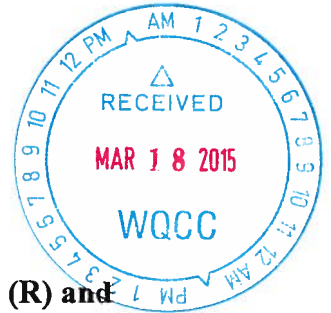


**STATE OF NEW MEXICO  
WATER QUALITY CONTROL COMMISSION**



**In the Matter of:  
PROPOSED AMENDMENT  
TO 20.6.6 NMAC (Dairy Rule)**

**No. WQCC 12-09 (R) and  
No. WQCC 13-08 (R)**

**NEW MEXICO ENVIRONMENT DEPARTMENT'S MOTION FOR LEAVE TO FILE  
AMENDED NOTICES OF INTENT TO PRESENT  
TECHNICAL AND REBUTTAL TESTIMONY**

Comes now the Ground Water Quality Bureau ("GWQB") of the Water Protection Division<sup>1</sup> of the New Mexico Environment Department ("NMED" or "Department") and moves, pursuant to Section 401.A. of the Procedural Order issued on October 3, 2014, and in accordance with the provisions of Rule 1-007.1 NMRA, for leave to file amended Notices of Intent to Present Technical and Rebuttal Testimony at the Proposed Amendment to 20.6.6 NMAC ("Dairy Rule") hearing scheduled to commence on April 6, 2015, in Roswell, New Mexico. As grounds for this motion, the Department states as follows:

1. On October 17, 2014, the Department filed a Notice of Intent to Present Technical Testimony ("NOI") in the Dairy Rule hearing. In its NOI, the Department listed Jerry Schoeppner as its technical witness and attached Mr. Schoeppner's testimony and qualifications as exhibits to the NOI. Mr. Schoeppner provided pre-filed direct testimony on behalf of the GWQB of the Water Protection Division of NMED.

2. On November 21, 2014, the Department filed a Notice of Intent to Present Technical Rebuttal Testimony. In its rebuttal NOI, the Department listed Mr. Schoeppner as its technical rebuttal witness and attached Mr. Schoeppner's rebuttal testimony as an exhibit. Mr.

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<sup>1</sup> The Water Protection Division was formerly known as the Resource Protection Division.

Schoeppner provided pre-filed rebuttal testimony on behalf of the GWQB of the Water Protection Division of NMED.

3. At the time of filing his technical direct and rebuttal testimony, Mr. Schoeppner was employed as Bureau Chief of the GWQB.

4. As of March 27, 2015, Mr. Schoeppner will resign from employment at NMED. As a result, Mr. Schoeppner will not be available to testify on behalf of the GWQB and in matters relating to the GWQB. Mr. Schoeppner will not be able to answer questions raised during the hearing regarding the current or future administration of the Dairy Rule.

5. In order to present technical testimony at the hearing, a person must file an NOI. Procedural Order, Part III, Section 302.A. The Hearing Officer's Order Requiring Addendum states that all parties that filed an NOI on or before October 17, 2014, shall not file another NOI, and additional rebuttal testimony will not be accepted. Order Requiring Addendum, Part (c).

6. Notwithstanding the Hearing Officer's Order Requiring Addendum, Water Quality Control Commission ("WQCC" or "Commission") hearings shall allow for all interested participants to have a reasonable opportunity to submit data, views, and arguments. Guidelines for Water Quality Control Commission Regulation Hearings ("WQCC Guidelines"), Part I, Section 102.C. The Hearing Officer shall conduct the hearing so as to provide a reasonable opportunity for all persons to be heard. Procedural Order, Part IV, Section 401.B. The Department has complied with the filing timelines in the Procedural Order, and due to unforeseen circumstances, the Department's only witness has become unavailable. In this instance, the Department has acted to notify the Hearing Officer, the Commission and the other parties as expeditiously as possible. To disallow the Department to file amended direct and

rebuttal NOIs will foreclose the Department from filing any technical testimony, thus depriving the Department of a reasonable opportunity to be heard.

7. The Department has a real and tangible interest in participating in this rulemaking since it is the agency responsible for administering the Dairy Rule. The Commission, the parties, and the public have a real interest in hearing the Department's position on 20.6.6 NMAC because it offers a unique perspective that no other party can provide.

8. Administrative hearings are distinct regarding the unavailability of a witness. Most obviously, witnesses in the administrative context often pre-file written testimony, unlike the district court setting. In addressing this unique arrangement, the New Mexico Public Regulation Commission ("PRC") has allowed a new witness to adopt the pre-filed testimony of another witness if good cause exists to do so. PRC Case No. 14-00106-TREN, Order Granting Staff's Motion to Allow Adoption of Testimony, ¶ 12 (Jan. 8, 2015), attached hereto as NMED Exhibit A. Good cause exists to allow substitution of a witness and adoption of his or her testimony when the witness who filed the testimony becomes unavailable. *See* PRC Case No. 10-00295-UT, Order Granting Staff's Motion for Substitution of Witness (Dec. 15, 2010) (where the Hearing Examiner allowed the party to substitute a witness who became unable to attend the hearing due to the requirement to be present at another hearing on the same date), attached hereto as NMED Exhibit B. A new witness may adopt the pre-filed testimony of another witness if he or she is qualified to adopt the testimony. *Id.*

9. It is in the public interest for the person most able to answer questions about the testimony on cross-examination to adopt the testimony at the hearing. PRC Case No. 14-00106-TREN, Order Granting Staff's Motion to Allow Adoption of Testimony, ¶ 13 (Jan. 8, 2015) (NMED Exhibit A).

10. Similarly, due to the unforeseen circumstance that Mr. Schoepner will not be employed by the Department at the time of the Dairy Rule hearing, the Department proposes to have Ms. Trais Kliphuis serve as a substitute witness in the hearing, and to adopt portions of Mr. Schoepner's pre-filed direct and rebuttal technical testimony to which she is qualified to speak. The Department does not intend to supplement its previously filed testimony, but only to provide a substitute witness who can testify to portions of what is already in the record as the Department's position in this proceeding. To the extent that the testimony has been altered, portions have been omitted, or Ms. Kliphuis has made minimal stylistic changes to the language of the testimony, has updated permit numbers based on the most up-to-date figures and calculations, and has amended the introduction section to reflect her qualifications. The Department is attaching the Amended Direct and Rebuttal NOIs, and associated exhibits, showing the testimony that would be adopted by Ms. Kliphuis if this motion is granted. *See* NMED Exhibits C and D.

11. Ms. Kliphuis serves as the Department's Water Protection Division Director, managing the GWQB, the Surface Water Quality Bureau, the Drinking Water Bureau, and the Construction Programs Bureau. Ms. Kliphuis was Mr. Schoepner's immediate supervisor, and Mr. Schoepner reported to Ms. Kliphuis on all matters involving the GWQB, including administration of the Dairy Rule and dairy permitting.

12. Ms. Kliphuis has reviewed the Dairy Industry Group for a Clean Environment's ("DIGCE") petition and the testimonies and exhibits filed in this case, and she is competent to testify on behalf of the GWQB in the Dairy Rule hearing.

13. The relief requested in this motion would promote the public interest in developing a complete record in this case by permitting the Department to present a witness who

is the best available source of testimony on the Department's position. Given Ms. Kliphuis' role overseeing the GWQB, she can more fully respond to questions regarding the contents of the Department's testimony and other questions that may arise during the hearing than any other substitute witness.

14. The Department has the right to select its own witnesses to carry the Department's evidentiary burdens in this case. *See Holton v. Janes*, 1919-NMSC-037, ¶ 10, 25 N.M. 374.

15. No party will suffer any prejudice by the granting of this motion.

16. In accordance with Rule 1-007.1(C) NMRA, which serves as guidance in this proceeding, the proposed pleadings are attached to this motion as NMED Exhibits C and D.

17. Counsel for the parties was contacted on March 17, 2015. Petitioner DIGCE does not object to this motion. Amigos Bravos, Rio Grande Chapter of the Sierra Club, Caballo Concerned Citizens, Lea County Concerned Citizens, and Rio Valle Concerned Citizens ("the Coalition") opposes the motion. The New Mexico Attorney General does not object to the filing of this motion, but reserves his right to object to the content of the amended NOIs.

18. For these reasons, the Department respectfully requests that the Hearing Officer grant it leave to file amended Notices of Intent to Present Technical Direct and Rebuttal Testimony.

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Respectfully submitted,

GROUND WATER QUALITY BUREAU  
NEW MEXICO ENVIRONMENT DEPARTMENT



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

<b>In the Matter of:</b>	)	
<b>PROPOSED AMENDMENT</b>	)	
<b>TO 20.6.6 NMAC (Dairy Rule)</b>	)	<b>No. WQCC 12-09 (R) and</b>
	)	<b>No. WQCC 13-08 (R)</b>

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of New Mexico Environment Department's Motion for Leave to File Amended Notices of Intent to Present Technical and Rebuttal Testimony, along with copies of the Amended Notices of Intent to Present Technical and Rebuttal Testimony, were served on the parties of record in this matter via electronic mail on March 18, 2015.

**SERVICE LIST**

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*For the Petitioner, Dairy Industry Group for  
a Clean Environment (DIGCE)*

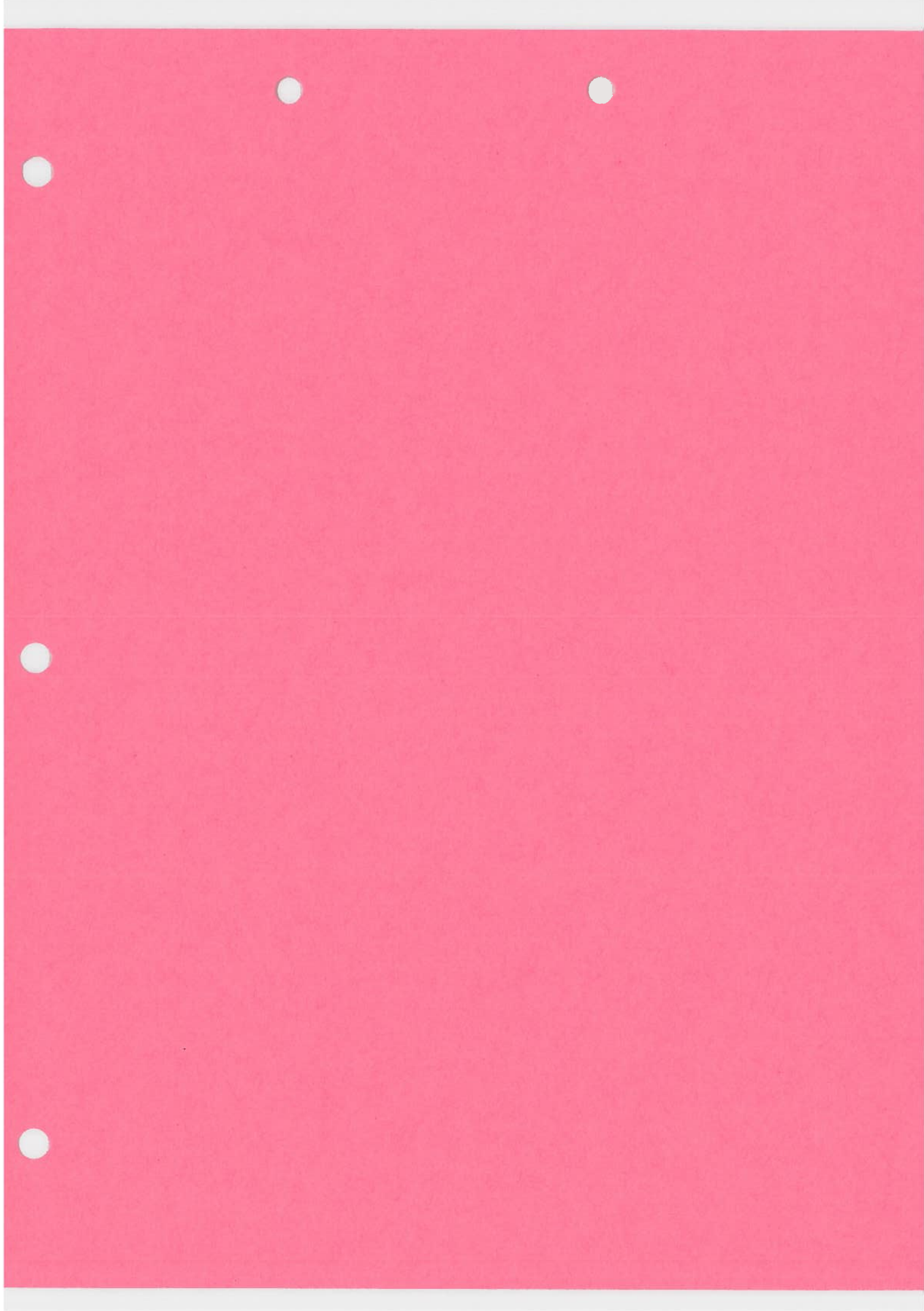
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*Counsel for the Commission*



