

STATE OF NEW MEXICO
BEFORE THE WATER QUALITY CONTROL COMMISSION



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)
In the Matter of:)
)

PROPOSED AMENDMENT)
TO 20.6.2 NMAC (Dairy Rules))
_____)

No.: WQCC 09-13 (R)

**NEW MEXICO ENVIRONMENT DEPARTMENT'S
RESPONSE TO DIGCE'S MOTION TO DISMISS FOR FAILURE TO MEET
STATUTORY CRITERIA**

The New Mexico Environment Department ("Department" or "NMED") hereby responds to the Dairy Industry Group for a Clean Environment's ("DIGCE") Motion to Dismiss for Failure to Meet Statutory Criteria ("Motion to Dismiss").

DIGCE argues that in this proceeding the Department has the burden of proof, and it has not met that burden of proof. DIGCE argues that in particular, the Department has not met its statutory burden pursuant to the Water Quality Act to use "the best available scientific information" under NMSA 1978 §74-6-4(K).

DIGCE is confused on the law, and its argument is misplaced. First of all, the statute governing rulemaking activities by the Water Quality Control Commission ("Commission") does not place a burden on the Department. NMSA 1978 §74-6-4. Section 74-6-4 (K) states that "*The commission shall consider in addition to the factors listed in Subsection E of this section, the best available scientific information.*" (Italics added.) The law is clear that the burden

created by this section is placed on the Commission, not the Department. *Tenneco Oil Company v. N.M. Water Quality Control Comm'n*, 107 N.M. 469, 471, 760 P.2d 161, 163 (Ct. App. 1987). The Commission must consider the factors listed in Section 74-6-4.E, including the best available scientific information, and base its decision in this rulemaking proceeding on the evidence before it. *See Id.* at 164. That evidence is presented to the Commission during a rule-making hearing and can come from any party. As stated by Mr. Olson in his pre-filed direct testimony, the Department believes that the evidence it has submitted in support of the proposed Dairy Rule is the best available scientific information. If DIGCE believes that it has better scientific information that it wants the Commission to consider, it has the obligation to produce it as evidence at the Commission's rule-making hearing.

Second, the Department has pre-filed substantial scientific information supporting its proposed rule. For some reason, DIGCE seems to think that because Mr. Olson stated in his pre-filed direct testimony that the Department has relied on the best scientific information available to it, that this statement is the scientific evidence supporting the rule. DIGCE has ignored the fact that the Department has pre-filed the written testimony of seven technical witnesses in its direct testimony and five technical witnesses in its rebuttal testimony. It ignores the fact that the Department has pre-filed numerous technical and scientific exhibits supporting its testimony and the proposed rule. In its desire to make the false claim that the Department has not supported the proposed Dairy Rule with the best available scientific information, DIGCE has ignored the facts.

Third, the term "scientific" is not defined in the statute. However, the online edition of the Compact Oxford English Dictionary¹ defines science as:

science

• **noun** 1 the intellectual and practical activity encompassing the systematic study of the structure and behaviour of the physical and natural world

¹ http://www.askoxford.com/concise_oed/science?view=uk

through observation and experiment. 2 a systematically organized body of knowledge on any subject.

— ORIGIN Latin *scientia*, from *scire* 'know'.

The Department's proposed rule, and the testimony supporting it, is based on years of education, experience, observation, data, and study related to geology, hydrology, soil science, engineering principles, agronomy, wastewater management, the behavior of wastewater in the vadose zone and ground water and the contamination and remediation of ground water, by the Department's witnesses and by the authors of exhibits submitted by the Department. DIGCE's contention that the proposed Dairy Rule and the Department's testimony is not based upon the best available scientific information is spurious and unsupported by the facts.

If DIGCE seriously believed that the proposed Dairy Rule is not based upon the best available scientific information, it could have produced scientific information in its rebuttal testimony that refutes the direct evidence of the Department. Instead, DIGCE has not submitted any scientific or technical testimony or exhibits that refute the Department's scientific and technical position. In fact, DIGCE did not provide any pre-filed rebuttal of the Department's direct testimony on the technical and scientific rationale for the proposed rule. Indeed, as the Department points out in its pre-filed written rebuttal testimony, many of the exhibits DIGCE submitted in its direct case actually support the Department's proposed rule. DIGCE has not in any manner shown that the evidence submitted by the Department is inadequate for the Commission to determine that the proposed rule is based on the best available scientific information.

For the foregoing reasons, the Motion to Dismiss filed by DIGCE should be denied.

Respectfully Submitted,

NEW MEXICO ENVIRONMENT DEPARTMENT

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this the New Mexico Environment Department's Response to DIGCE's Motion to Dismiss For Failure to Meet Statutory Criterea was served by e-mail on the following parties on April 9, 2010:

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