

**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)

**Dairy Producers of New Mexico and
Dairy Industry Group for a
Clean Environment,
Petitioner.**

**NOTICE OF INTENT TO PRESENT DIRECT TESTIMONY ON DAIRY PRODUCERS OF
NEW MEXICO'S AND DAIRY INDUSTRY GROUP FOR A CLEAN ENVIRONMENT'S
STATEMENT ON 20.6.2 NMAC PROPOSED AMENDMENTS**

The Dairy Producers of New Mexico (DPNM) and Dairy Industry Group for a Clean Environment (DIGCE) (Jointly "Dairies"), hereby submit this Notice of Intent to Present Direct Testimony on 20.6.2 NMAC Proposed Amendments in accordance with the Scheduling Order in this case. Pursuant to the Proposed Amendments to 20.6.2 NMAC, Dairies hereby state:

1. Person for whom the witness(es) will testify:

The witnesses will testify for Dairies and their members.

2. Identify each technical witness the person intends to present and state the qualifications of that witness including a description of their educational and work background:

Dairies present the following witness, whose educational and work background is presented in the attached testimony:

Eric Palla

3. **Attach the full written direct testimony of each technical witness, which shall include an express basis for all expert opinion offered:**

The direct written testimony of each technical witness is attached.

4. **Include the text of any recommended modifications to the proposed regulatory change:**

The text of Dairies' recommended modifications and amendments are included in the attached written direct testimony.

5. **Identify and attach all exhibits to be offered by the person at the hearing:**

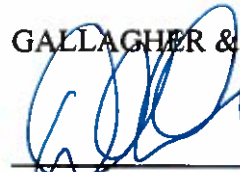
Written Direct Testimony of Eric Palla, offered as Dairies' Exhibit A.

Resume of Eric Palla, offered as Dairies' Exhibit B.

WHEREFORE, DPNM and DIGCE respectfully request that the Water Quality Control Commission accept the following NOI on the Proposed Amendments on behalf of DPNM and DIGCP. Further, DPNM and DIGCE reserves the right to supplement this pleading and its attachments in accordance with the governing rules and Scheduling Order.

Respectfully Submitted,

GALLAGHER & KENNEDY, P.A.



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Notice of Intent was served on September 11, 2017 via electronic mail to the following:

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DAIRIES EXHIBIT A

**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)

DAIRIES EXHIBIT A

**DIRECT TESTIMONY OF ERIC PALLA
ON BEHALF OF DIGCE AND DPNM**

My name is Eric Palla and I currently service as President of the Board of Directors of the Dairy Industry Group for a Clean Environment (“DIGCE”) and offer this testimony as a representative of DIGCE. As part of my role with DIGCE, I participated in the Dairy Rule proceedings and am familiar with how the Dairy Rule operates to regulate dairies. I also have operated a dairy near Clovis, New Mexico and in that capacity have personally handled the discharge permit process for my dairy operations. Consequently, I am familiar with the regulations in both 20.6.2 and 20.6.6 NMAC as they apply to dairies. I hold a Bachelor of Science degree in Ag Business from Texas A&M University. A copy of my current resume is attached hereto and will be Dairies Exhibit B.

On behalf of DIGCE and the Dairy Producers of New Mexico I present this written direct testimony in support of the amendments to 20.6.2 NMAC offered by DIGCE and DPNM (jointly “Dairies”). Dairies identified their proposed additions and alternative language for amendments to 20.6.2. NMAC in their Statement of Position and Proposed Amendments filed on July 27, 2017. Based upon the changes made in the Department’s Amended Petition and additional consideration

of appropriate language to accomplish Dairies' needs, Dairies have modified some of their proposals from the language offered in the July 27, 2017 filing. Dairies offer amendments on the following topics that are supported in my Direct Testimony: (1) a different definition of "discharge permit amendment" from the definition as proposed by the Environment Department; (2) different language regarding the five-year review of variances granted by the Commission; (3) support for new language from the Department regarding petitions for alternative abatement standards by persons exempt under 20.6.2.4105 NMAC, (4) a replacement provision to the Department's language on the information requirements in a petition for alternative abatement standards to allow dairies to utilize the above provision, (5) language clarifying that information requested by the Department to support a Stage 1 abatement plan must be reasonable, and (6) language clarifying that a matter unresolved following dispute resolution is appealable. Dairies have indicated opposition to some of the rule amendments as proposed by the Environment Department, including some of the proposed amendments to the ground water quality standards. Dairies will address the amendments that it opposes, as well as the proposals made by other parties, in its written Rebuttal Testimony to be filed at a later date in accordance with the Scheduling Order.

