

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



**IN THE MATTER OF PROPOSED)
AMENDMENTS TO GROUND)
AND SURFACE WATER)
PROTECTION REGULATIONS,)
20.6.2 NMAC)**

No. WQCC 17-03(R)

**DAIRY PRODUCERS OF NEW MEXICO'S AND DAIRY INDUSTRY
GROUP FOR A CLEAN ENVIRONMENT'S STATEMENT OF POSITION
AND PROPOSED AMENDMENTS**

In accordance with the Revised Procedural Order issued in this case on June 2, 2017, the Dairy Producers of New Mexico and the Dairy Industry Group for a Clean Environment (jointly "Dairies") file this Statement of Positions regarding the proposed amendments to 20.6.2 NMAC as attached in the Department's Petition. In addition, Dairies file its proposed amendments to 20.6.2 not contained in NMED's Petition, but which are logical outgrowths of NMED's proposed amendments. Dairies submitted two sets of comments on the draft amendments to 20.6.2 published by the Department in 2016 and take the same positions as taken then, except as specifically modified by this Statement.

STATEMENT OF POSITIONS

1. Dairies generally support the proposed definition of "discharge permit amendment" in renumbered section 20.6.2.7.D(4) NMAC and agree that this is an important rule change. However, Dairies propose alternative language consistent with their comments submitted to the Department on the draft rule amendments.

2. Dairies support the proposed revision to the definition of "discharge permit modification" in renumbered section 20.6.2.7.D(5), provided that appropriate amendments are

made to the definition of “discharge permit amendment” consistent with Dairies’ position stated in paragraph 1.

3. Dairies supports the revision to the definition of “hazard to public health” in renumbered section 20.6.2.7.H, provided that the language is made grammatically correct by starting a new sentence after the stricken language.

4. Dairies take no position on the changes to the definition of “toxic pollutant” in renumbered section 20.6.2.7.T(2) and the corresponding language in section 20.6.2.3103.A, new paragraph (2). Dairies reserve the right to modify this position and to present technical testimony in response to any technical testimony and changes proposed by other parties regarding this language.

5. Dairies take no position on the proposed changes to section 20.6.2.1201 NMAC at this time, but reserve the right to take a position in response to technical testimony and changes proposed by other parties regarding this provision.

6. Dairies support the proposed changes to section 20.6.2.1210, particularly removing the five-year limit on the term of a variance. With regarding to proposed Subsection E, Dairies believe that the phrase “any changed circumstances or newly-discovered facts” is too vague, as this language is not limited to circumstances or facts material to maintaining the variance in place. This language also is too vague and overly broad as a basis for grounds for any person to request a hearing. Dairies also propose language below that clarifies that to the extent the Dairy Rule variance provision applies and is in any way inconsistent with this provision, the Dairy Rule provision should control.

7. Dairies take no position on the proposed change to the introductory language of section 20.6.2.3103 but reserve the right to take a position in response to technical testimony and changes proposed by other parties regarding this language.

8. Dairies take no position on the proposed changes to the numerical standards in section 20.6.2.3103.A(1) to the extent the proposed changes are consistent with Primary Drinking Water Maximum Contaminant Levels set under the Safe Drinking Water Act (“MCLs”). That is the stated basis for the proposed changes in the Department’s draft Statement of Reasons. However, Dairies’ position is contingent on the Commission taking a consistent position that the standards in section 20.6.2.3103.A should be consistent with the Safe Drinking Water Act MCLs, and Dairies reserve the right to change this position in response to positions or technical testimony presented by other parties.

9. Dairies take no position on the proposed changes to section 20.6.2.3103.B.

10. Dairies oppose the proposed change to section 20.6.2.3105.A.

11. Dairies support the proposed changes to section 20.6.2.3105.L and .M and new subsections .N and .O.

12. Dairies support the proposed changes to sections 20.6.2.3106, .3108, .3109, .3112 and .3114.

14. Dairies oppose the proposed change to section 20.6.2.4101.B as unnecessary if there is no renumbering of section 20.6.2.4103.

15. Dairies oppose the new subsection B added to section 20.6.2.4103.

16. Dairies support the proposed changes to section 20.6.2.4103.C as it appears to conform to the proposed changes to section 20.6.2.3103.

