATION OF PROTOCOLS FOR STAKEHOLDER NEGOTIATIONS**

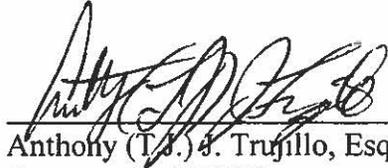
The Dairy Industry Group for a Clean Environment (hereinafter, "DIGCE"), by and through undersigned counsel, hereby submits this Motion to Strike Testimony for a Violation of Protocols for Stakeholder Negotiations.

Pursuant to 74-6-4(K) NMSA 1978, this rulemaking process requires an opportunity for stakeholder negotiations. DIGCE participated in the stakeholder negotiations in accordance with the protocols agreed to by all parties. *See* Exhibit 1. Specifically, the applicable protocol required that "offers, proposals, or statements made during the stakeholder negotiations any notes taken that refer to offers, proposals, or statements made shall not be used as evidence for or against any party in any future hearing." *See* Exhibit 1. In turn, the Coalition offered testimony by Brian Shields that directly violation the protocol for stakeholder negotiations. *See* Exhibit 2.

Accordingly, the only question for purposes of this motion is what type of remedy is appropriate in light of this violation. DIGCE maintains that while the Water Quality Control Commission (hereinafter, "WQCC") may select from a range of options, the WQCC is not required to exhaust less severe sanctions for imposing a just remedy. *See, e.g., Lewis v. Samson*, 131 N.M. 317, 323 (2001) (the trial court is not required to exhaust less severe sanctions). Therefore, DIGCE respectfully requests that all or part of the testimony by Brian Shields be stricken from the record and appropriate limiting instructions be given regarding such testimony.

WHEREFORE, DIGCE respectfully requests that all or part of the testimony by Brian Shields be stricken from the record and appropriate limiting instructions be given regarding such testimony.

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, Tuesday, April 06, 2010:

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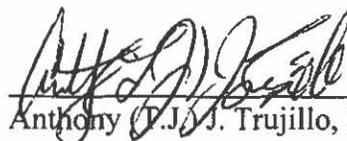
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NMED Dairy Industry Regulation Proposal Development: DRAFT Protocol for Stakeholder Negotiations

Statement of Purpose

1. In 2009 the New Mexico State Legislature passed Senate Bill 206 amending the Water Quality Act. This law took effect on June 19, 2009. It directs the New Mexico Environment Department (NMED) to propose regulations for the dairy industry to the Water Quality Control Commission (WQCC). The WQCC has approved a schedule directing NMED to file the proposed dairy regulations with the WQCC on December 22, 2009.

2. The statute also directs NMED to establish and consult with an advisory committee representing multiple perspectives including regulated industry, technical experts, and the public. NMED convened an advisory group and met from June 26, 2009 to July 15, 2009 to receive advice on a discussion draft of proposed regulation.

3. The statute requires an opportunity for public input and for stakeholder negotiations. NMED held public meetings in June 2009 in Hobbs, Clovis/Portales, Roswell, Mesquite, and Los Lunas. NMED also solicited and received public comment on two discussion drafts of proposed regulations issued on May 22, 2009 and August 7, 2009. NMED is convening stakeholder negotiations to explore all possible agreement among key stakeholders about proposed regulations. This protocol shall clarify the approach to be used to explore possible agreement over individual sections of proposed regulations and of a comprehensive proposal.

4. Based upon input received from the public and the advisory committee meetings and other comments submitted to NMED, NMED has modified the August 7, 2009 discussion draft and will use this working draft as its current proposal. Stakeholders may offer their own proposals. All public comments received by NMED shall be mailed to participants on CD no later than October 5, 2009.