Kay R. Bonza





**BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION**

IN THE MATTER OF THE PETITION )  
OF STAFF FOR AN ORDER TO SHOW )  
CAUSE WHY AUTOPROS, INC. D/B/A )  
HOLMES WRECKER SERVICE SHOULD )  
NOT BE FOUND TO HAVE VIOLATED )  
18.3.1.9(b) AND/OR NMSA 1978, § 65-2A-20(C) )  
AND/OR NMSA 1978, § 65-2A-21(A) )  
\_\_\_\_\_ )

Case No. 14-00106-TREN

**ORDER GRANTING STAFF'S MOTION TO ALLOW ADOPTION OF  
TESTIMONY**

This matter comes before Carolyn R. Glick, Hearing Examiner for the New Mexico Public Regulation Commission, upon the filing of the following pleadings:

1. *Staff's Motion to Allow Adoption of Testimony*, filed by the Commission's Utility Division Staff on January 6, 2015; and
2. *AutoPros' Response and Stipulation to Staff Allowing Adoption of Testimony*, filed on January 8, 2015, by AutoPros d/b/a Holmes Wrecker Service.

The Hearing Examiner **FINDS AND CONCLUDES:**

1. On November 17, 2014, Staff filed, among other testimonies, the Pre-Filed Direct Testimony of Investigator J. Albert Dominguez. Mr. Dominguez states in his Pre-Filed Direct Testimony that he investigated the subject matter of this case, which is whether AutoPros violated any statutes or rules in relation to its provision of service on November 23, 2013. Mr. Dominguez's Pre-Filed Direct Testimony discusses the scope of his investigation and the basis for his conclusion that AutoPros violated a Commission rule and the Motor Carrier Act.

2. In her Follow-Up Order from Status Conference, issued on December 19, 2014, the Hearing Examiner ordered Staff to file, on or before December 22, 2014, Supplemental Testimony, recommending what action the PRC should take in this case for each violation by AutoPros of a statute or PRC rule, if the PRC finds any such violation.

3. In her Follow-Up Order from Status Conference, the Hearing Examiner ordered that AutoPros may file response testimony, responding to Staff's Supplemental Testimony, on or before December 29, 2014. AutoPros did not file response testimony.

4. On December 22, 2014, Staff filed the Pre-Filed Direct Testimony of Manuel Anaya. Mr. Anaya did not previously file testimony in this case. Mr. Anaya recommends a \$10,000 fine for violation of a Commission Rule and a \$10,000 fine for violation of a statute and that the Commission order AutoPros to refund about \$15,338 of overcharges to the person overcharged.

5. Mr. Anaya says in his Testimony that he is providing the Testimony because Investigator Dominguez was then unavailable to provide such testimony. Anaya Testimony, p.2, lines 12-14. Mr. Anaya says that his recommendations are based on his review of Staff's investigative reports, relevant portions of the case file, the Petition and Affidavits, the pre-filed testimonies, and his review of the Motor Carrier Act and Commission Rules. Anaya Testimony, p.2, lines 16-18.

6. In its Motion to Allow Adoption of Testimony, Staff moves for an order allowing Investigator Dominguez to adopt all substantive portions of the Pre-Filed Direct Testimony of Manuel Anaya.

7. In support of its Motion, Staff states that because Mr. Dominguez, Staff's main witness and the principal investigator assigned to this case, was out-of-the-office, out-of-state and unavailable on December 22, 2014, to provide the Supplemental Testimony ordered by the Hearing Examiner, Investigator Manuel Anaya provided the supplemental testimony.

8. Staff's Motion further states that because Investigator Dominguez is now back in the State and will testify at the hearing scheduled to begin on January 15, 2015, it is Staff's desire for Mr. Dominguez to adopt the substantive portions of Mr. Anaya's Testimony "as Investigator Dominguez can more fully respond to questions regarding these topics and others that may be raised during the hearing than Investigator Anaya." Motion to Allow Adoption of Testimony, ¶ 4. According to Staff,

Investigator Dominguez was more intimately involved in the investigation of this matter than Investigator Anaya, and therefore, he is the best available source of testimony to fully develop the record on the issue of Staff's recommended actions.

Motion to Allow Adoption of Testimony, ¶ 5.

9. Attached to Staff's Motion is a red-lined version of the Pre-Filed Direct Testimony of Manuel Anaya, showing the changes to that Testimony that would be made if Mr. Dominguez is allowed to adopt the Testimony. Most of the changes are deletions of questions and answers related to Mr. Anaya's background. Staff proposes no substantive changes to Mr. Anaya's Testimony.

10. Staff states that if its Motion is granted, it will not call Mr. Anaya as a witness at the hearing.

11. Staff's Motion states that AutoPros opposes the Motion. However, in its *Response and Stipulation to Staff Allowing Adoption of Testimony*, AutoPros states that in light of the Hearing Examiner's *Order Partially Granting and Partially Denying AutoPros' Motion to Vacate and Continue Public Hearing*, and in the interests of justice and to promote efficiency, AutoPros stipulates to entry of an order allowing Investigator Dominguez to adopt all substantive portions of the Pre-Filed Direct Testimony of Manuel Anaya.

12. Typically, the issue of whether to allow adoption of testimony arises in the context of a party or Staff requesting that a new witness adopt the testimony of a witness who has already filed testimony because the witness who filed the testimony has become unavailable. *See, e.g.,* Case No. 10-00295-UT, Order Granting Staff's Motion for Substitution of Witness (12-15-10). The Commission has only allowed a new witness to adopt the prefiled testimony of another witness if good cause exists to do so. This, according to the Commission, is because "the witness who prefiled the testimony presumptively is the person most knowledgeable about the prefiled testimony and most able to answer questions on cross examination and from the Commission relating to that testimony." Case No. 10-00086-UT, Order Denying PNM's Motion to Allow Adoption of Testimony 5 (1-4-11).

13. In this case, Staff's request to allow adoption of testimony arises in a different context than the usual context described above. Here, Staff seeks permission for a witness who has filed testimony to adopt the later-filed testimony of another witness. Nevertheless, the guiding principle in ruling on Staff's Motion in this case should be the guiding principle from the more usual cases: it is in the public interest for the person most knowledgeable about the testimony and most able to answer questions about the testimony on cross examination to adopt the testimony at the hearing.

14. In this case, Investigator Dominguez has been the primary investigator in this case and Staff represents that he could more fully respond to questions regarding Staff's recommendations that may be raised during the


hearing than Investigator Anaya. Thus, good cause exists to grant Staff's Motion to Allow Adoption of Testimony.

**IT IS THEREFORE ORDERED:**

- A. *Staff's Motion to Allow Adoption of Testimony* is granted.
- B. This Order is effective immediately.

Issued at Santa Fe, New Mexico on January 8, 2015.

**NEW MEXICO PUBLIC REGULATION COMMISSION**

  
\_\_\_\_\_  
Carolyn R. Glick  
Hearing Examiner

**BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION**

IN THE MATTER OF THE PETITION )  
OF STAFF FOR A N ORDER TO SHOW )  
CAUSE WHY AUTOPROS, INC. D/B/A )  
HOLMES WRECKER SERVICE )  
SHOULD NOT BE FOUND TO HAVE )  
VIOLATED 18.3.1.9(B) NMAC AND/OR )  
NMSA 1978, §65-2A-20(C) AND/OR )  
NMSA 1978, §65-2A-21(A) )

Case No. 14-00106-TR-EN

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing *Order Granting Staff's Motion to Allow Adoption of Testimony*, issued this 9th day of January, 2015, was sent by electronic mail and or regular mail to the parties listed below.