Definition of Discharge Permit Amendment

Dairies support the Department's proposal to add a definition of "discharge permit amendment" as new section 20.6.2.7.D(4). However, in place of the language proposed by NMED, Dairies propose that this definition read as follows:

(4) "discharge permit amendment" means a minor modification of a discharge permit that meets the requirements of 20.6.2.3109.I, and does not result in:

(a) a change in the location of a discharge that would affect groundwater beyond that impacted by the existing discharge location;

(b) an increase in daily discharge volume of greater than twenty percent ~~ten percent~~ of the daily discharge volume approved in the most recent discharge permit approval, renewal or modification for an individual discharge location, and where the sum of any volume increases via amendments during a permit term is greater

than twenty percent ~~ten percent~~ of the approved, renewed or modified discharge permit volume ~~or greater than 50,000 gallons/day, whichever is less,~~

(c) an increase in an effluent limit set forth in the most recent discharge permit approval, renewal or modification for an individual discharge location, or

(d) introduction of a new water contaminant;

The reasons for having a definition of “discharge permit amendment” are stated in the Department’s Proposed Statement of Reasons filed with its Petition. With regard to a change in the discharge volume that can be treated as an amendment, Dairies propose a limit of twenty percent rather than ten percent. This change is intended to address cases of low volume discharges where a ten percent change would be so small that a discharge permit amendment would rarely be allowable. Dairies recognize that for large volume dischargers or circumstances where a twenty percent change in volume corresponds to major facility changes, twenty percent might be too high to be treated as an amendment. However, the Secretary retains the discretion to handle a permit change as a “modification” as provided by both the existing and proposed definitions of “discharge permit modification.” For the same reason—to allow for appropriate flexibility given the scale of an operation—Dairies propose striking the 50,000 gallons/day cap on an amendment. Given the Secretary’s discretion to decide whether a permit change should be handled as a modification rather than as an amendment, it is appropriate to maintain more flexible language that is adaptable to the various types of discharges and facilities that require discharge permits.

Five Year Review for Variances

Dairies agree with the Department’s proposal to remove the five-year limit on variances. However, Dairies believe that the language proposed by the Department regarding the information to be provided for a five-year review and the criteria for requesting a hearing are too broadly stated and could allow an appeal to be requested for new facts or changes in circumstances that have

nothing to do with compliance with the terms of a variance. In place of the language proposed by the Department, Dairies propose that section 20.6.2.1210.E NMAC read as follows:

E. 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, including notification of any changed circumstances or newly discovered facts. 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. At such time as the department determines the report is administratively complete, the department shall post the report on its website, and mail or e-mail notice of its availability to those persons on a general and facility-specific list maintained by the department who have requested notice of discharge permit applications, and any person who participated in the variance process. If such conditions are not being met, or if there is evidence indicating changed circumstances or newly-discovered facts or conditions 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, any person who would have standing to appeal a permit decision or ~~including~~ the department, may request a hearing before the commission to revoke, modify or otherwise reconsider the variance within 90 days of the notice of availability of the report.

A compliance report should only be required to report changes in circumstances or newly discovered facts that are material to the variance. A hearing regarding a variance should be considered only when there are changes in circumstances or facts that are material to the granting of the variance or its compliance with 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. Also, the Water Quality Act limits who can appeal a permit decision. Only those persons who would have standing to appeal a permit decision should have standing to request a hearing on a variance before the Commission.

Petition for Alternative Abatement Standards for Abatement Actions Exempt from Abatement Plan Requirement

Dairies are subject to the Dairy Rule, 20.6.6 NMAC, which requires prescriptive actions under the contingency plan and closure plan requirements of a permit. Under both the contingency plan provisions, 20.6.6.27.B NMAC, and the closure provisions, 20.6.6.30.B NMAC, if there is an exceedance of ground water quality standards, a series of prescriptive measures are required. Under the contingency provision, when standards are exceeded in a monitoring well, the contingency requirements apply until standards are met for eight consecutive quarters or the department requires an abatement plan. 20.6.6.27.B NMAC. Following the implementation of a contingency plan or closure, it may become apparent that, although all reasonable measures have been taken to correct the problem, the standards of 20.6.2.3103 NMAC may continue to be exceeded at a monitoring well for some time. In those instances, it may be appropriate for the Commission to consider granting alternative abatement standards.