17. Dairies oppose the changes to section 20.6.2.4103.E as renumbered.

18. Dairies oppose the deletion of section 20.6.2.4103.E of the existing rules regarding technical infeasibility.

19. Dairies support the proposed changes to section 20.6.2.4103.F, but propose an amendment to subsection. Additionally, Dairies support the new proposed subsection G.

20. Dairies oppose the proposed change to section 20.6.2.4104.C and new subsection D.

21. Dairies oppose the proposed change to section 20.6.2.4105.B.

22. Dairies support the proposed change to section 20.6.2.4105.C.

23. Dairies support the proposed change to section 20.6.2.4106.D.

24. Dairies support the proposed changes to section 20.6.2.4108.

25. Dairies oppose the change to sections 20.6.2.4109.A and .4114.A.

26. Dairies support the proposed changes to section 20.6.2.4109.B.

27. Dairies take no position at this time on the proposed changes to the Underground Injection Control rules.

28. Dairies take no position at this time on any proposed amendment to the rules not addressed in the paragraphs above.

29. Dairies reserve the right to submit technical testimony and other evidence regarding any and all of the proposed amendments.

30. Dairies reserve the right to change its position on any of the proposed amendments, including but not limited to the positions taken by other parties, amendments proposed by other parties, and technical evidence or other evidence presented by other parties, or due to any changes in relevant federal or state standards or criteria, regulations, or legislation adopted, enacted or made prior to the Commission's decision on this matter.

PROPOSED AMENDMENTS

1. 20.6.2.7.D(4): In place of the language proposed by NMED, Dairies propose that this definition read as follows:

“Discharge permit amendment” means a minor modification of a discharge permit that does not result in a significant change in the location of a discharge, an increase in daily discharge volume of greater than 20% of the original daily discharge volume approved in an existing discharge permit for an individual discharge location, a significant increase in the concentration of water contaminants discharged, or introduction of a new water contaminant discharged unless the concentration of the new water contaminant is below the standards of 20.6.2.3103 NMAC.

Statement of Reasons: In addition to the reasons for the definition stated in the Department’s Proposed Statement of Reasons filed with its Petition, this language is consistent with the current definition in 20.6.7.7.B(19) as adopted by the Commission following a public hearing, and it would be best for consistency to use the same definitions in both part of the rules. The change from 10% to 20% is intended to address small discharges where a 10% change would be very minor. In addition, Dairies’ proposed language is more flexible and adaptable to the various types of discharges and facilities that require discharge permits.

2. 20.6.2.1210.E: Dairies propose that this subsection should read as follows:

For variances granted for a period in excess of five years, the petition shall provide to the department for review a variance compliance report accompanying an application to renew the associated discharge permit, or if there is no associated permit, at five year intervals, to demonstrate that the conditions of the variance are being met. The report shall identify any changes of circumstances or newly discovered facts which are material to the variance and which are substantially different than the circumstances or facts presented in the original application for the variance. If the conditions of the variance have not been met, or if there are changed circumstances or newly discovered facts that were unknown at the time the variance was initially granted and which are material to the variance or the conditions under which the variance was approved, then any person who would have standing to appeal a permit decision may request a hearing before the commission to revoke, modify or otherwise reconsider the variance.

Statement of Reasons: A hearing regarding a variance should be warranted not based on any change in circumstances or facts, but only regarding differences that are material to the

granting of the variance or its conditions. A reasonable test for materiality would be whether the commission's decision on the variance likely would have been substantially influenced by the change in facts or circumstances. Under this language, the commission can consider materiality when it considers whether to grant the request for a hearing.

3. 20.6.2.4103.F: Dairies propose that paragraph (1) is amended to read:

At any time after the submission of a Stage 2 abatement plan, or at any time during the abatement of water pollution that is subject to one or more of the exemptions of 20.6.2.4105 NMAC, any person may file a petition with the commission seeking approval of an alternative abatement standard(s) based on at least one of the following criteria:

Statement of Reasons: A Dairy may conduct abatement under discharge permits and the Dairy Rule under the existing rules without submitting a separate Stage 2 abatement plan. Dairies propose to clarify this point in the amendment below. If a dairy is abating ground water under the applicable rules but without a Stage 2 abatement plan and a dairy believes that it has completed sufficient abatement such that it would qualify to petition the Commission for an alternative abatement standard, then there is no reason why the dairy should have to prepare, submit and obtain approval of a separate Stage 2 plan. A dairy seeking to avail itself of this provision would still have to provide all of the information necessary to support the Commission's consideration and approval of an alternative abatement standard.

