

**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 VIOLATIONS OF SECTION 74-6-4(K) NMSA 1978

The Dairy Industry Group for a Clean Environment (hereinafter, "DIGCE"), by and through undersigned counsel, hereby submits this Motion to Dismiss for Violations of Section 74-6-4(K) NMSA 1978. As grounds, DIGCE refers the Water Quality Control Commission (hereinafter, "WQCC") to DIGCE Exhibits 74, 75, 76, 77, and 78.

In summary, these exhibits show that the New Mexico Environment Department (hereinafter, "NMED") initiated the rulemaking process under Section 74-6-4(K) NMSA 1978 before Senate Bill 206 from the 2009 Regular Session even became law. Consequently, NMED engaged in several premature activities, including: (1) issuance of draft rules before the underlying law became effective and approval of a schedule; (2) solicitation of public input before the law became effective and approval; and (3) advisory committee activities occurring before approval of a schedule.

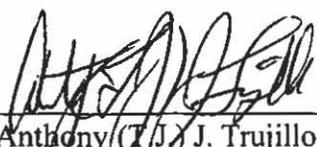
Section 74-6-4(K) NMSA 1978 is clear in that it requires the regulations to be "developed and adopted" in accordance with a schedule approved by the WQCC. The issuance of draft rules, solicitation of public input, and advisory committee were all "rule development" activities that should have been completed in accordance with pre-approved schedule. As a result of this rush to regulate, NMED got the WQCC to approve a schedule after the fact for rule development activities.

In turn, despite DIGCE's objections to the process, the dairy industry was left with insufficient notice and insufficient time to meaningfully participate and prepare for these premature rule development activities. For example, NMED hastily convened an advisory committee to consider NMED's draft rule, did not provide that advisory committee scientific evidence to support the NMED draft rule, and did not provide the advisory committee sufficient time to evaluate the NMED draft rule and to consider alternative based on the best available science. Indeed, during the entire process leading up to the formal filing of testimony in the matter, NMED failed to provide DIGCE or any other parties with any scientific information offered as the basis for its regulatory proposal.

At best, NMED's premature regulatory activities violated Section 74-6-4(K) NMSA 1978. At worst, the procedural due process rights of DIGCE and its members were violated. Thus, the best remedy for the WQCC to dismiss this rulemaking, require NMED to get a pre-approved schedule of rulemaking activities, and to direct NMED to establish a properly constituted advisory committee to reconsider rules for dairies in accordance with the Water Quality Act, as amended by Senate Bill 206, that will allow for consideration of 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, and grant any further relief as may be appropriate.

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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