5. Unlike public meetings and the advisory committee forum that received a broad range of comment and often involved participants stating particular positions and perspectives, the stakeholder negotiation is an "agreement seeking" process. All presentations and discussion should focus upon helping NMED and stakeholders consider possibilities for agreement. Where agreement cannot be reached, all stakeholders retain the right to advocate before the WQCC for particular technical, legal and policy positions that they believe best serve them and their constituents. In order that the stakeholder negotiation be a useful process, it is important that stakeholders commit themselves to (a.) come prepared to consider possibilities for agreement, (b.) listen in order to better understand others' viewpoints and legitimate interest, and (c.) make specific regulatory proposals.

Meeting Participants



1. The following have identified themselves as stakeholders and shall participate fully in the meetings: Dairy Industry Groups (DIGCE, DFA and DPNM); Environmental Advocacy Groups (Amigos Bravos and Sierra Club, Rio Grande Chapter); Community Groups (Caballo Concerned Citizens and Citizens for Dairy Reform); and individual dairy consultants (Loney Ashcraft and Jay Lazarus).

2. The bureau chief of the NMED Ground Water Quality Bureau, Bill Olson, and the attorney for NMED, Adolfo Mendez shall participate on behalf of NMED. Up to 5 additional members of the NMED staff may attend to advise them.

3. Each stakeholder may have two representatives at the negotiation table. Additionally, each stakeholder may bring 5 advisors to assist their participation. These advisors shall not participate directly in the meeting unless (a.) the stakeholder requests that the advisor speak for them and (b.) the Chair agrees that this will better accomplish the purpose of the meeting. For example, an advisor with technical knowledge may be better able to explain a stakeholder's proposal for regulatory specifics so NMED and other stakeholders understand why this language is proposed and desirable. All stakeholders may consult with their advisors as needed to insure that they have the advice and information they need to effectively participate and negotiate. In order to insure that each stakeholder has access to the needed advisors, a stakeholder may substitute advisors at any time so long as there are no more than five advisors for each stakeholder in the room at any time. If a stakeholder believes that 5 advisors are insufficient to provide the assistance needed to address particular issues on the agenda, the stakeholder may request that the Chair grant permission to add more advisors for a particular issue. The Chair shall advise the other stakeholders, receive their views, and make a determination as to whether the additional advisors shall be permitted to attend.

4. Mark Bennett, Decision Resources, Inc. will be the Facilitator of the meetings and shall also serve as the Chair. In this capacity he is responsible for all procedural matters as set forth in this protocol.

Definition of Preliminary Agreement

In order to determine whether there is preliminary agreement about a particular provision of regulation that can be presented by NMED to the WQCC as "agreed upon" by the represented stakeholders, the facilitator shall poll the group to declare their support or lack of support using the following consensus process:

When the Chair indicates that the allotted time for discussion is complete or at the request of the facilitator:

- a. The proposed agreement shall be restated clearly.
- b. Each stakeholder representative shall indicate their level of support for the decision with a simultaneous declaration of support with a hand using a 0-5 scale
 - i. fist/zero=strongly opposed,
 - ii. 1=serious reservations (no support),

- iii. 2=some reservations but can live with it (no opposition),
 - iv. 3=mild support or neutrality (acceptable),
 - v. 4=strong support,
 - vi. 5=full support)
- c. If all stakeholder representatives register a declaration of 2 or more, the decision will be recorded as a preliminary consensus agreement to be reviewed along with other preliminary agreements at the end of the process.
- e. If any stakeholder representative makes a declaration of zero or 1, the Chair shall determine whether to end further discussion or continue discussion with stakeholders to clarify positions in the interest of exploring possible agreement.
- f. If there is no agreement, neither NMED nor any other stakeholder shall make any reference to the expressions of support or lack of support for those particular proposals in a petition for proposed regulations to the WQCC (see "Dairy Industry Regulation Stakeholder Stipulation" below)

Conduct of Meetings.... Guidelines (Ground Rules)