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The Honorable Gary King  
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A.J. Salazar  
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**Hand-delivered to:**  
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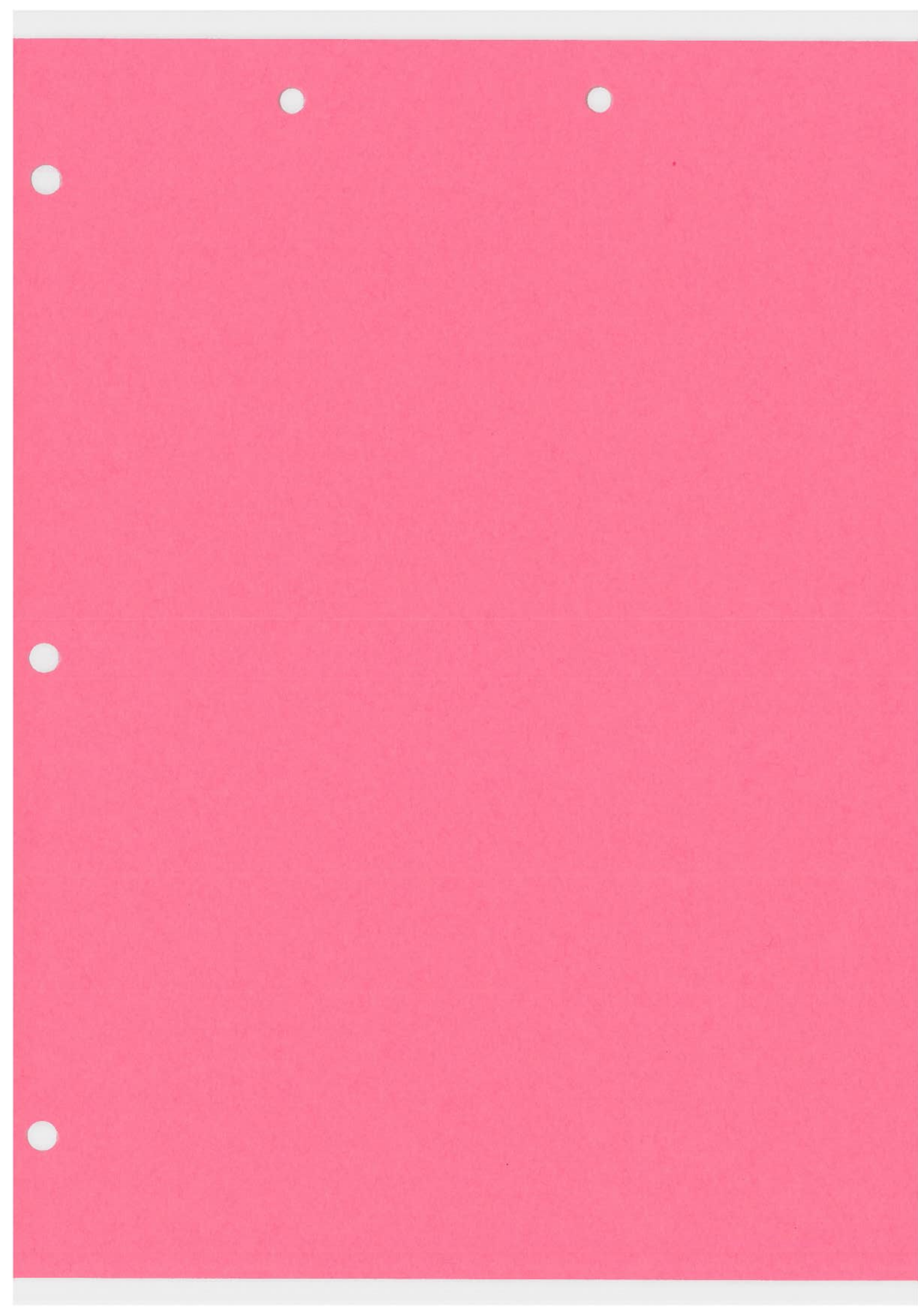
**Hand-delivered to:**  
Michael Smith  
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Thomas.banner@state.nm.us

DATED this 9th day of January, 2015.

NEW MEXICO PUBLIC REGULATION COMMISSION

  
Elizabeth Saiz, Law Clerk



**BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION**

IN THE MATTER OF THE APPLICATION OF NEW )  
MEXICO GAS COMPANY FOR APPROVAL OF 2011 )  
ENERGY EFFICIENCY PROGRAMS AND PROGRAM )  
COST TARIFF RIDER PURSUANT TO THE NEW )  
MEXICO PUBLIC UTILITY AND EFFICIENT USE OF )  
ENERGY ACTS )  
NEW MEXICO GAS COMPANY, )  
Applicant )  
\_\_\_\_\_ )

Case No. 10-00295-UT

**ORDER GRANTING STAFF'S MOTION FOR SUBSTITUTION OF WITNESS**

This matter comes before Carolyn R. Glick, Hearing Examiner for the New Mexico Public Regulation Commission ("Commission") upon the Motion for Substitution of Witness ("Motion") filed by the Commission's Utility Division ("Staff") on December 14, 2010. The Hearing Examiner finds and concludes:

1. On December 1, 2010, Staff filed the Direct Testimony of Steven Schwebke in this case. Staff's Motion seeks permission for Staff Utility Economist Jeff Primm to adopt Mr. Schwebke's pre-filed Direct Testimony. In support of its Motion, Staff states that Mr. Schwebke is unable to attend the December 17, 2010 hearing in this case because he will be attending another unanticipated Commission-scheduled out-of-town hearing in Case No. 10-00366-UT on that date. Staff states that no other Staff witness is available to attend and provide Staff testimony at the December 17, 2010 hearing in Case No. 10-00366-UT. Staff's Motion states that Mr. Primm has testified in numerous energy efficiency cases before the Commission, including gas company energy efficiency cases and that he has reviewed the filings in this case and is able to adopt Mr. Schwebke's Direct Testimony. Mr. Primm has filed Rebuttal Testimony in this case. Staff states that New Mexico Gas Company and Prosperity Works do not oppose Staff's Motion and that the

Order Granting Staff's Motion for  
Substitution of Witness  
Case No. 10-00295-UT




Coalition for Clean Affordable Energy was unable to provide a response at the time of filing of Staff's Motion.

2. Because Mr. Schwebke cannot be present at the hearing in this case, because Mr. Primm is qualified to adopt Mr. Schwebke's Direct Testimony, and because Staff's Motion is unopposed by the two other parties who have filed testimony in this case, Staff's Motion should be granted.

**IT IS THEREFORE ORDERED** that Staff's Motion is granted. Jeff Primm may adopt the prefiled Direct Testimony of Steven Schwebke in this case. This Order is effective immediately.

Issued at Santa Fe, New Mexico on December 15, 2010.

**NEW MEXICO PUBLIC REGULATION COMMISSION**

  
\_\_\_\_\_  
Carolyn R. Glick  
Hearing Examiner

**BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION**

IN THE MATTER OF THE APPLICATION )  
OF NEW MEXICO GAS COMPANY FOR )  
APPROVAL OF 2011 ENERGY EFFICIENCY )  
PROGRAMS AND PROGRAM COST )  
TARIFF RIDER PURSUANT TO THE )  
NEW MEXICO PUBLIC UTILITY )  
AND EFFICIENT USE OF ENERGY ACTS, )

Case No. 10-00295-UT

NEW MEXICO GAS COMPANY, )  
)  
)

Applicant. )  
)  
)

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing **Order Granting Staff's Motion for Substitution of Witness**, issued on December 15, 2010, was either mailed by first class, postage pre-paid, or e-mailed to the following:

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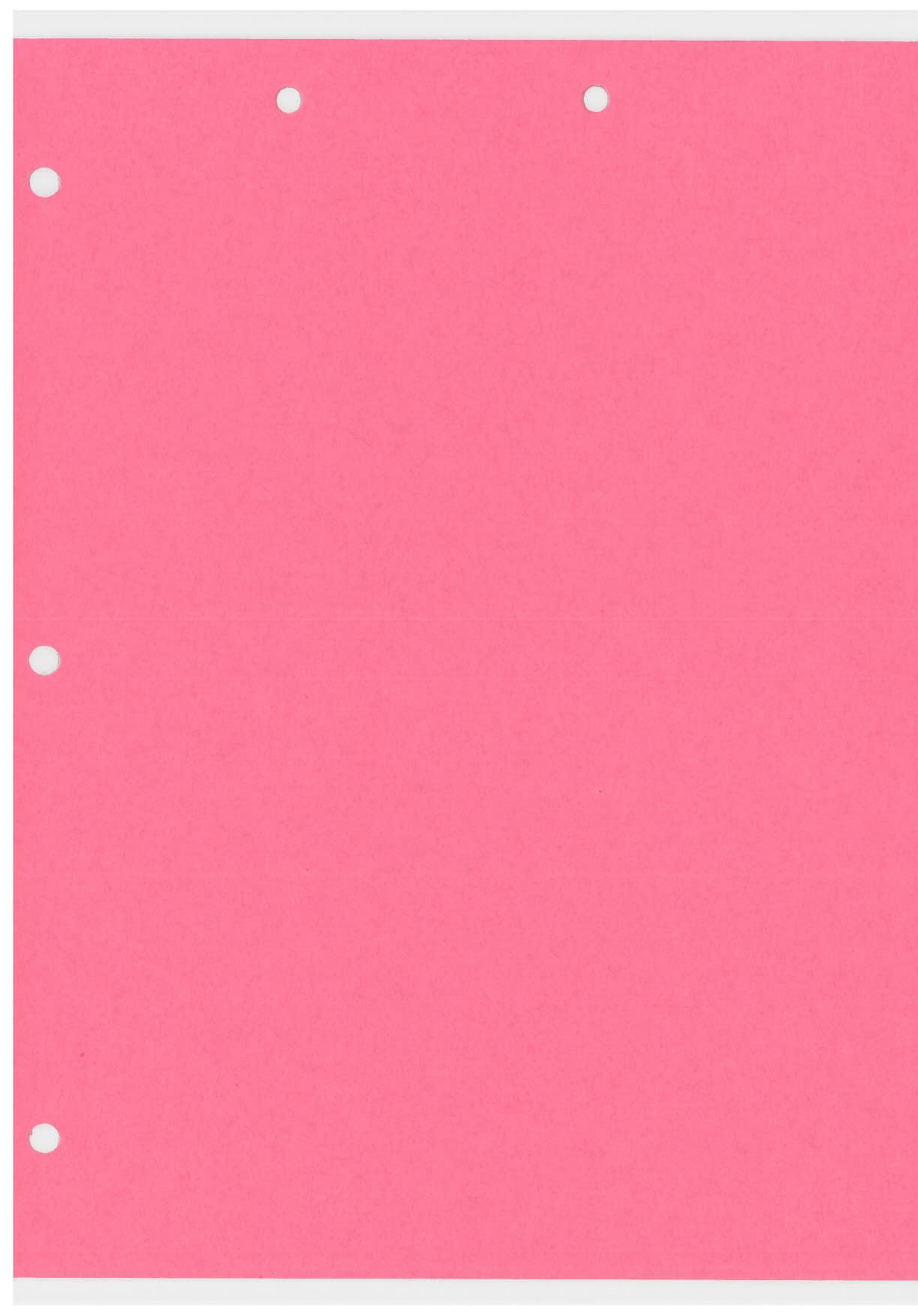
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DATED this 15<sup>th</sup> day of December, 2010.

**NEW MEXICO PUBLIC REGULATION COMMISSION**

  
Elizabeth Saiz, Law Clerk



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

**In the Matter of:  
PROPOSED AMENDMENT  
TO 20.6.6 NMAC (Dairy Rule)**

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)

**No. WQCC 12-09 (R) and  
No. WQCC 13-08 (R)**

**NEW MEXICO ENVIRONMENT DEPARTMENT'S AMENDED NOTICE OF INTENT  
TO PRESENT TECHNICAL TESTIMONY**

The Ground Water Quality Bureau ("GWQB") of the Water Protection Division of the New Mexico Environment Department ("NMED" or "Department"), pursuant to Section 104.B of the Guidelines for Water Quality Control Commission Regulation Hearings and in accordance with Section 302 of the Procedural Order issued on October 3, 2014, provisionally files this Amended Notice of Intent to Present Technical Testimony at the Proposed Amendment to 20.6.6 NMAC ("Dairy Rule") hearing scheduled to commence on April 6, 2015.

1. Entity Represented by the Technical Witness

The technical witness will testify for the GWQB of the Water Protection Division of NMED.

2. Name and Qualifications of the Technical Witness

The Department will call the following witness at the hearing to present direct technical testimony:

Trais Kliphuis. Trais Kliphuis is the Water Protection Division Director for NMED. As Division Director, Ms. Kliphuis oversees the GWQB, Surface Water Quality Bureau, Drinking Water Bureau, and the Construction Programs Bureau. She has served in this position since September 2014, and has worked for NMED for 14 years. Ms. Kliphuis was the immediate supervisor of Mr. Schoeppner, the Department's former witness who was in charge of

implementing the Dairy Rule since it took effect in December 2011. Ms. Kliphuis holds a Bachelor of Science degree in Chemical Engineering from Tufts University. Ms. Kliphuis' qualifications and work background are further described in her written testimony, included as NMED Exhibit 1, and her resume, included as NMED Exhibit 2.

