Received
APR 2010
Boards and Commissions

STATE OF NEW MEXICO
BEFORE THE WATER QUALITY CONTROL COMMISSION

In the Matter of:	)	
PROPOSED AMENDMENT TO 20.60.2 NMAC (Dairy Rules)	)	No.: WQCC 09-13(R)

COALITION'S RESPONSE IN OPPOSITION TO DIGCE'S MOTION TO DISMISS FOR FAILURE TO MEET STATUTORY CRITERIA

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 to Dismiss for Failure to Meet Statutory Criteria* filed by the Dairy Industry Group for a Clean Environment ("DIGCE"). The Hearing Officer should deny the Motion because, frankly, it is frivolous. No statute or other authority allows the Hearing Officer or the WQCC to preempt a public hearing and dismiss an entire rulemaking. Even if such authority existed, DIGCE has provided no standard, evidence or authority to support its allegation that the New Mexico Environment Department's ("NMED") proposal is not based on "the best available scientific information." DIGCE simply gives its legal opinion that NMED failed to make an adequate "showing." And finally, the statute cited by DIGCE clearly and expressly applies to the Water Quality Control Commission ("WQCC"), not NMED. Thus, after hearing all the evidence, the WQCC will determine (not NMED) which regulations to adopt (if any), based on the express statutory criteria set out in the Water Quality Act and any other considerations that it deems relevant. Obviously, the WQCC cannot practically or legally make this determination until *after* it conducts a public hearing and reviews all the evidence—

including all the scientific information presented by NMED, DIGCE, the Coalition and the other parties.

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 to Dismiss* must be derived from the applicable statute.

The applicable statutes in this case require the WQCC to hold a public hearing before adopting a regulation, NMSA 1978, § 74-6-6(A)(1993), and further requires (among other things) that it "consider … the best available scientific information." NMSA 1978, § 74-6-4(K) (2009). Under this standard, DIGCE's Motion should be denied. No authority authorizes DIGCE's Motion to Dismiss. DIGCE's has, moreover, failed to present any standard, evidence or authority to support its argument that NMED's proposal is not based on "the best scientific information." And finally, although the proponent of a rule bears the burden of proof, the applicable statutory requirement clearly and expressly applies to the WQCC, not NMED. The

WQCC obviously cannot determine whether the proponent of a rule has met its burden until it hears all the evidence.

2. DIGCE cites no law or evidence in support of its Motion; therefore, its Motion is frivolous and should be denied.

DIGCE appears to believe that it is before a court of law in which the Rules of Civil Procedure apply, but it is not. Thus, DIGCE can cite no statute, rule or any other authority that would allow the Hearing Officer, or even the WQCC, to summarily "dismiss" an entire rulemaking after the WQCC has decided to conduct a statutorily prescribed public hearing in response to a rulemaking petition. *See, generally,* NMSA 1978, §74-6-6 (1993). No such authority exists. Even if there were this authority, DIGCE has utterly failed to provide any basis for dismissal. First, DIGCE has failed to cite any objective legal standard for determining how the "best available scientific information" should be identified; it merely gives its unsupported legal opinion that NMED failed to make an adequate "showing." Such "unsupported legal conclusions" need not be accepted by the Hearing Officer. See Yates Exploration v. Valley Improvement Ass'n, 108 N.M. 405, 409 (1989). Moreover, DIGCE is free to bring out any alleged weaknesses in NMED's case on cross examination.

Second, the statute cited by DIGCE clearly and expressly applies to the WQCC, not NMED. In determining whether to adopt a regulation, the statute requires "the *commission*" to conduct a public hearing and further requires "the *commission* [to] consider ... the best available scientific information." NMSA 1978, § 74-6-4(K) (emphasis added). At the public hearing, DIGCE and every other party will have a statutory right to examine NMED's witnesses on the issue of "best available scientific information." DIGCE also had the right to present prefiled direct testimony on this issue for the WQCC's consideration, although it failed to do so. Nevertheless, DIGCE still has the right to argue at the end of the hearing before the WQCC that

the "best scientific information" was not presented. DIGCE does not, however, have the right to preempt the public hearing altogether. There simply is nothing in the Water Quality Act or elsewhere that would allow WQCC to decide DIGCE's pet issue, or *any* substantive issue, before the WQCC actually conducts a public hearing and reviews all the evidence. NMSA 1978, § 74-6-6 ("No regulation or water quality standard or amendment or repeal thereof shall be adopted until after a public hearing at a public hearing"). Thus, DIGCE's motion is frivolous and must be denied. Cf. G.E.W. Mechanical Contractors v. Johnston Co., 115 N.M. 727, 733 (Ct. App. 1993) (defining a "frivolous action" as one in which "there is no arguable basis in law or fact to support the cause of action and the claim is not supported by a good faith argument for the extension, modification, or reversal of existing law.").

CONCLUSION

For all the forgoing reasons, DIGCE's Motion to Dismiss should be DENIED.

Respectfully submitted,

New Mexico Environmental Law Center

By _____

Bruce Frederick
Jonathan Block
Eric Jantz
Douglas Meiklejohn
1405 Luisa Street, Suite 5
Santa Fe, New Mexico 87505
Tel: (505) 989-9022, ext. 26
Fax: (505) 989-3769
bfrederick@nmelc.org

Attorneys for Amigos Bravos, Caballo Concerned Citizens Group, Food and Water Watch and the Sierra Club Rio Grande Chapter

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

SERVICE LIST

Adolfo Mendez, II, Office of General Counsel New Mexico Environment Department Runnels Building Rm. N4050 1190 S1. Francis Drive Santa Fe, NM 87505 adolfo.mendez@state.nm.us	Alva Carter Jr. DIGCE 214 W. 2nd Street Portales NM 88130 alva@yucca.net	T.J. Trujillo Gallagher & Kennedy P.A. 1233 Paseo de Peralta Santa Fe NM 8750 I ajt@gkne1.com
Dalva Moellenberg Gallagher & Kennedy P.A. 2575 E Camelback Rd 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 ofNM P.O. Box 6299 Roswell NM 88202 dpnm 1@juno.com
Jerry Nivens Caballo Concerned Citizens P.O. Box 131 Caballo NM 87931 jerry@caballonm.com	Dan Lorimier Sierra Club, Rio Grande 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@iccaw.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 turnerdj 1980@hotmail.com
Jo Ann King 13100 N Calle Bonita Hobbs NM 88242 joannkingl0@leaco.net	Lonny Ashcraft Ashcraft Consulting, Inc. P.O. Box 623 Roswell NM 88202 Ioneyashcraft@cableone.net	Jay Lazarus Glorieta Geoscience, Inc. P.O. Box 5727 Santa Fe NM 87502 lazarus@glorietageo.com
Joyce Medina, Commission Administrator joyce.medina@state.nm.us		