1. **Caucusing:** During the meeting, any stakeholder can indicate the need for an opportunity to speak privately with other stakeholders and their advisors. So long as such requests are in service of the goals of the meeting and do not disrupt the process, they shall be honored.
2. **Meeting Format:** All meetings shall have an agenda that stakeholders receive in advance of the meeting. The determination of agenda items for the next meeting shall be discussed as the last item on the agenda of the previous meeting. Once an agenda has been set, the stakeholders agree to prepare for and follow the agenda. However, any stakeholder may request that the Chair depart from the agenda in order to take advantage an opportunity to make progress on a logically related issue. The Chair will determine how to handle such requests after consulting with the other stakeholders.
3. **Preparation:** At the first meeting, each stakeholder is encouraged to provide any written proposals for regulatory language and may make a summary presentation of their proposed regulations. At subsequent meetings, if stakeholders have any additional written proposals to present, they shall distribute this information to all participants as far in advance of the meeting where it will be discussed as is reasonable. This time is critical so all stakeholders have an opportunity to (a.) review and consider the proposal and (b.) consult with members of their constituent groups about the proposal in order to be in a position to negotiate possible agreement. The Chair and the stakeholders will determine the agenda and related information exchange deadlines as the last item of business at the previous meeting.
4. **Record of Meeting:** Formal minutes will not be kept. The facilitator will record preliminary agreements during each meeting and circulate this record to all participants so these can be tested, reaffirmed, or modified at the end of the process for the final stipulation. These preliminary agreements shall be superseded by the final stipulation and have no further force and effect. There will not be any tape or video recording of meetings. All participants may make

their own written notes. Any participant who is not able to take their own notes may have a dedicated note taker attend the meeting to assist him or her.

5. **Public Observation:** To encourage open and frank exploration of possible agreement on regulatory language, attendance at the stakeholder negotiations is limited to NMED, stakeholders and their advisors.

6. **Role of Facilitator:** The facilitator shall work to ensure that the process runs smoothly. This includes:

- assisting the stakeholder representatives to listen carefully
- keeping the focus on the agenda,
- calling upon stakeholder representatives to keep order in the discussion
- addressing the guidelines and safeguards below if necessary
- working to resolve impasses that occur
- assisting with agenda drafting
- other functions as requested by the Chair and the stakeholders

The facilitator will not take positions on issues that are the subject of negotiation and serves at the will of the Chair as advised by the stakeholders.

Guidelines and Safeguards

1. NMED, stakeholders and their advisors (if they are authorized to participate) agree to conform to this protocol and to act in a good faith effort to reach agreement in all aspects of these negotiations by encouraging the free and open exchange of ideas, views, and information.

2. With the exception of agreed upon provisions included in the Dairy Industry Regulation Stakeholder Stipulation described below, NMED, stakeholders and their advisors agree that offers, proposals, or statements made during the stakeholder negotiations and any notes taken that refer to offers, proposals, or statements made shall not be used as evidence for or against any party in any future hearing.

3. Stakeholder representatives will act with respect toward each other by refraining from personal attacks and prejudicial statements.

4. Stakeholders agree to exchange information in good faith and provide information as much in advance of the meeting at which the information is to be used as possible.

Dairy Industry Regulation Stakeholder Stipulation at End of Negotiation

At the end of the stakeholder negotiations, all preliminary agreements will be reviewed in light of the overall outcome. NMED and any stakeholders may reaffirm their previous indication or

change it based upon the entire process. Any aspect of proposed regulations that continues to have the unanimous support or acceptance of NMED and all the stakeholders shall be put in a written stipulation signed by NMED and all the stakeholders. The stipulation will accompany NMED's petition for dairy specific regulations submitted to the WQCC.

Where unanimous support or acceptance by NMED and all the stakeholders cannot be achieved, NMED may modify its proposal for dairy specific regulations submitted in its petition to the WQCC.

