

**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)

**DIGCE'S JOINT REPLY TO NEW MEXICO ENVIRONMENT DEPARTMENT'S AND
COALITION'S RESPONSES TO DIGCE'S MOTION TO STRIKE TESTIMONY FOR A
VIOLATION OF PROTOCOLS FOR STAKEHOLDER NEGOTIATIONS**

The Dairy Industry Group for a Clean Environment ("DIGCE") hereby replies to the New Mexico Environment Department's (NMED's) and the Coalition's Responses to DIGCE's Motion to Strike Testimony for a Violation of Protocols for Stakeholder Negotiations ("Motion to Strike").

The Coalition's Response withdrew the testimony of Brian Shields to which DIGCE objected as well as the Coalition's Exhibit 7. As a result, the Coalition asks the Hearing Officer to deny DIGCE's Motion to Strike as moot. NMED's Response states that NMED does not object to the Hearing Officer's striking the portion of Mr. Shield's testimony, conditioned on the Hearing Officer also striking certain testimony offered by DIGCE. DIGCE agrees that, based on the Coalition's withdrawal of the objectionable testimony of Mr. Shields and the Coalition's Exhibit 7, DIGCE's motion is now moot, as is NMED's Response. Consequently, DIGCE's withdraws its Motion to Strike.

The Coalition's Response further identifies certain testimony offered by DIGCE's witnesses and objects to that testimony based upon the protocol for the stakeholders' negotiations and based on relevancy. That part of the Coalition's Response is, in fact, a new

motion and should be denied as untimely because it was not filed by the April 6 deadline for filing motions.

If the Hearing Officer decides to consider the portion of the Coalition's response requesting that portions of DIGCE's testimony be stricken, despite the untimeliness of the Coalition's request, DIGCE must point out that there is a significant difference between the references to the stakeholder negotiations in DIGCE's testimony and the withdrawn testimony of Mr. Shields. Mr. Shields' testimony identified a specific proposal offered by another party during the stakeholder negotiations and suggested that the Commission should consider and adopt that proposal. That testimony goes to the essence of the protocol for the stakeholder negotiations, which was to encourage the parties to freely exchange ideas for the rules without fear that compromise proposals, if not agreed upon by all parties, can't be used against the party who offered the compromise.

The portions of DIGCE's testimony to which the Coalition objects, however, do not mention any statements made by any other party during the stakeholder negotiations. Indeed, the referenced portions of the testimonies of Messrs. Carter and Bradley and Ms. Fikse do not identify any statements made during the stakeholder negotiations, but indicate only the witnesses' participation in that process. Consequently, those portions of the testimonies are not contrary to the protocol for the stakeholder negotiations. With respect to relevancy, there is no reason to strike the testimony. Indeed, if that approach were taken, the Commission would need to strike all references to the stakeholder negotiations contained in the record. That is unnecessary, particularly because the Commission simply can give whatever weight it chooses to references regarding the stakeholder negotiations.

With respect to Dr. Auvermann's testimony and exhibit, Dr. Auvermann is referencing his own presentation, not positions taken or statements made by any other party during the stakeholder negotiations. Consequently, there can be no prejudice to any other party, and the references to the stakeholder negotiations simply are background information on the presentation. Moreover, it would be nonsensical to strike the presentation itself just because it was made before the stakeholder group, just as it would be nonsensical to strike NMED's references to the fact that the stakeholder negotiations took place (NMED NOI Attachment 1, Written Testimony of William Olson, page 11) or portions of the proposed dairy rules that NMED presented to the stakeholder group. Moreover, to the extent that Dr. Auvermann's testimony could be interpreted as implying any response by other parties to the presentation, NMED has made similar statements. For example, NMED's testimony states that it developed a revised set of dairy rules ". . . based on those stakeholder negotiations . . ." even though the stakeholder negotiations resulted in no stipulations, as provided in the protocol. *See* NMED NOI Attachment 1, Written Testimony of William Olson, page 11.

In sum, the Coalition has conceded that a portion of the testimony of Mr. Shields as well as an exhibit were presented in violation of the protocol for the stakeholder negotiations, and the Coalition has cured that problem by withdrawing the testimony and exhibit. Any further action with respect to the protocol, as suggested by the Coalition and NMED, is unfounded and unnecessary and, indeed, would require a detailed review of the record to strike other references to the stakeholder negotiations in testimony presented by all parties.

WHEREFORE, due to the Coalition's withdrawal of those portions of the testimony of Brian Shields and the exhibit to which DIGCE objected, DIGCE withdraws its Motion to Strike and, as a result, the Hearing Officer need not further consider this matter. As a result of the

Coalition's withdrawal of the testimony, NMED Response also is moot. To the extent that the Coalition's Response could be treated as a new Motion, it should be denied as untimely and without basis.

Respectfully Submitted,



Dalva L. Moellenberg
Attorney for DIGCE
Gallagher & Kennedy, P.A.
2575 E. Camelback Road
Phoenix, AZ 85016
Phone: (602) 530-8223
E-Mail: dldm@gknet.com

-and-

Anthony (T.J.) J. Trujillo, Esq.
Attorney for DIGCE
Gallagher & Kennedy, P.A.
1233 Paseo de Peralta
Santa Fe, NM 87501
Phone: (505) 982-9523
E-Mail: ajt@gknet.com

Certificate of Service:

I hereby certify that a true and accurate copy of the foregoing pleading was served upon the following parties electronically this Friday, April 09, 2010:

Adolfo Mendez, II, Asst. General Counsel
Office of General Counsel
New Mexico Environment Department
Runnels Building Room N4050
1190 St. Francis Drive
Santa Fe, NM 87505
Adolfo.mendez@state.nm.us

Michael Jensen
Amigos Bravos
PO Box 238
Taos, NM 87571
mjensen@amigosbravos.org

Alva Carter, Jr.
DIGCE
214 W. 2nd Street
Portales, NM 88130
alva@yucca.net

Dalva Moellenberg
Gallagher & Kennedy, P.A.
2575 E. Camelback Road
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 of New Mexico
PO Box 6299
Roswell, NM 88202
dpm1@juno.com

Jerry Nevins
Caballo Concerned Citizens
PO Box 131
Caballo, NM 87931
jerry@caballonm.com

Dan Lorimier
Sierra Club, Rio Grace 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
3431 West Elm Street
McHenry, Illinois 60050
ddiamond@iccaw.org

Jana Hughes
Citizens for Dairy Reform
302 Stiles Road
Hobbs, NM 88242
Hjana48@yahoo.com

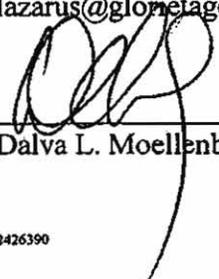
Deb Turner
13101 N. Calle Bonita
Hobbs, NM 88242
Turnerdj1980@hotmail.com

Jo Ann King
13100 N. Calle Bonita
Hobbs, NM 88242
Joannking10@leaco.net

Lonny Ashcraft
Ashcraft Consulting, Inc.
PO Box 623
Roswell, NM 88202
loneyashcraft@cableone.net

Bruce Frederick
NM Environmental Law Center
1405 Luisa Street, Suite 5
Santa Fe, NM 87505
bfrederick@nmelc.org

Jay Lazarus
Glorieta Geoscience, Inc.
PO Box 5727
Santa Fe, NM 87502
lazarus@glorietageo.com



Dalva L. Moellenberg

2426390