3. List and Description of Exhibits

The Department submits the following exhibits:

NMED Exhibit 1	Written Testimony of Trais Kliphuis
NMED Exhibit 2	Resume of Trais Kliphuis

4. Reservation of Rights

The Department reserves the right to call any other person to present original and/or rebuttal testimony in response to another notice of intent or public comment filed in this matter or to any testimony or exhibit offered at the public hearing.

Respectfully submitted,

GROUND WATER QUALITY BUREAU  
NEW MEXICO ENVIRONMENT DEPARTMENT



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Christopher Atencio, Assistant General Counsel  
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**STATE OF NEW MEXICO  
WATER QUALITY CONTROL COMMISSION**

<b>In the Matter of:</b> <b>PROPOSED AMENDMENT</b> <b>TO 20.6.6 NMAC (Dairy Rule)</b>	) ) ) ) )	<b>No. WQCC 12-09 (R) and</b> <b>No. WQCC 13-08 (R)</b>
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**DIRECT TESTIMONY OF TRAIS KLIPHUIS**  
**March 18, 2015**

**I. INTRODUCTION**

My name is Trais Kliphuis and I am the Division Director of the Water Protection Division of the New Mexico Environment Department (“Department” or “NMED”). I have held this position since September 2014. I oversee four bureaus: the Ground Water Quality Bureau (“GWQB”), the Surface Water Quality Bureau, the Drinking Water Bureau and the Construction Programs Bureau. Part of overseeing these Bureaus includes being the immediate supervisor of each Bureau Chief. I also provide oversight of and direction on staffing, regulatory issues, and performance measures for Program Managers and Bureau Chiefs. The GWQB has five programs: the Pollution Prevention Section, the Agriculture Section, the Remediation Oversight Section, the Superfund Oversight Section, and the Mining Environmental Compliance Section. The Pollution Prevention Section manages all aspects of ground water discharge permitting for industrial, and domestic operations, and the Agriculture Section manages all aspects of ground water discharge permitting for agricultural operations, including dairies, under the Water Quality Act, NMSA 1978, Sections 74-6-1 to -17, (“WQA”) and the Water Quality Control Commission (“WQCC” or “Commission”) regulations, 20.6.2 and 20.6.6 NMAC. Management of ground water discharge permits

1 includes reviewing discharge permit applications; issuing discharge permits; conducting  
2 inspections; approving and overseeing corrective actions, closure plans, and abatement of  
3 contaminated ground water; participating in public meetings; and public hearings and  
4 enforcing the WQA and WQCC regulations. In addition, as Division Director, I sometimes  
5 participate in the determination of compliance and enforcement priorities, assignment of  
6 management staff responsibilities, and recruitment of program personnel.

7 Prior to my current position, I worked as the WIPP Staff Manager at the NMED  
8 Hazardous Waste Bureau. Prior to that position, I worked at the NMED Air Quality Bureau.  
9 While there, I worked as a Line Manager and as Acting Minor Source Unit Manager for  
10 approximately three years. Before that, I held various positions in the Permitting Section at  
11 the Air Quality Bureau.

12 Prior to my 14 years at NMED, my relevant work experience includes working for a  
13 Department of Energy research grant recipient managing the laboratory and performing research  
14 experiments, and as a Staff Research Associate at the University of California at Berkeley.

15 I have a Bachelor of Science degree in Chemical Engineering from Tufts University. A  
16 copy of my resume is NMED Exhibit 2.

17 The purpose of my testimony is to describe the regulatory framework in which discharge  
18 permits are reviewed and processed by the GWQB, to provide a brief summary of the history and  
19 implementation of 20.6.6 NMAC ("Dairy Rule") since it was adopted by the WQCC, and to  
20 describe the administrative burdens faced by the GWQB in implementing the Dairy Rule.

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## II. HISTORY OF THE DAIRY RULE

The regulations found in 20.6.2 NMAC (“Part 2 Regulations”) were adopted in 1977, pursuant to the WQA, to protect ground water and surface water quality. The Legislature amended the WQA in 2009 to require the WQCC to adopt industry-specific dairy and copper mining wastewater discharge regulations. *See* NMSA 1978, § 74-6-4(K). The Dairy Rule was the first rule to be developed pursuant to these amendments and used a stakeholder process that included participation from industry representatives, the regulated community, private citizens and environmental groups. After a hearing and deliberations, the Commission adopted the Dairy Rule in December 2010. The Dairy Industry Group for a Clean Environment (“DIGCE”) filed an appeal of the rule January 11, 2011, in the Court of Appeals, and implementation of the Dairy Rule was postponed while the parties to the rulemaking engaged in settlement discussions. Following negotiations amongst the dairy industry; the Department; and Amigos Bravos, Caballo Concerned Citizens, and the Rio Grande Chapter of the Sierra Club (collectively the “Coalition”), the Commission approved an amended Dairy Rule in November 2011, which took effect on December 31, 2011.

On September 4, 2012, DIGCE filed a petition to amend the Dairy Rule requesting three specific changes: (1) to allow the use of chemigation valves as a means of providing backflow prevention; (2) to eliminate the requirement to field calibrate flow meters; and (3) to revise requirements in the Nutrient Management Plan (“NMP”) and eliminate the requirement for certification of the NMP by both a certified professional agronomist or certified crop advisor, and a person certified by the Natural Resources Conservation Service as a nutrient management planner (“First Petition”). On December 7, 2012, the Coalition filed a Motion for

1 Reconsideration and Memorandum of Law to Reconsider the Petition and for Dismissal of the  
2 Petition, arguing that the appropriate procedure was not followed pursuant to NMSA 1978,  
3 Section 74-6-4(K). The First Petition was continued on December 11, 2012, until January 8,  
4 2013. On January 8, 2013, the Commission denied the Coalition's Motion to Dismiss. The First  
5 Petition was continued again, and the Commission set a hearing date for July 2013. An  
6 Unopposed Motion to Continue was filed on June 7, 2013, and the First Petition was scheduled  
7 for hearing on September 10, 2013. Before the hearing took place, DIGCE filed a second petition  
8 to amend the Dairy Rule on August 5, 2013 ("Second Petition"). This petition included 27  
9 proposed amendments. DIGCE also requested that the WQCC hold a single hearing on the first  
10 and second petitions; the Commission approved the request to combine the hearing on the  
11 petitions, which is the matter currently in front of the Commission (collectively "Proposed  
12 Amendments"). This hearing was originally scheduled for March 2014, but was postponed  
13 several times and is now scheduled to commence on April 6, 2015.

14 Following continuance of the hearing, NMED convened a Dairy Rule Technical Working  
15 Group ("TWG") made up of technical specialists from NMED and the New Mexico Department  
16 of Agriculture. The purpose of the TWG was to inform NMED's position on the Proposed  
17 Amendments as well as facilitate discussion about the dairy industry in New Mexico. The TWG  
18 hosted meetings where the interested parties, the Coalition, and DIGCE, could make  
19 presentations to the TWG on the Proposed Amendments and have open and candid discussion  
20 about the regulation of dairies. The TWG made conference rooms available in Albuquerque on  
21 May 16 and June 24, 2014. DIGCE participated on both days, and the Coalition elected not to  
22 participate. The TWG provided equal time to the Coalition and DIGCE on each day and all the

1 meetings were recorded. Additionally, the TWG hosted a public meeting on the evening of July  
2 29, 2014, in Roswell, New Mexico. This public meeting allowed for presentations on the  
3 Proposed Amendments by DIGCE and the Coalition as well as information from the TWG. The  
4 TWG provided additional time for public comment following the discussion. Notice of the public  
5 meeting was provided via email on July 3, 2014, to the interested parties; posted on NMED's  
6 website and in NMED's southeast field offices on July 16, 2014; and, published in newspapers in  
7 Roswell, Clovis/Portales, Lovington, Las Cruces and Albuquerque on July 18, 2014. The GWQB  
8 also sent the notice to the 460 email addresses that make up the WQCC interested persons list  
9 and the dairy permit holder list. Over 60 people attended the Roswell meeting. I did not attend  
10 any of the meetings but I have listened to the recordings and reviewed summary documents.

### 11 **III. REGULATORY FRAMEWORK FOR ISSUANCE OF DISCHARGE PERMITS**

12 The Part 2 Regulations require that all ground water with an existing total dissolved  
13 solids concentration of 10,000 milligrams per liter or less be protected for present and potential  
14 future use as domestic and agricultural water supply. 20.6.2.3101(A) NMAC. The Part 2  
15 Regulations further require that surface waters which are gaining because of ground water flow  
16 be protected for uses designated in the New Mexico Water Quality Standards. 20.6.2.3101(A)  
17 NMAC. The WQCC sets ground water quality standards that must not be exceeded by  
18 contaminants discharged from a facility. *See* NMSA 1978, § 74-6-4(D). 20.6.2.3104 and  
19 20.6.2.3105 NMAC also require that a facility obtain a discharge permit if the facility discharges  
20 effluent or leachate containing water contaminants in excess of the ground water standards or  
21 any other toxic pollutant that may move directly or indirectly into ground water. The focus of a  
22 discharge permit is to protect ground water quality. Prior to adoption of the Dairy Rule, the Part

2 Regulations exclusively governed ground water discharges from dairy facilities; the Dairy Rule supplements these regulations. 20.6.6.6 NMAC.

A discharge permit is defined in the Part 2 Regulations as a discharge plan approved by NMED. 20.6.2.7(O) NMAC. Prior to a facility discharging, or when NMED informs a facility that a discharge permit is required, the Part 2 Regulations require the facility owner to submit a discharge plan (i.e. application for a discharge permit) that contains detailed information about the facility and the discharge system. 20.6.2.3106 NMAC.

The Part 2 Regulations require discharge permits for many types of facilities in New Mexico, including domestic wastewater treatment plants, industrial plants, and food processing facilities. A discharge plan submitted to NMED by an applicant contains four components: (1) an operational plan; (2) a monitoring plan; (3) a contingency plan; and (4) a closure plan. 20.6.2.3106 NMAC and 20.6.2.3107 NMAC. The operational plan describes how the discharge system will be constructed, operated and maintained; the monitoring plan describes what instrumentation will be installed to monitor the discharge and ground water, including a schedule and list of monitoring parameters; the contingency plan describes corrective actions that will be taken in the event of operational failures or exceedances of ground water standards; and the closure plan describes how the facility will be closed when operations cease.

Whereas the Part 2 Regulations allow the applicant to propose a variety of options to satisfy operational, monitoring, contingency, and closure requirements, the Dairy Rule lists specific operational, monitoring, contingency, and closure methods dairies must follow, precluding the dairy permit applicant from proposing, and the Department from accepting, variations in requirements based on site-specific factors without first seeking a variance from the

1 Commission. 20.6.6.18 NMAC. In the Part 2 Regulations that apply to non-dairy permits, several  
2 requirements, including contingency plans and closure, are deferred to workplans that are  
3 submitted after the issuance of the permit for specific and particularized situations. However, the  
4 Dairy Rule provides very specific and prescriptive requirements for each part of a dairy  
5 discharge permit and application. *See, e.g.* 20.6.6.11 NMAC; 20.6.6.16 NMAC; 20.6.6.17  
6 NMAC; 20.6.6.20 NMAC. This requires much more extensive application submittals from  
7 parties seeking a dairy discharge permit, and requires more GWQB staff time to review and  
8 ensure that all Dairy Rule requirements are included and adequately met.