Under the current rule, 20.6.2.4103.F NMAC, a petition for alternative abatement standards may be filed only after a Stage 1 abatement plan has been completed and a Stage 2 abatement plan has been submitted. Stage 1 and Stage 2 plans can be costly and time-consuming. When a dairy has been subject to a contingency action, it will already have conducted an investigation of the contamination and will have implemented the prescriptive contingency measures to achieve cleanup and monitored the results for some time. If it is apparent to the dairy operator and the Department that nothing more can reasonably be done, it would be appropriate to allow the permit holder to apply for alternative abatement standards.

Dairies provided proposed language for an amendment to 20.6.2.4103.F(1) in its file on July 27, 2017. In its Amended Petition filed on July 27, 2017, the Department proposed revised language for 20.6.2.4103.F that accomplishes the same purpose as the language proposed by

Dairies. Consequently, Dairies support the language proposed by the Department, with one clarifying change. The Department includes the phrase “or pursuant to the exemptions of 20.6.2.4105 NMAC,” but this phrase would better read “or pursuant to one or more of the exemptions of 20.6.2.4105 NMAC.” Thus, Dairies propose the following language for this provision:

F. Alternative Abatement Standards: If the person abating water pollution pursuant to an approved abatement plan, or pursuant to one or more of the exemptions of 20.6.2.4105 NMAC is unable to fully meet an abatement standard set forth in Subsections A, B, C and D of this section, the person may file a petition with the commission seeking approval of an alternative abatement standard.

Note that Dairies oppose the addition of new Subsection B of 20.6.2.4103. NMAC, and Dairies will present their testimony on that point in their rebuttal testimony.

Clarifying Exemption from Abatement Plan Requirement

As discussed above, Dairies believe that the rules should allow a dairy that has completed action required under the contingency and/or closure provisions of 20.6.6.27 and/or 20.6.6.30 NMAC to file a petition seeking alternative abatement standards without unnecessarily preparing and filing separate Stage 1 and Stage 2 abatement plan documents. The Department proposed a change to 20.6.2.4103.F to allow parties exempt from certain abatement requirements under 20.6.2.4105 to submit petitions for alternative abatement standards.

Typically, a dairy might qualify for either or both of two exemptions under 20.6.2.4105 NMAC. Dairies are subject to discharge permits under the Dairy Rule, 20.6.6 NMAC. A dairy who is abating water pollution under a discharge permit, including its contingency or closure provisions, may not be subject to 20.6.2.4104 and .4106 if the abatement is done “under the authority of a ground-water discharge plan approved by the secretary, provided that such abatement is consistent with the requirements and provisions of Sections 20.6.2.4101, 20.6.4103,

Subsections C and E of Section 20.6.2.4106, Sections 20.6.2.4107 and 20.6.2.4112 NMAC.” Abatement conducted by a dairy under the contingency or closure provisions of 20.6.6.27 and .30 NMAC and its permit should be generally consistent with the abatement rule requirements cited above. However, if compliance with Subsections C and E of Section 20.6.2.4106 is considered to be accomplished only by submitting Stage 1 and Stage 2 abatement plans as referenced in those Subsections, then qualifying for the exemption in 20.6.2.4105.A(6) may not result in a dairy being able to submit a petition for alternative abatement standards under section 20.6.2.4103.F as proposed by the Department without the dairy submitted written Stage 1 and Stage 2 abatement plans. Consequently, qualifying for that exemption may not help a dairy.

The second exemption under 20.6.2.4105 that may apply to some dairies is 20.6.2.4105.C(2) NMAC, which exempts “[l]and application 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], provide that it is done in compliance with a discharge plan approved by the secretary.” [bracketed language proposed for removal in the Department’s Petition] This exemption, however, may not apply to all dairies. For example, some dairies conduct land application of water that contains total dissolved solids, or in a few instances chlorides, above the levels specified in 20.6.2.3103 NMAC. Also, this exclusion refers to the “land application” of “ground water.” Dairies typically land-apply wastewater. Also, dairy activities such as discharges to lagoons are subject to discharge permits and contingency action under 20.6.6.27 NMAC, but may not qualify as “land application of ground water.”