Meeting Schedule

Meetings shall take place as follows:

1. October 16, 2009, NMED District 1 Office, Albuquerque;
2. October 29-30, 2009, Roswell Convention Center, Roswell;
3. November 12, 2009, Natural Resources Conservation Service Office, Albuquerque;
4. November 17-18, 2009, Natural Resources Conservation Office, Albuquerque;
5. November 30, 2009 (if necessary), NMED District 1 Office, Albuquerque

The participants may hold additional meetings if all participants agree that such meetings will be useful to reach agreement.

At the final meeting, the participants shall discuss procedural issues about the presentation of any stipulation to the Water Quality Control Commission, the submission of petitions by multiple stakeholders to the Commission, and efficient ways to present disputed issues to the Commission.

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

**IN THE MATTER OF THE PROPOSED AMENDMENT
TO 20.6.2 NMAC (DAIRY REGULATIONS)**

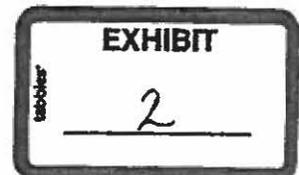
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) **WQCC 09-13 (R)**

TESTIMONY OF BRIAN SHIELDS

I am the Executive Director of Amigos Bravos, Inc., a New Mexico non-profit river conservation organization. I have served as a founding member of the Board of Directors from 1988-1990, as Projects Director from 1991-1996, and as Executive Director since 1996. Established in 1988, Amigos Bravos is an award-winning, nationally recognized river conservation organization with offices in Taos and Albuquerque, a staff of seven, and over 1,600 supporters. Rooted in both science and the law, and inspired by the traditional values and wisdom of New Mexico's diverse communities, Amigos Bravos is guided by social justice principles and dedicated to preserving and restoring the ecological and cultural integrity of New Mexico's rivers and watersheds. Amigos Bravos has played a leading role in reducing water contamination emanating from the Chevron Mining Inc molybdenum mine in Questa, preserving the Valle Vidal, holding Los Alamos National Laboratory accountable for its toxic legacy, restoring the Red River, reforming mining practices, and bringing river otters back to New Mexico.

In response to severe impacts to New Mexico's limited water resources, and the lack of comprehensive mining reform at the federal level, mining activists, including Amigos Bravos, worked for passage of the 1993 New Mexico Mining Act. The Act contains strict requirements regarding the location of new mines and a strong mandate for the reclamation of existing and new mines that includes establishing financial assurance to cover closure and cleanup costs. Since the passage of the New Mexico Mining Act of 1993, I have been involved in numerous regulatory proceedings regarding the development of closure plans and corresponding financial assurance requirements at the Chevron Mining, Inc. molybdenum mine in Questa, NM. Starting in 2007, I have represented Amigos Bravos' interests in a successful national lawsuit that mandates EPA to develop financial assurance regulations for all producers and handlers of hazardous waste.

20.6.2.3206 Application Requirements for New Discharge Permits. The New Mexico Environment Department's Revised Petition for Regulatory Change does not contain language relating to financial assurance. An astonishing sixty-one percent (61%) of active New Mexico dairies are currently not in compliance with groundwater standards for nitrates (Coalition Exhibit 4). Given the extremely high rate of groundwater contamination and permit non-compliance among New Mexico dairy facilities, I strongly believe that the proposed regulations must require financial assurance from all dairy facilities operating in the State. The rationale for financial assurance is to ensure that entities that discharge pollutants will be able to clean up any environmental contamination regardless of whether their business fails; this minimizes the cost to local, state, and federal governments to have to intervene and do cleanup, helps ensure that

