

**BEFORE THE WATER QUALITY CONTROL COMMISSION  
FOR THE STATE OF NEW MEXICO**



**In the Matter of:**

**PROPOSED  
AMENDMENTS TO GROUND  
AND SURFACE WATER  
PROTECTION REGULATIONS,  
20.6.2 NMAC**

**No. WQCC 17-03(R)**

**DAIRIES' RESPONSE TO AMIGOS BRAVOS'S AND GILA RESOURCES  
INFORMATION PROJECT'S EXPEDITED MOTION TO STAY ALL FILING  
DEADLINES AND HEARING**

Dairy Group for a Clean Environment and Dairy Producers of New Mexico (jointly "Dairies") hereby respond to the above motion filed on August 29, 2017 by Amigos Bravos and Gila Resources Information Project (jointly "Movants"). That motion requests an indefinite stay of all deadlines and the public hearing on this matter "until discovery issues are resolved and discover is completed." Dairies oppose the motion for the following reasons:

1. Movants created the "problem" they now complain of due to their own lack of diligence. The Department's proposed rule amendments have been available and public knowledge since the Department initiated its public consultation process well over one year ago in the summer of 2016. With the knowledge of the Department's proposed rule amendments, Movants agreed to the schedule as ordered by the Hearing Officer on June 2, 2107. Movants, however, submitted their first Inspection of Public Records Act ("IPRA") request related to this proceeding on July 25, 2017 and were still submitting requests as of August 29, 2017 according to the information presented in the Notice of Intent filed on September 11. Movants could have initiated their IPRA requests long ago.

2. One of the issues that seems to be the focus of Movants' complaints is the Department's proposal to formalize its longstanding approach to issue permit "amendments" for permit changes that do not constitute permit "modifications" as that term has been defined in the Commission's regulations for many years. This is not the first time, however, that the Commission has considered formalizing the concept of permit "amendments." Both Movants were parties in the Copper Rule proceeding, which concluded in the fall of 2013 and which included the adoption of a definition of "discharge permit amendment" as 20.6.7.7.B(19) NMAC. In that proceeding, the Department took essentially the same position as it is taking now on the need to formalize and define the concept of a "discharge permit amendment," and Movants opposed and litigated the same issue in that proceeding. This is further evidence of Movants' lack of diligence if they need more information for this matter.

3. Movants have no right to discovery in this proceeding. Neither the Water Quality Act provisions regarding rulemaking, section 74-6-6 NMSA 1978, nor the rules governing this proceeding, 20.1.6 NMAC, identify any right or requirement for pre-hearing discovery. Furthermore, the Legislature considered changes to the minimum requirements for rulemakings by New Mexico agencies as part of House Bill 58, which amended the State Rules Act. That legislation does not establish a discovery right during a rulemaking proceeding and, indeed, generally allows for a more simple procedure than is specified in 20.1.6 NMAC and the Commission's practice. Although discovery is not contemplated by the laws and rules governing this proceeding and it is debatable whether the Hearing Officer would have the power to include some type of discovery in the procedures for this case, Movants did not ask for any such provision in the Procedural and Scheduling Order and, consequently, waived any claim to the need for "discovery."

4. Movants apparently had sufficient information to formulate an alternative proposal to the Department's proposal on permit amendments, as Movants filed their Notice of Intent to Present Technical Testimony by the September 11, 2017 deadline. Consequently, as to that deadline, Movants' motion is moot.

5. The normal process for a rulemaking, and the process established in the Procedural and Scheduling Order, to which Movants did not object, is that "discovery" is accomplished through review of the Petition and the positions and direct testimony offered by other parties. Considering that there are more than a dozen parties who have already entered appearances in this proceeding, if separate discovery was allowed, these rulemaking proceedings would consume even more resources from all of the parties and could drag on for years. The Commissions' rulemaking proceedings already are far more "trial-like" than other typical rulemaking proceedings. There is a need for greater efficiency in a rulemaking process, not discovery rights that could cause these cases to drag on forever.

For these reasons, Dairies oppose this Motion and ask that the Hearing Officer deny it. Now that the written direct testimony has been filed by all parties and all can assess the need for an extent of rebuttal testimony, the Hearing Officer can consider specific requests, if any are made, to extend the time to file written rebuttal testimony if more time is needed to gather the information reasonably necessary for each party to prepare and file rebuttal testimony.

Respectfully Submitted,

GALLAGHER & KENNEDY, P.A.



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## **CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing Response to Motion to Stay all Filing Deadlines and hearings was served on September 13, 2017, via electronic mail to the following:

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