4. 20.6.2.4105.C: Dairies propose to amend subsection (2) to read as follows:

Land application or other discharge of ground water contaminated with nitrogen originating from human or animal waste and not otherwise exceeding the standards of Subsection A of Section 20.6.2.3103 NMAC and not containing a toxic pollutant as defined in Section 20.6.2.1101 NMAC, provided that it is done in compliance with a discharge plan approved by the secretary, including but not limited to abatement of water pollution pursuant to a contingency or corrective action or closure plan;

Statement of Reasons: Dairies are subject to prescriptive contingency and closure requirements under the Dairy Rule, 20.6.6 NMAC. Dairies abating ground water pollution in

accordance with a discharge plan incorporating those prescriptive requirements and otherwise meeting the conditions of the existing exemption in 20.6.2.4105.C(2) NMAC should be allowed to complete abatement under those provisions without being subject to the requirements of sections 20.6.2.4104 and .4106 NMAC. The Dairy Rule contingency provisions expressly allow the Department to require abatement pursuant to the abatement regulations and procedures if abatement under the discharge permit is not successful.

5. 20.6.2.4106.C: Dairies propose minor amendments to section 20.6.2.4106.C, and subsection (7) as shown below:

The purpose of Stage 1 of the abatement plan shall be to design and conduct a site investigation that will adequately define site conditions, and provide the data necessary to select and design an effective abatement option. Stage 1 of the abatement plan may include, but not necessarily be limited to, the following information depending on the media affected, and as reasonably may be required to select and implement an expeditious abatement option:

(7) Any additional information that may be reasonably required to design and perform an adequate site investigation.

Statement of Reasons: These changes clarify that information required in a plan should be subject to a reasonableness test so that the Department does not have absolute discretion to require information that may be unnecessary and/or unduly costly and burdensome.

6. 20.6.2.4113 and .4114: Dairies propose the following clarifying amendments to 4113 and .4114.A:

4113: In the event of any technical dispute regarding the requirements of Paragraph (9) of Subsection A and Subsection E of Section 20.6.2.1203, Sections 20.6.2.4103, 20.6.2.4105, 20.6.2.4106, 20.6.2.4111 or 20.6.2.4112 NMAC, including notices of deficiency, the responsible person may notify the secretary by certified mail that a dispute has arisen, and desires to invoke the dispute resolution provisions of this Section, provided that such notification must be made within thirty (30) days after receipt by the responsible person of the decision of the secretary that causes the dispute. Upon such notification, all deadlines affected by the technical dispute shall be extended for a thirty (30) day negotiation period, or for a maximum of sixty (60) days if approved by the secretary for good cause shown. During this negotiation period, the secretary or his/her designee and the responsible person shall meet at least once. Such meeting(s)

may be facilitated by a mutually agreed upon third party, but the third party shall assume no power or authority granted or delegated to the secretary by the Water Quality Act or by the commission. If the dispute remains unresolved after the negotiation period, the decision of secretary shall be final and subject to appeal.
[12-1-95; 20.6.2.4113 NMAC - Rn, 20 NMAC 6.2.IV.4113, 1-15-01]

4114: If the secretary determines that an abatement plan is required pursuant to Paragraph (9) of Subsection A of 20.6.2.1203, Paragraph (4) of Subsection E of 20.6.2.3109, or Subsection B of 20.6.2.4105 NMAC, approves or provides notice of deficiency of a proposed abatement plan, technical infeasibility demonstration or abatement completion report, or modifies or terminates an approved abatement plan, or takes final action on dispute resolution under 20.6.2.4113 NMAC, he shall provide written notice of such action by certified mail to the responsible person and any person who participated in the action.

Statement of Reasons: The proposed amendments would add clarity to the appellate process following decisions during dispute resolution.

7. Dairies reserve the right to submit technical testimony and other evidence regarding any and all of Dairies' proposed amendments.

8. Dairies reserve the right to change their position on any of Dairies' proposed amendments, including but not limited to the positions taken by other parties, amendments proposed by other parties, and technical evidence or other evidence presented by, or legislation adopted, enacted or made prior to the Commission's decision other parties, or due to any changes in relevant federal or state standards or criteria, regulations on this matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served on July 27, 2017, via electronic mail to the following:

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