9       After NMED reviews an application for a discharge permit under the Part 2 Regulations  
10 and determines it is administratively and technically complete, the available information is  
11 evaluated to determine if the proposed discharge plan would prevent contaminants in the  
12 discharge from causing exceedances of the ground water quality standards contained in  
13 20.6.2.3103 NMAC. If NMED determines that the proposed discharge plan would likely prevent  
14 exceedances of the ground water quality standards and meets the requirements of the WQCC  
15 Regulations, staff prepare a draft discharge permit with conditions for approval. If NMED  
16 determines that the proposed discharge plan would likely not prevent exceedances of the ground  
17 water quality standards, the discharge plan is disapproved.

18       A discharge permit is generally issued for a period of five years. NMSA 1978, § 74-6-5.  
19 The permit remains in effect after the expiration date as long as the permittee submits an  
20 application for discharge permit renewal at least 120 days before the expiration of a Part 2  
21 discharge permit or one year before the expiration of a Dairy Rule discharge permit, and the

1 permittee is not "in violation" of the permit on the date of expiration. 20.6.2.3106(F) NMAC  
2 and 20.6.6.10(A) NMAC. This is commonly called "administratively continued."

3 **IV. IMPLEMENTATION OF THE DAIRY RULE**

4 NMED began implementing the Dairy Rule following its effective date of December 31,  
5 2011. This put into motion a rigorous schedule for issuing draft dairy discharge permits over an  
6 18-month period beginning in January 2012 and ending in June 2013, in accord with  
7 20.6.6.35(D) NMAC. However, because DIGCE appealed the original rule and permitting  
8 schedule adopted by the Commission in December 2010, and the amended Dairy Rule, effective  
9 December 31, 2011, did not include a revised schedule, the Department lost one year (December  
10 2010 to December 2011) of time to issue permits in accordance with the new rule. This loss of  
11 time required the Department to shift staff from other ground water permitting programs to assist  
12 in meeting the aggressive and shortened permit schedule imposed by the Dairy Rule. The  
13 Department's Agriculture Team was forced to delay permitting and enforcement of most non-  
14 dairy facilities in order to successfully meet this Dairy Rule permit schedule.

15 A total of 126 draft permits were issued between January 2012 and June 2013 in  
16 accordance with the schedule in the Dairy Rule; 22 permits were finalized, 102 facilities  
17 submitted comments, and 11 variance petitions were submitted in which a hearing was scheduled  
18 before the Commission. The Department recommended denial of an additional variance petition,  
19 and the permittee did not request a hearing. The 102 facilities that submitted comments to the  
20 Department also informally requested variances from the Dairy Rule. Many of the submittals  
21 requested a variance from the entire rule but did not provide site-specific conditions to support  
22 the request. Therefore, these requests were not formalized and a hearing was not scheduled by

1 the Commission. In addition, the GWQB received 17 requests from dairies for a permit hearing.

2 NMED staff met with many of the permittees who filed variances. With an inability for  
3 NMED to use its discretion during the discussions, in light of the prescriptive nature of the Dairy  
4 Rule, meetings with permittees who filed variances were predominantly unproductive. Even  
5 when the Department was willing to negotiate a joint variance in certain areas (such as the  
6 number and location of monitoring wells needed at a particular facility required to detect ground  
7 water pollution, or whether an engineered clay-liner at a particular facility could effectively  
8 protect ground water), both NMED and the permittee were concerned about the substantial  
9 resources necessary to bring a joint variance to a hearing before the WQCC. Each party would  
10 likely require legal services and technical testimony to support the criteria for a variance that the  
11 Commission must review per 20.6.2.1210 NMAC, as well as the additional criteria in the Dairy  
12 Rule pursuant to 20.6.6.18 NMAC.

13 Conversely, with permits for industrial and domestic facilities issued pursuant to the Part  
14 2 Regulations, NMED can negotiate site-specific provisions with the permit applicant, and if  
15 both parties agree on permit terms and requirements, NMED can then move forward to public  
16 notice of a draft permit or issuance of a final permit if no public comments are received, without  
17 the need to file a variance petition. However, the Dairy Rule does not allow NMED this  
18 flexibility to work with an applicant, or to approve alternate and equally protective permit  
19 requirements based on comments from an applicant or the public. For any technical options other  
20 than those specified in the Dairy Rule to be incorporated into a dairy permit, NMED and/or the  
21 applicant must file a variance petition with the Commission pursuant to 20.6.6.18 NMAC, and  
22 present the matter at a public hearing seeking approval of the Commission for the variance. So,

1 following the efforts made by NMED to meet with permittees, many permittees requested stays  
2 of enforcement for permit requirements at issue in the variance requests, in order to see if the  
3 proposed changes to the Dairy Rule would be successful.

4 As examples for the benefit of the Commission, NMED held the following meetings and  
5 discussions with dairy permittees and their representatives to discuss filed or anticipated variance  
6 requests. I did not attend any of the meetings but I have reviewed summary documents.

- 7 - On October 31, 2012, NMED staff and counsel met with representatives of an  
8 operational dairy to discuss variance of the facilities requirements, but any agreement  
9 would have required a hearing before the Commission. The permittee ultimately  
10 requested a stay of enforcement for those requirements at issue in its variance request  
11 until after the WQCC ruled on the First Petition.
- 12 - On April 11, 2013, consultants and representatives from a lending company in the  
13 process of foreclosing on a dairy and representatives of another dairy seeking a  
14 closure discharge permit met with NMED to discuss negotiation of a joint variance  
15 for the facilities and alternate closure requirements that could be supported by the  
16 Department. Progress halted when the dairy representatives requested longer and  
17 more detailed meetings after the WQCC ruled on the First Petition.
- 18 - On May 1, 2013, NMED staff met with attorneys and consultants for a closed and  
19 vacant dairy to discuss a joint variance for areas of agreement; however, the dairy  
20 representatives requested a stay of enforcement of the requirements at issue in the  
21 variance petition and deferral of discussion until after the WQCC ruled on the First  
22 Petition.



- 1           - On July 10, 2013, NMED staff met with another dairy to negotiate a joint variance or  
2           closure permit for the foreclosed facility; however, this matter was also stalled until  
3           resolution of the First Petition.
- 4           - On July 12, 2013, NMED representatives met with consultants and owner  
5           representatives of nine dairies, to discuss their general issues with the draft permits,  
6           the Dairy Rule requirements for monitoring wells, and the challenge of meeting the  
7           Dairy Rule monitoring requirements at dairies under abatement (where there is  
8           documented ground water contamination that must be addressed in an Abatement  
9           Plan under 20.6.2.4000 to 20.6.2.4999 NMAC). However, in light of the expenses  
10          related to going before the WQCC with a variance petition, the dairies declined to  
11          participate in settlement discussions until the requirements of the Dairy Rule were  
12          clearer and settled.

13          Although NMED expended substantial time and effort to try to negotiate and establish  
14          facility-specific solutions for dairies that NMED supported, most dairy representatives expressed  
15          reservations about the substantial resources that would be needed in seeking WQCC approval of  
16          their variance requests, even if requesting a variance jointly with the Department. A hearing  
17          requires significant resources which include: the creation of an Administrative Record, drafting  
18          testimony with supporting exhibits, reviewing and commenting on other party's testimony, and  
19          participating in the hearing. These dairy representatives indicated they would prefer to wait until  
20          after the WQCC ruled on the First Petition set for September 2013, since rule changes made by  
21          the WQCC in response to the petition might make moot parts or all of the dairies' variance  
22          requests. As a result, NMED was not able to negotiate any settlements or joint variances with

1 dairies that have appealed or sought variances from the Dairy Rule requirements. Altogether,  
2 NMED granted eight dairies requests for a stay of enforcement of the matters at issue in their  
3 variance petitions until the matters were decided.

4       On top of the issues created for NMED by the lack of flexibility provided in the rule,  
5 DIGCE's petitions in September 2012 and August 2013 to amend the Dairy Rule created  
6 uncertainty for continued implementation of the rule. The Department continued and completed  
7 issuance of draft permits following DIGCE's first filing to comply with the June 2013 deadline  
8 as set by 20.6.6.35 NMAC. Additionally, NMED engaged in meetings with permittees as  
9 outlined above. However, the Department did not complete review of the comments received on  
10 all of the draft permits issued by the Department between January 2012 and June 2013 or issue  
11 final permits due to the pending hearing on the Proposed Amendments (first set for September  
12 2013, then March 2014 following the filing of the Second Petition; then December 2014  
13 following DIGCE's filing of an unopposed motion to continue the hearing, and subsequently  
14 moved to April 2015 due to DIGCE filing another unopposed motion for continuance in  
15 December 2014), and due to the compressed permitting schedule caused by the initial one-year  
16 delay while the rule was negotiated and amended. If the Department had issued final permits and  
17 the Dairy Rule was subsequently amended, the Department would likely be required to re-issue  
18 the permits, wasting limited and valuable staff time which could be used to address other  
19 permitting and enforcement matters in the GWQB. Therefore, the Department suspended  
20 finalizing draft permits.

21       DIGCE's First Petition was scheduled to go to hearing on September 10, 2013. At the  
22 time the decision to delay issuance of final permits was made, NMED did not anticipate such a

1 long period of time would elapse from the time the drafts were issued (June 2013). NMED  
2 resumed issuance of final permits when the hearing was rescheduled for late 2014.

3 NMED began issuing final dairy permits by priority based on the following criteria: (1) if  
4 the current permit was expired and not administratively continued; (2) if the facility had existing  
5 ground water contamination; (3) depth to ground water; and (4) if the facility did not have  
6 monitoring wells. To date, an additional 27 permits have been finalized. As a response to  
7 issuance of these additional 27 final permits, NMED has received 8 variances and 5 requests for  
8 permit review before the Commission. Therefore, out of the 126 draft permits issued since the  
9 effective date of the Dairy Rule, 49 permits have been finalized, and 19 variance petitions and 45  
10 requests for permit review have been received. Three variance petitions have been resolved.

#### 11 **V. ADMINISTRATIVE BURDEN**

12 The Agriculture Section of the GWQB is responsible for managing all agricultural  
13 facilities including dairies. At the time that the Dairy Rule was adopted, the Section was termed a  
14 "team" and was part of the Pollution Prevention Section. It consisted of a Team Leader and four  
15 technical staff. Shortly after the Dairy Rule was adopted, two team staff resigned, including the  
16 Team Leader and supervisor. In order to complete issuance of draft permits required under the  
17 Dairy Rule, two staff were temporarily assigned to the Agriculture Team from other permitting  
18 teams. Once all draft permits were issued in June 2013, the two temporarily assigned staff  
19 returned to their previous teams, thus leaving a shortage of staff to address comments on the  
20 drafts and to issue final permits. Due to lack of funding throughout the permitting programs in  
21 the GWQB, these positions have not yet been filled resulting in the Agriculture Team having two  
22 out of six positions vacant and a 30% vacancy rate, which makes it extremely difficult for the

1 Department to administer the Dairy Rule. A base budget increase to fund the existing positions  
2 was requested in the 2015 legislative session. Since the request has not yet been approved, the  
3 permitting program will continue to be insufficiently funded and unable to fill all existing vacant  
4 positions, which will continue to increase the administrative and resource burden for the  
5 Department to implement the Dairy Rule.