Dairies July 27, 2017 Statement of Position and Proposed Amendments proposed a change to the language of 20.6.2.4105.C(2) to clarify that dairies conducting abatement under contingency

or closure provisions of 20.6.6.27 and/or 20.6.6.30 NMAC could qualify as exempt from an abatement plan requirement under 20.6.2.4105.C(2). However, considering the new language proposed by the Department and the limitations of the exemption in 20.6.2.4105.C(2), Dairies do not believe that the language it identified in that section accomplishes Dairies' purpose of avoiding an unnecessary Stage 1 and Stage 2 written plan.

Instead of its proposed amendment to 20.6.2.4105.C(2), Dairies offer a change to 20.6.2.4103.F(2)(d) so that subparagraph would read as follows:

(d) a summary of all actions taken to abatement water pollution to standards, including a summary of the Stage 1 and Stage 2 abatement plan. For abatement conducted by a person exempt under 20.6.2.4105 NMAC and who has not submitted a Stage 1 or Stage 2 abatement plan, in lieu of submitting such a plan or plans, the petitioner shall submit a description of the legal authority, permit or requirements under which the abatement was conducted and a copy of relevant plans, approvals, correspondence, or other documentation of the actions to abate water pollution.

This language is consistent with the purpose of Dairies amendment to 20.6.2.4105.C(2) as offered in its July 27 submittal and is necessary for Dairies to be able to petition for alternative abatement standards in a proper case without unnecessarily submitting a Stage 1 and Stage 2 abatement plan.

Information Request to Support Stage 1 Abatement Plan

Dairies believe that information requested by the Department to support a Stage 1 Abatement Plan investigation should be reasonable in terms of cost, burden, and technical need to adequately define site conditions. The current regulation arguably gives persons subject to an abatement requirement no opportunity to contest unreasonable requests for additional information. Consequently, Dairies propose minor amendments to section 20.6.2.4106.C NMAC, and paragraph (7) of the subsection so they read as shown below:

C. 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 needed to select and implement an expeditious abatement option:

....

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

Clarification of Appeal Rights Following Dispute Resolution

Dairies are concerned that the current rule language of sections 20.6.2.4113 and 20.6.2.4114 NMAC are unclear regarding appeal rights following the conclusion of dispute resolution without a resolution of the matter. The dispute resolution provision, 20.6.2.4113 NMAC, gives certain rights for a person subject to an abatement requirement to invoke dispute resolution over certain matters. Those include notices of deficiency issued by the Department regarding several rule provisions. The same actions that are subject to dispute resolution are subject to an appeal to the commission under 20.6.2.4114 NMAC. The current rule language of 20.6.2.4113 states that if an action is unresolved after dispute resolution, “the decision of the secretary shall be final.” That could be interpreted to mean that there is no right of appeal, even if the matter subject to dispute resolution is subject to an appeal under 20.6.2.4114 NMAC. Furthermore, the appeal section does not reference actions that have been subject to dispute resolution.

Dispute resolution should be encouraged as a method to more quickly and efficiently resolve disputes concerning an abatement plan. If an action is appealable under 20.6.2.4114 and also is subject to dispute resolution under 20.6.2.4113, but invoking dispute resolution means that the action is no longer appealable, that will discourage persons from invoking dispute resolution. Dairies do not believe that is the intent of the current rules, but the rule language could be so


interpreted. Consequently, Dairies propose to clarify that an action for which dispute resolution is invoked, but remains unresolved, still is subject to an appeal under 20.6.2.4114.

20.6.2.4113 DISPUTE RESOLUTION: 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.

20.6.2.4114 APPEALS FROM SECRETARY'S DECISIONS: 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.

Conclusion

This concludes my direct written testimony on behalf of the Dairies.



Eric Palla

DAIRIES EXHIBIT B

Eric Palla

History

- 1) Raised on Family Farm in Clovis, NM
- 2) Bachelor of Science Degree in Ag-Business from Texas A&M University
- 3) Married Megan Stock 1997
- 4) 1997 returned to family dairy farm
- 5) Current operations partner in family farm

Family

Megan Palla wife of 20 years, Owner of Megan Palla, CPA

Jack Palla - 17

Grant Palla - 14

Thomas Palla – 12

Claire Palla - 9

Leadership Positions

- 1) Director for COBA\Select Sires
- 2) Chairman of DIGCE (Dairy Industry Group for a Clean Environment)
- 3) NMSU Ag Science Center Clovis Advisory Board
- 4) Texas A&M University Animal Science Dept. Advisory Council
- 5) DFA SWAC Voting Delegate