

STATE OF NEW MEXICO
BEFORE THE WATER QUALITY CONTROL COMMISSION



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

No.: WQCC 09-13(R)

**COALITION’S RESPONSE TO DIGCE’S MOTION
STRIKE TESTIMONY FOR A VIOLATION OF
PROTOCOLS FOR STAKEHOLDER NEGOTIATIONS**

COMES NOW Amigos Bravos, Citizens for Dairy Reform, Caballo Concerned Citizens Group, Food and Water Watch and the Sierra Club Rio Grande Chapter (collectively referred to as “the Coalition”), and hereby responds the *Motion to Strike Testimony for Violation of Protocols for Stakeholder Negotiation*.

Had DIGCE contacted counsel for the Coalition, its heavy-handed motion to strike would have been unnecessary. Counsel and Mr. Shields were unaware of the Protocol. However, because we were stakeholders and desire to honor the agreed upon Protocol, the Coalition hereby voluntarily withdraws from the record the stricken parts of Mr. Shields’ testimony identified on Exhibit A to this Response;¹ the Coalition also withdraws its Exhibit 7. However, there is no justification for striking Mr. Shields’ entire testimony and no authority to impose such a punitive sanction. In any event, the Hearing Officer should deny DIGCE’s Motion as moot.

Furthermore, in keeping with the Protocol relied on by DIGCE, the Coalition requests the Hearing Officer to strike (or DIGCE to voluntarily withdraw) the following from DIGCE’s pre-filed testimony:

¹ We have also taken this opportunity to correct a few typographical errors in the testimony, which is also shown in redline.

1. PRE-FILED DIRECT TESTIMONY OF ALVA CARTER, JR. at 2 (“I have reviewed NMED’s Proposed Rules and *based on ... and my participation in the advisory committee and stakeholder negotiations*, I firmly believe that NMED’s Proposed Rules will be the demise of the dairy industry in the state”)(emphasis added).
2. PRE-FILED DIRECT TESTIMONY OF WALTER BRADLEY at 1 (“DFA has participated in the ... stakeholder negotiations as part of the rulemaking process. As a result of these efforts, DFA supports DIGCE’s Positions and opposes NMED’s Proposed Rules.”)
3. PRE-FILED DIRECT TESTIMONY OF BEVERLY FIKSE at 1 (“DPNM has participated in ... stakeholder negotiations as part of the rulemaking process. As a result of these efforts, DPNM supports DIGCE’s Positions and opposes NMED’s Proposed Rules.”)
4. PRE-FILED DIRECT TESTIMONY OF DR. BRENT AUVERMANN at 1-2 (“On November 30, 2009, I gave a presentation to the dairy rules stakeholder group to assist in its deliberations. A copy of that presentation is provided as DIGCE Exhibit 64. In that presentation, I summarized many of the extensive and detailed written comments that individual team members had provided up to that point and emphasized several key points, including that compacted clay or soil liners are commonly used in the dairy industry and have some key advantages over synthetic liners. I also described why groundwater monitoring is of limited effectiveness in monitoring potential groundwater impacts from impoundments and land application areas and alternatives to groundwater monitoring, including vadose zone monitoring. I recommended that compacted clay/soil liner systems continue to be allowed for use in appropriate conditions under the new dairy rules and that the new dairy rules provide for alternatives to groundwater

monitoring for earlier detection of potential groundwater impacts. Following my presentation, provided through DIGCE's counsel, copies of peer-reviewed scientific literature on which my presentation and recommendations are based. Our team also recommended alternatives to flow meters that are more suitable for use in a dairy environment, such as water level measurements. I have reviewed NMED's proposed rules published after my presentation to the stakeholder group, and the recommendations in my presentation and the other recommendations made by our team have not been incorporated into NMED's proposed rules. [¶] The proposed changes to and comments on NMED's proposed rules submitted by DIGCE incorporate changes that reflect the recommendations of our team. These include provisions for clay liners for dairies in some locations and alternative monitoring approaches, such as vadose zone monitoring and soil monitoring in land application areas, that may supplement and reduce the need for ground water monitoring. They also include an allowance for measurement devices other than flow meters and more flexibility for blending of irrigation water and wastewater before land application. [¶] To date, based on ... the information provided by NMED to the stakeholder group ..., we have seen very little, if any, scientific information in support of NMED's rule proposal.”)

5. DIGCE Exhibit 64.
6. DIGCE Exhibit 8 at 7-8 (“*This is a radical change from current practice ... is not based on comments or suggestions made during the stakeholder or advisory committee process*”) (emphasis in original).

The foregoing excerpts should also be stricken on relevancy grounds, since participation in the stakeholders’ process is not relevant to any issue before the WQCC.

WHEREFORE, based on the forgoing, the Coalition requests the Hearing Officer to deny DIGCE's Motion as Moot. The Coalition further requests the Hearing Officer to strike the portions of DIGCE's testimony identified herein, because they violate the Protocol relied upon by DIGCE in its Motion to Strike, and because they are not relevant to any issue before the WQCC.

Respectfully submitted,

New Mexico Environmental Law Center

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Certificate of Service

I certify that the foregoing document was emailed on the 9th day of April 2010 to the persons identified on the attached service list and that the original and appropriate number of copies was filed with the WQCC.


Bruce Frederick

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

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

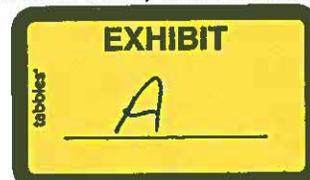
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WQCC 09-13 (R)

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 a membership of 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~~ Mining 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 ~~discharging~~ 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