6 The fees for dairy permits remained the same for dairies throughout the various  
7 amendments of the Rule and are woefully inadequate to cover the cost of managing permits for  
8 dairies. The fee for a five-year permit for a dairy ranges from \$1,150 (for a discharge of less than  
9 10,000 gallons per day) to \$4,600 (for a discharge of 100,000 gallons per day or greater). The fee  
10 for obtaining a discharge permit for a dairy has remained the same since 2001. Managing a dairy  
11 permit involves reviewing a discharge permit application for administrative and technical  
12 completeness; creating a draft permit, issuing the draft permit for public review and comment,  
13 reviewing comments and requests for hearing including hearings on variance requests,  
14 participating in public meetings and hearings, drafting a final permit based on the administrative  
15 record, inspecting each facility, addressing compliance issues, reviewing quarterly monitoring  
16 reports and environmental data, and overseeing abatement if ground water contamination is  
17 present. Increasing the fees to more accurately reflect oversight costs would provide additional  
18 funding to fill the vacant positions.

19 As previously testified, the Department received 11 variance requests from 22 final  
20 permits that were issued between March 2012 and September 2013, and 8 variance requests out  
21 of the 27 final permits issued between July 2014 and October 2014. This equates to an average of  
22 ~40% variance requests of final permits. Out of the remaining 77 draft permits, if 40% result in

1 variance petition requests, the Department can expect that an additional 30 dairies will request a  
2 variance. It will be a considerable burden on the Department to prepare for so many variance  
3 hearings before the Commission.

4 Providing NMED discretion to approve alternative methods that are equally protective of  
5 ground water would allow NMED to work with permittees and interested parties on site-specific  
6 permit conditions with equivalent protections for ground water without the need for a variance  
7 from the WQCC in every situation. Areas warranting alternatives and more Department  
8 discretion are alternate monitoring well networks (number of wells, location of wells, and well  
9 construction), an alternate schedule for installation of monitoring wells, an alternate schedule for  
10 surveying monitoring wells, and alternate liners that demonstrate equivalent protection of ground  
11 water. Providing the Department more discretion would eliminate the need for a Commission  
12 hearing and variance from the prescriptive Dairy Rule requirements. This would streamline  
13 approval of final permits and still offer equivalent protection of ground water, while maintaining  
14 the option for a permittee to seek a variance before the Commission if they so choose. It would  
15 also allow the Department, the public, and the permittees to avoid the substantial legal and  
16 technical costs of a variance hearing before the WQCC. Providing more discretion to the  
17 Department on dairy permits would be consistent with the GWQB's method of reviewing and  
18 approving site-specific requirements for other ground water discharge permits, including  
19 industrial and domestic waste permits, yet would still provide a predictable and consistent  
20 framework for regulation of dairies that is protective of ground water.

21 Additionally, the existing Dairy Rule includes a schedule for issuing draft permits. If the  
22 Rule were to be amended, the Department proposes that an additional schedule for revised dairy

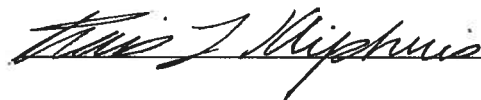
1 permits would not be necessary. 20.6.6.35 NMAC. The Department is committed to issuing draft  
2 and final dairy permits as quickly as possible given the current budget and staff resources,  
3 prioritizing the issuance of permits based on threats to human health and the environment, rather  
4 than by a schedule driven by less compelling factors.

5 **VI. CONCLUSION**

6 In conclusion, as the Administrative Record demonstrates, implementation of the Dairy  
7 Rule has been burdensome if not impossible for the Department. Amending the Dairy Rule to  
8 provide NMED with some discretion to approve additional alternatives in limited areas where  
9 the Department has identified the need for flexibility while maintaining equivalent protection of  
10 ground water would streamline implementation of the Dairy Rule and would significantly reduce  
11 or eliminate the administrative burden of implementing the rule.

12 Thank you. That concludes my direct testimony.

13  
14 Respectfully submitted,

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## **TRACY (TRAIS) KLIPHUIS**

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### **Employment**

**Director** – January 2015 – Present, Water Protection Division, New Mexico Environment Department, Santa Fe, NM

- Responsible for oversight and management of approximately 188 full time employees and a 20 million dollar budget that includes the Ground Water Quality Bureau, the Surface Water Quality Bureau, the Drinking Water Bureau and the Construction Program Bureau
- Actively participate in policy development and implementation

**Acting Director** – September 2014 – January 2015, Resource Protection Division, New Mexico Environment Department, Santa Fe, NM

- Responsible for oversight and management of approximately 170 full time employees and 20 million dollar budget that includes the Ground Water Quality Bureau, the Surface Water Quality Bureau, the Department of Energy Oversight Bureau and the Petroleum Storage Tank Bureau

**Waste Isolation Pilot Plant (WIPP) Staff Manager** – November 2011 – September 2014, New Mexico Environment Department, Hazardous Waste Bureau, Santa Fe, NM

- Supervise technical staff and contract consultant including review of documents, management of tasks, generator site audits and conduct regular meetings.
- Serve as project leader for Hazardous Waste WIPP Permit to ensure facility waste management operations are in compliance and to ensure fair application and enforcement of federal regulations.
- Support Bureau improvement including, initiative to improve program functioning and job satisfaction and recommend improvements to regulations, policies and guidelines.
- Prepare and facilitate state wide agency meetings that include DOE and active citizen groups.

**Acting Minor Source Unit Manager, NSR Permitting Section** – September 2008 – November 2011 (filled two positions, i.e. in addition to Line Manager duties below), New Mexico Environment Department, Air Quality Bureau, Santa Fe, NM

- Responsible for training and supervision of nine employees
- Responsible for interpretation of NMAC and CFR regulations and consequent development of guidance documents used by staff and public
- Lead weekly section meeting that include extensive discussion of permitting issues
- Supervised public meeting and hearing presentations, negotiations and agreements
- Also assigned and responsible for Line Manager duties described below

**Line Manager, NSR Permitting Section** – January 2008 – November 2011, New Mexico Environment Department, Air Quality Bureau, Santa Fe, NM

- Responsible for supervision of five employees
- Responsible for timely review and issuance of high quality permits that consistently and

- fairly apply state and federal environmental regulations
- Responsible for recruiting staff using creative pro-active hiring techniques
- Conduct meaningful and constructive performance reviews using guidelines set forth by SPO rule 1.79 NMAC and NMED policy
- Responsible for maintaining well-trained, motivated, informed and productive staff

**Environmental Scientist and Specialist – Advanced** - February 2007 to December 2007, New Mexico Environment Department, Air Quality Bureau, Santa Fe, NM

- Responsible for permitting the states most complex facilities
- Responsible for writing guidance documents and template language
- Assumed acting manager duties when manager was out of office for extended periods including technical review of permits

**Environmental Scientist and Specialist – Operations** - July 2002 to February 2007, New Mexico Environment Department, Air Quality Bureau, Santa Fe, NM (Started as Part Time but completed as Full Time)

- Monthly Report Specialist – Run queries from databases and prepare detailed analysis of all permitting actions
- Title V and NSR permit writer for complex facilities including natural gas processing plants, potash mine and processing facility, polyurethane manufacturing and more.
- TEMPO specialist (an Oracle database system) – Led weekly training sessions for colleagues, trouble shoot problems and assist in general and specific data entry issues
- Create, update and revise guidance documents for entering air quality permit information and production of Title V and NSR permits
- Create, update and revise permit templates in LetterBuilder using database fields and functions and reference tables

**Environmental Scientist and Specialist – Basic** - March 2002 to July 2002, New Mexico Environment Department, Air Quality Bureau, Santa Fe, NM (Part Time – typically 20 hours per week)

- Developed TEMPO Title V guidance documents for entering air quality permit information and production of Title V and NSR permits. This includes training of coworkers and industry. Also, developed permit templates in LetterBuilder using database fields and functions and reference tables.
- Evaluated Air Quality Permit Applications by performing complex mathematical equations, chemistry and engineering principles and techniques.

**Environmental Trainee** – New Mexico Environment Department, Air Quality Bureau, Santa Fe, NM January 1999 to March 2000

- Studied and toured almost every type of air quality regulated facility in New Mexico including compressor stations, power plants, gas plants, smelters, crushers, and above and below ground mining facilities.
- Trained in use of portable analyzer.
- Responsible for computing and invoicing of annual Title V fees (approx. 3 million dollars)
- Technical analysis and issuance of Title V Operating Permits

**Research Associate and Environmental Manager** - August 1993 - January 1999, Kliphuis Consulting, Santa Fe, NM (Part Time – typically 20 hours per week)



- Perform research using extreme temperature radioactive kiln.
- Organized and managed laboratory for a Department of Energy research grant recipient
- Responsible for handling of radioactive material (uranium tetrafluoride) and associated environmental compliance.

**Staff Research Associate** - January 1989 to August 1993, University of California at Berkeley, Biochemistry Department (Part Time - Typically 30 hours per week)

- Provided general research support for biochemistry laboratory including managing production of all support materials and solutions.
- Performed sterile tissue culture technique, DNA mini preps, and isolation of adhesion dependent mammalian cells from live chicken embryos.
- Radiation safety officer, responsible for weekly scan of entire laboratory, proper disposal of radioactive material, and clean up of contaminated equipment.