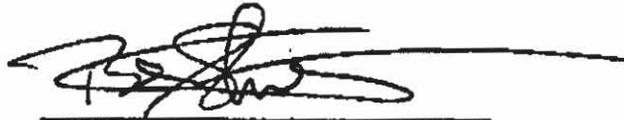


any cleanup is done sooner, and protects the tax payer from having to subsidize the industry's cleanup costs. Financial assurance also creates a greater incentive to safely locate, manage, and dispose of waste. Dairy facilities impact human health, property, and local environments by the release of pollutants. The US-EPA has recognized that financial assurances are intended to address pollution from toxic and hazardous substances, and EPA specifically states that "[h]aving the financial wherewithal to perform closure and/or cleanup is critical to protecting human health and the environment from toxic and hazardous waste and substances that are polluting the land, air, and water. The financial responsibility requirements achieve this protection by: (1) promoting the proper handling of hazardous and toxic, waste and substances, (2) ensuring that funds will be available to address contamination; (3) preventing the shifting of cleanup costs from the responsible party to the tax payer or other parties; and (4) making facilities and land available to the public for reuse." EPA, *Compliance and Enforcement National Priority: Financial Responsibility Under Environmental Laws 2* (2005).

In New Mexico, financial assurance is a requirement of the New Mexico Mining Act (Coalition Exhibit 5). The State of Oklahoma requires financial assurance for dairy facilities (*Oklahoma Concentrated Animal Feeding Operations Act*, "§ 20-55. Evidence of Financial Ability to Run an Animal Feeding Operation with a Liquid Animal Waste Management System" Coalition Exhibit 6). During the New Mexico dairy stakeholder meetings in the Fall of 2009, in which Amigos Bravos participated, the Groundwater Quality Bureau (GWQB) provided what they called an "Exceptions Concept" (20.6.2.XXXX; Coalition Exhibit 7). Representatives from the dairy industry were seeking grounds for exceptions and the GWQB responded with the "Exceptions Concept" document, the largest section of which deals with Financial Assurance (proposed 20.6.2.XXXX.a(6)). I support the language regarding Financial Assurance contained in the Exceptions Concept, but for all the reasons listed above, I believe that financial assurance must apply to all dairy facilities as an integral component of the permit, not just as a condition in the case of an exception to the regulations. Therefore, we are adding an additional section, **S. Financial Assurance**, to 20.6.2.3206. My recommendation for Financial Assurance also applies to section 20.6.2.3207 **Application Requirements for Discharge Permit Renewal or Modification**, where I propose an additional subsection: **Q. Financial Assurance**. My recommended changes are included in Coalition Exhibit 2.

Closure Plan. Closure Plans for facilities that produce, handle, and dispose of animal waste and chemicals that can contaminant water supplies are an essential component of an operations plan. Without a closure plan, the operator and the regulating agency are unable to adequately determine and predict environmental impacts that could lead to unintended post-operations consequences. Moreover, comprehensive closure plans are an important tool to help operators determine the most protective and cost-effective waste management practices in order to avoid potential long-term cleanup costs and environmental impacts. For instance, if a closeout plan had been required prior to open pit mining at the Molycorp (now Chevron Mining) molybdenum mine in Questa – where EPA is now estimating an eight-hundred million dollar cleanup cost – it is highly unlikely that the waste rock piles would have been placed in such proximity to the Red River. I believe that the New Mexico Environment Department's Revised Petition for Regulatory Change must require site-specific closure plans for all dairies as a part of the permit application and approval process. In the proposed regulatory change, NMED includes language on closure requirements in 20.6.2.3230 **Closure Requirements for All Dairy Facilities** (p79 of

the proposed regulations). There are also two "reserved" sections for dairy facilities with land application areas (20.6.2.3231) and dairy facilities discharging to an evaporative wastewater disposal system (20.6.2.3232). However, nowhere in the proposed regulation does NMED require the submittal and approval of a closure plan. Given the extremely high rate of groundwater contamination and permit non-compliance among New Mexico dairy facilities, I believe that all dairy facilities must submit a closure and post-closure plan at the time of original permit or, in the case of existing dairy facilities, at the time of permit renewal or modification, as is required under the Mining Act. Approved closure plans are the basis for determining financial assurance and for protecting public health and the environment. My recommended changes are included in Coalition Exhibit 2.



Brian Shields