## Education And Training

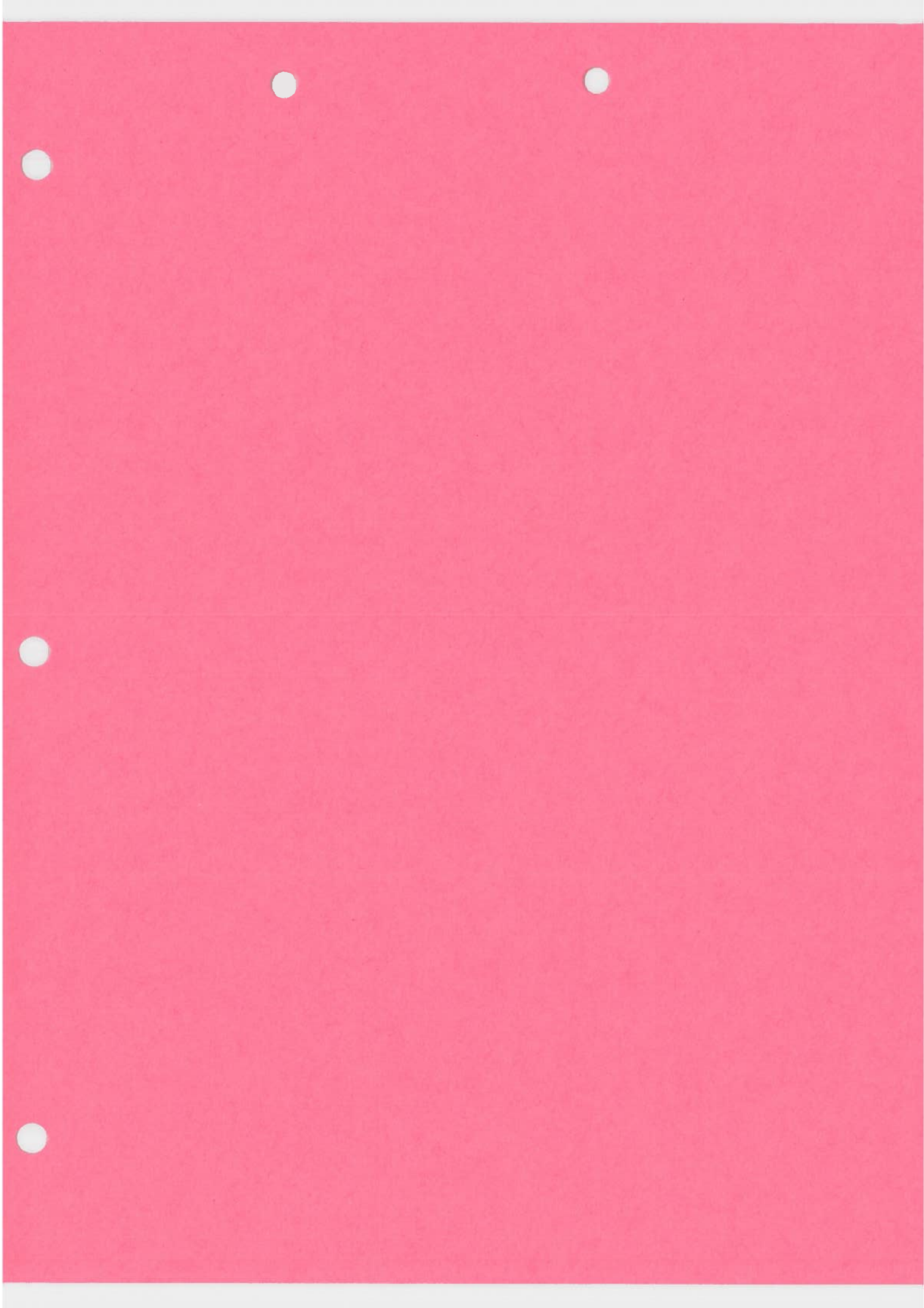
- Public Servant Leadership Program, September – November 2013
- Environmental Negotiation, September 2012
- Hazardous Material Incident Response Operations (Hazwoper), April 2012
- National Nuclear Fuel Cycle Summit, Carlsbad, NM April 3-5, 2012
- Introduction to Renewable Energy, Solar Energy International, February 11-12, 2012
- Quality Assurance and Lead Auditor, Quality Assurance Academy – DOE, January 2012
- Collaboration and Cultural Competency Training (State Tribal Collaboration Act), October 2011
- Effective Permit Writing, July 19-21, 2011
- Facilitation for Scientists and Resource Managers, March 2011
- Santa Fe Community College – Conflict Resolution and Mediation, Certification in Mediation, September - December 2010
- Institute for Participatory Management and Planning - Workshop on Negotiating Informed Consent, October 2010
- Conflict, Communication and Change, April 2010
- Western States Air Resource Council - Intermediate NSR, October 2009
- Ethics and Decision Making Skills, September 2009
- Labor Negotiations Workshop – Federal Mediation and Conciliation Services, May 2009
- Western States Air Resource Council- Compliance Assurance and Other Title V Monitoring, November 2006
- Santa Fe Community College – Management Development Certification Program, January 2006
- Western States Air Resource Council - Basic NSR and NSR Reform, October 2005
- Dearborne Institute – Real Estate Law, Practice and Procedures, February 2004
- Western States Air Resource Council - Advanced NOx Emissions, September 2003
- Western States Air Resource Council - Writing Effective Permit Conditions, October 2002
- Eastern Technical Associates Certification as a Visible Emissions Evaluator, September 1999
- EPA Course on Hazardous Air Pollutants, May 1999
- Institute for Participatory Management and Planning - Workshop on Negotiating Informed Consent, October 1999
- Western States Air Resource Council - Advanced Permit Writing Workshop, November 1999
- Tufts University, Medford, MA, Bachelor of Science in Chemical Engineering, May 1988

**Additional  
Experience**

- Toastmaster Student – September 2012 - present
- Santa Fe Public Schools Citizen Review Committee (CRC) Member, July 2011 - present
- Santa Fe Magistrate Court Mediation Services Volunteer, March 2011 – December 2012
- Santa Fe Public Schools Task Force Volunteer, September 2010 – January 2011
- Chairperson, Employee Recognition Committee, January 2005 – January 2006
- Licensed New Mexico Real Estate Broker, March 2004 - present
- Certified Producer and Video Editor, Santa Fe Public Access Television, August 1995 - 2000

**Awards**

- New Mexico Environment Department Group Achievement Award, June 2014
- New Mexico Environment Department Employee of the Quarter Award, February 2011
- Three time recipient of the Air Quality Bureau Outstanding Achievement Award – August 2004, April 2007 and March 2009



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

**In the Matter of:  
PROPOSED AMENDMENT  
TO 20.6.6 NMAC (Dairy Rule)**

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**No. WQCC 12-09 (R) and  
No. WQCC 13-08 (R)**

**NEW MEXICO ENVIRONMENT DEPARTMENT'S AMENDED NOTICE OF INTENT  
TO PRESENT TECHNICAL REBUTTAL TESTIMONY**

The Ground Water Quality Bureau ("GWQB") of the Water Protection Division of the New Mexico Environment Department ("NMED" or "Department"), pursuant to Section 104.B of the Guidelines for Water Quality Control Commission Regulation Hearings and in accordance with Section 302 of the Procedural Order issued on October 3, 2014, provisionally files this Amended Notice of Intent to Present Technical Rebuttal Testimony at the Proposed Amendment to 20.6.6 NMAC ("Dairy Rule") hearing scheduled to commence on April 6, 2015.

1. Entity Represented by the Technical Witness

The technical witness will testify for the GWQB of the Water Protection Division of NMED.

2. Name and Qualifications of the Technical Rebuttal Witness

The Department will call the following witness at the hearing to present technical rebuttal testimony:

Trais Kliphuis. Trais Kliphuis is the Water Protection Division Director for NMED. As Division Director, Ms. Kliphuis oversees the GWQB, Surface Water Quality Bureau, Drinking Water Bureau, and the Construction Programs Bureau. She has served in this position since September 2014, and has worked for NMED for 14 years. Ms. Kliphuis was the immediate supervisor of Mr. Schoeppner, the Department's former witness who was in charge of

implementing the Dairy Rule since it took effect in December 2011. Ms. Kliphuis holds a Bachelor of Science degree in Chemical Engineering from Tufts University. Ms. Kliphuis' qualifications and work background were provided with the Department's Amended Notice of Intent to Provide Technical Testimony for its direct case.

3. List and Description of Exhibits

The Department submits the following exhibit:

NMED Exhibit 3

Written Rebuttal Testimony of Trais Kliphuis

4. Reservation of Rights

The Department reserves the right to call additional witnesses or introduce additional exhibits in response to the testimony and witnesses presented at the hearing. Additionally, the Department reserves the right to raise relevant objections to the evidence, witnesses, and exhibits offered by the parties.

Respectfully submitted,

GROUND WATER QUALITY BUREAU  
NEW MEXICO ENVIRONMENT DEPARTMENT



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

**In the Matter of:  
PROPOSED AMENDMENT  
TO 20.6.6 NMAC (Dairy Rule)**

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**No. WQCC 12-09 (R) and  
No. WQCC 13-08 (R)**

**REBUTTAL TESTIMONY OF TRAIS KLIPHUIS  
March 18, 2015**

The New Mexico Environment Department (“Department” or “NMED”) wishes to respond to several issues in the direct testimony submitted by the Dairy Industry Group for a Clean Environment (“DIGCE”) and Amigos Bravos, Rio Grande Chapter of the Sierra Club, Caballo Concerned Citizens, Lea County Concerned Citizens, and Rio Valle Concerned Citizens (“the Coalition”), as discussed below.

**I. DIGCE’s witness Charles W. Fiedler**

**A. Site-specific considerations for monitoring well networks are required.**

The Department agrees with Mr. Fiedler’s testimony that a groundwater monitoring network must be designed to take into account facility-specific conditions, and that it poses a significant and unnecessary burden to petition the Commission for a variance to accept an alternate monitoring well network that is proposed by the applicant and supported by the Department in each instance. Fiedler Testimony, pp. 3-4, 6. The Department agrees with Mr. Fiedler’s testimony where he compares establishing a monitoring network under 20.6.6 NMAC (“Dairy Rule”) to establishing a monitoring network under 20.6.2 NMAC (“Part 2”). Fiedler Testimony, p. 7. Under Part 2, the Department has the ability to approve a facility-specific monitoring network. The Department supports a revision to the Dairy Rule to allow Department

1 discretion to approve an alternate monitoring network based on site-specific conditions and  
2 potential sources that exist at a dairy facility.

3 **B. Monitoring well networks must incorporate potential contamination sources.**

4 While the Department agrees with Mr. Fiedler's recommendation to allow the permittee  
5 flexibility in locating groundwater monitoring wells based on a hydrogeological characterization  
6 of a given facility, Fiedler Testimony, p. 11, the Department does not support the concept of a  
7 monitoring network based on the facility as a whole (no less than one upgradient well and two  
8 downgradient wells to confirm the absence (or presence) of contamination from the proposed  
9 facility). Fiedler Testimony, pp. 12, 17-18. This does not provide optimal monitoring coverage  
10 for potential contamination sources at a facility. The Department agrees with Mr. Fiedler that an  
11 upgradient well is necessary to establish background for a facility, Fiedler Testimony, p. 12, but  
12 asserts that there should be no established minimum number of wells that all facilities must have.  
13 In fact, based on factors such as the size of a dairy, volume of discharge, depth to groundwater,  
14 and the number and size of potential contamination sources, a small dairy with limited sources  
15 may require fewer monitoring wells to establish a monitoring well network that is protective of  
16 groundwater than what is proposed by DIGCE. Layout and the number and size of source areas  
17 differ from one facility to another; therefore, the Department should be able to approve a site-  
18 specific monitoring well network for each site, taking into consideration the hydrogeology, the  
19 number, size and location of potential contamination sources to allow for early detection of  
20 groundwater pollution.

21 Without early detection using monitoring wells positioned relative to source areas, the  
22 costs of investigation, corrective action and abatement can increase substantially, and large

1 amounts of groundwater may be contaminated before it is detected. The appropriate monitoring  
2 well network is dependent on site-specific conditions. The Department employs and trains  
3 technical staff in the Ground Water Quality Bureau ("GWQB") who possess and/or have access  
4 to the requisite scientific expertise to approve effective groundwater monitoring networks  
5 developed by a qualified professional and submitted by an applicant. Vesting the Department  
6 with the ability to approve such networks without petitioning the Commission for a variance will  
7 ease the Department's administrative burden while ensuring groundwater protection.

8 **C. NMED must have final approval of monitoring well network proposals.**

9 The Department agrees with Mr. Fiedler's steps allowing a qualified professional to  
10 collect data, complete an investigation and design a groundwater monitoring network based on  
11 facility design and the hydrogeological investigation of a facility. Fiedler Testimony, p. 13.  
12 However, the Department disagrees with Mr. Fiedler's testimony that an outside qualified  
13 professional's assessment of the number of monitoring wells is entirely sufficient. *Id.* The  
14 Department, as regulator of the Dairy Rule, must have final approval of monitoring well  
15 networks proposed by the permittee's qualified professional, and the Department must be  
16 allowed to require modification of the monitoring well network proposed by the applicant.  
17 Approval of monitoring networks is standard for every regulatory entity that Mr. Fiedler  
18 discusses in his testimony; the Solid Waste Bureau, Hazardous Waste Bureau, and U.S.  
19 Environmental Protection Agency; and this is the process used by the Department for all non-  
20 dairy permitted facilities. Providing the Department with discretion to approve an alternate  
21 monitoring network will streamline the administrative process, reduce the administrative burdens  
22 on the Department and the Commission, and will be consistent with the Department's process for



1 approving monitoring networks for all other permitted industries including domestic waste  
2 facilities, industrial facilities, and mines. The process will retain the opportunity for the public to  
3 weigh in through the public comment period for draft discharge permits provided in 20.6.2.3108  
4 NMAC. It will also preserve the opportunity for the permittee to request a variance from the  
5 Dairy Rule requirements as provided in 20.6.6.18 NMAC.

6 **D. Existing monitoring wells may be approved if they effectively monitor**  
7 **groundwater quality.**

8 The Department agrees with Mr. Fiedler's testimony that existing wells can be used in  
9 the monitoring network for a facility, Fiedler Testimony, p. 14, but disagrees that all previously  
10 installed wells should be accepted by the Department. The Department must have the ability to  
11 evaluate each well and will only accept wells that meet the criteria that Mr. Fiedler outlines in his  
12 testimony: they must be properly located and completed to effectively monitor groundwater  
13 quality. This is standard practice for the Department with all other permitted facilities and  
14 monitoring wells. If the Department is given the ability to work with the permittee to determine  
15 monitoring well placement, this will eliminate the need for the permittee and NMED to schedule  
16 a hearing before the Commission to request a variance to allow the use of existing monitoring  
17 wells that may be a few feet outside of the location prescribed by the Dairy Rule, for example,  
18 but still provide representative groundwater conditions downgradient of a potential source area.

19 **E. DIGCE's amendment to 20.6.6.23 NMAC will reduce the effectiveness of**  
20 **groundwater monitoring.**

21 The Department does not agree with Mr. Fiedler's testimony that, if the Commission  
22 accepts DIGCE's amendment to 20.6.6.23 NMAC, there will not be any reduction in the

1 effectiveness of groundwater monitoring or reduction in environmental liability compared to the  
2 existing requirements. Fiedler Testimony, p. 20. DIGCE's proposed changes in 20.6.6.23 NMAC  
3 would only monitor groundwater conditions upgradient and downgradient of a dairy facility, thus  
4 failing to detect potential contamination as early as possible. DIGCE's proposed amendments for  
5 a base minimum of three monitoring wells decreases the effectiveness of groundwater  
6 monitoring and increases potential environmental liability by foreclosing the possibility of early  
7 detection of potential contamination. By the time contamination is discovered in the wells  
8 downgradient of a facility, larger areas of groundwater could be contaminated, reducing the  
9 ability to take swift corrective action measures.

10 **II. DIGCE's witness I. Keith Gordon**

11 Mr. Gordon provides testimony related to the single 60-mil synthetic liner that the Dairy  
12 Rule prescribes for wastewater and combined wastewater/stormwater impoundments. In his  
13 testimony, Mr. Gordon states that single geosynthetic liners may leak when deployed as an  
14 independent unit, as opposed to one component of a liner system. Gordon Testimony, p. 3. He  
15 also cites to compacted soil liners ("CSL") being used as secondary liners by the U.S.  
16 Environmental Protection Agency, Gordon Testimony, p. 9, and as part of a composite liner  
17 system by the Department's Solid Waste Bureau, Hazardous Waste Bureau and the New Mexico  
18 Oil Conservation Division. Gordon Testimony, p.11.

19 The Department recognizes that double/composite liner systems are an existing design  
20 that can provide maximum protection of groundwater quality. A less substantial system has a  
21 potential to result in groundwater contamination, which would require facilities to implement  
22 corrective action or abatement. Installation of a double/composite liner system with leak

1 detection and pump back systems at the outset is a proven and effective way to reduce the  
2 potential of future costs of corrective action or abatement. Should the Commission choose to  
3 retain the current liner requirement in the Dairy Rule as the standard, and in order to take  
4 appropriate measures to protect groundwater, the Department supports having discretion to make  
5 decisions on liner requirements that are equally protective of groundwater based on site-specific  
6 facility conditions and new technology. Providing more discretion to the Department on liner  
7 requirements for dairy permits is consistent with the GWQB's method of reviewing and  
8 approving other industrial and domestic waste discharge permits, and will eliminate the  
9 Commission's burden of making a technical, site-specific determination that can be made by  
10 NMED technical staff.

11 Based on the Department's experience administering dairy discharge permits, areas with  
12 material appropriate for constructing CSLs are limited in the State. Still, the Department has  
13 technical staff to determine if CSLs may be suitable in limited circumstances, and therefore  
14 supports vesting NMED with discretion to determine in which situations such liners will  
15 adequately prevent groundwater contamination.

16 The goal of liner systems, as Mr. Gordon accurately states, is to provide "environmental  
17 protection; and more specifically stewardship of groundwater and surface water quality." Gordon  
18 Testimony, p. 11. Protection of groundwater in New Mexico is crucial as approximately 81% of  
19 New Mexico residents' source of drinking water is groundwater. NMED Surface Water Quality  
20 Bureau, 2014-2016 State of New Mexico Clean Water Act Section 303(d)/Section 305(b)  
21 Integrated Report, at 67 (2014). New Mexico does not protect groundwater based on use as Mr.  
22 Gordon states, Gordon Testimony, p. 12; the Water Quality Act, NMSA 1978, Sections 74-6-1 to

1 -17 (1967, as amended through 2013) ("WQA") protects *all* groundwater. NMSA 1978, § 74-6-  
2 4(E) (2009). Mr. Gordon's testimony does not recognize that new liners need not be installed  
3 immediately at all dairies. Rather, the chosen technology must be implemented when there are  
4 new or replacement liners required based on the status of a particular dairy.

5 **III. DIGCE's witness Mark Turnbough**

6 Dr. Turnbough concludes from his analysis that there is a significant increase in the  
7 number of monitoring wells required under the Dairy Rule compared to Part 2. Turnbough  
8 Testimony, pp. 8-10. The Department acknowledges that the Dairy Rule requires an increase in  
9 the minimum number of monitoring wells under renewal of Dairy Rule permits compared to  
10 what was required under Part 2 permits. There are several reasons why more monitoring wells  
11 are required by the Dairy Rule, but most important is the fact that at the time of development of  
12 the Dairy Rule, there were concerns about nitrate contamination. In order to provide early  
13 detection of contamination from individual sources at a dairy facility so that corrective action can  
14 be taken quickly, a more extensive monitoring network was determined to be necessary, leading  
15 to an increase in the number of monitoring wells required to be installed at some facilities. Early  
16 detection of contamination protects New Mexico's groundwater resources, which is the intent of  
17 the Dairy Rule. Early detection also can save the dairy industry money over time because  
18 corrective action can be taken before large areas of groundwater have been contaminated, which  
19 can trigger costly abatement activity. While Dr. Turnbough's testimony accurately indicates that  
20 the Dairy Rule requires additional monitoring wells at dairies, his analysis does not take into  
21 account the necessity to detect the individual sources of existing groundwater contamination at  
22 dairies through the use of additional monitoring well data.

1 Dr. Turnbough proposes accepting valid existing monitoring well configurations that  
2 were approved under previous permits, renewals, or permit modifications. Turnbough  
3 Testimony, p. 14. Dr. Turnbough does not elaborate on how validity would be determined. It  
4 would be difficult to make a determination of validity outside a permit process, and the  
5 Department cannot make a blanket commitment as some existing monitoring wells may not have  
6 been located or constructed properly (i.e. "valid"). The Department must assess monitoring well  
7 networks based on a systematic analysis that includes well completion data, location of wells and  
8 site-specific hydrologic conditions.

9 Finally, the Department agrees with Dr. Turnbough's recommendation to establish  
10 provisions for a monitoring well network based on site-specific considerations. Turnbough  
11 Testimony, p. 14. The Department supports adding language in the Dairy Rule that would give  
12 the Department discretion to approve an alternate, facility-specific monitoring network or system  
13 that is equally protective of groundwater and addresses the potential sources of contamination  
14 that exist at a particular facility. This recommendation eases the burden on the Department in  
15 administering Dairy Rule discharge permits. It will allow the Department to issue discharge  
16 permits more efficiently, without the need to prepare for an onerous hearing before the  
17 Commission when the Department supports a monitoring well network that differs from the  
18 prescriptive Dairy Rule requirements, yet provides for adequate monitoring and detection of  
19 groundwater contamination.

20 **IV. Coalition Witness Kathy J. Martin**

21 Generally, Ms. Martin describes the various types and methods used for flow metering  
22 and backflow prevention in her testimony submitted with the Coalition's NOI in WQCC 12-

09(R). *See* e.g. Martin 12-09 Testimony, pp. 4-5; pp. 6-8. The Department agrees with Ms. Martin that there is a misunderstanding of terminology regarding field calibration of flow meters. Martin 12-09 Testimony, p. 9. The Department agrees that some kind of validation of flow meter performance should be required and is willing to work with the parties to determine what this should be. However, the Department recognizes that Ms. Martin's testimony generally fails to consider the administrative and practical burdens of implementing and enforcing the Dairy Rule as written.

**V. Coalition Witness William C. Olson**

Mr. Olson equates DIGCE's proposed changes to monitoring well placement in 20.6.6.23 NMAC with pollution by rule up to the boundary of the facility. Olson Testimony, p. 23. While the Department believes that a site-specific monitoring well network is the best method to detect any groundwater contamination, the Department disagrees with Mr. Olson's characterization. By his reasoning, monitoring wells are the only protective measure for groundwater, and every other protective measure in the Dairy Rule is ineffective. Monitoring wells monitor for contamination and the effectiveness of the actual pollution prevention devices such as impoundment liners, nutrient management plans, and effective management of wastewater.

**VI. CONCLUSION**

In conclusion, the Department has been struggling to adequately administer the Dairy Rule since it took effect on December 31, 2011. Since that time the Department has identified administrative burdens that make effective implementation of the Dairy Rule very challenging. My testimony identifies a few of the burdens that the Department faces with the current rule. In order to more effectively manage permitting and enforcement of the Dairy Rule, the Department

1 recommends that changes be made to vest the Department with more discretion in some areas. In  
2 addition to the technical information provided by the parties, the Department requests that the  
3 Commission consider these practical considerations in its decision.

4 This concludes my rebuttal testimony.

5  
6 Respectfully submitted,

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