

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



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

No. WQCC 11-04 (R)

STATEMENT OF REASONS AND ORDER

This matter comes before the Water Quality Control Commission (“Commission”) upon a petition filed the New Mexico Environment (“Department”), Dairy Industry Group for a Clean Environment (“DIGCE”), and Amigos Bravos, the Caballo Concerned Citizens, and the Sierra Club Rio Grande Chapter (collectively, “the Coalition”) proposing amendments to 20.6.6 NMAC – *Dairy Rule*. On November 16, 2011, following a public hearing, the Commission deliberated and adopted the proposed amendments for the reasons that follow¹:

BACKGROUND

On December 22, 2009, the Department submitted a petition for regulatory change to the Commission. The petition proposed to amend the Ground and Surface Water Protection Regulations, 20.6.2 NMAC, to include new rules for the dairy industry. The petition was in response to a 2009 amendment to the Water Quality Act requiring the Commission to adopt new industry-specific discharge permit rules for the dairy industry and “to specify in regulations the

¹ In adopting any amendments to its standards or regulations, the Commission must prepare a Statement of Reasons to fulfill the requirement that the rulemaking record “must indicate the reasoning of the Commission and the basis on which it adopted the regulations.” *City of Roswell v. New Mexico Water Quality Control Comm’n*, 84 N.M. 561, 565, 505 P.2d 1237 (Ct. App. 1972). See also, *Bokum Resources Corp. v. New Mexico Water Quality Control Comm’n*, 93 N.M. 546, 603 P.2d 285 (1979) and *Tenneco Oil Co. v. New Mexico Water Quality Control Comm’n*, 107 N.M. 469, 760 P.2d 161 (Ct. App. 1987).

measures to be taken to prevent water pollution and to monitor water quality.” NMSA 1978, § 74-6-4(K). A public hearing was held on the proposed amendment on April 13-16 and June 8-17, 2010. Participants were the Department, DIGCE and the Coalition.

The Commission voted to adopt the Dairy Rule on December 15, 2010 and it was published in the New Mexico Register on January 15, 2011. On January 21, 2011 DIGCE filed a Notice of Appeal to the Court of Appeals seeking judicial review of the Dairy Rule. Following lengthy negotiations, the parties reached an agreement on proposed changes to the Dairy Rule on July 7, 2011. On July 28, 2011 the Department, DIGCE and the Coalition (“Petitioners”) filed a joint Petition to Amend the Dairy Rule to make changes to the Dairy Rule consistent with the terms of the settlement.

PROCEDURAL HISTORY

1. On January 1, 2011 DIGCE filed a Motion to Stay the Dairy Rule.
2. On January 21, 2011 DIGCE filed an appeal of the Dairy Rule in the Court of Appeals.
3. On April 5, 2011 the Department, DIGCE and the Coalition entered into a Stipulation on Motion to Stay the Dairy Rule to facilitate settlement discussions.
4. On April 6, 2011 the Department issued an Order Suspending Enforcement of 20.6.6 NMAC, the Dairy Rule.
5. On July 14, 2011, the Commission issued an Order Granting a Stay of the Dairy Rule until the date that the Commission takes formal action on a proposed amended dairy rule or December 31, 2011, whichever occurs first.
6. On July 28, 2011 the Petitioners filed a joint Petition to Amend the Dairy Rule.
7. On July 28, 2011 a Notice of Docketing was issued.
8. On August 26, 2011 the Hearing Officer issued a Procedural Order.
9. On September 28, 2011 the Commission issued an Amended Order Granting a Stay of the Dairy Rule until the effective date of amendments to the Dairy Rule or December 31, 2011, whichever occurs first.
10. On September 29, 2011 the Petitioners filed a Notice of Intent to Present Technical Testimony.
11. On October 17, 2011 a Notice of Public Hearing was issued.
12. On November 16, 2011 the Commission conducted a hearing in this matter.

LEGAL AUTHORITY

1. NMSA 1978, Section 74-6-4 (E) grants the Commission the authority to promulgate regulations to prevent or abate water pollution in the state.
2. In 2009, the Legislature amended Section 74-6-4 and 74-6-5 of the Water Quality Act (“2009 WQA amendments”). The amendments removed a provision in 74-6-4 (E) that prohibited the Department from specifying “the method to be used to prevent or abate water pollution.” The 2009 WQA amendments also require the Commission to “specify in regulations the measures to be taken to prevent water pollution and to monitor water quality.” *See* NMSA 1978, § 74-6-4(K).
3. The 2009 WQA amendments also require the Commission to adopt regulations for the dairy industry. *See* NMSA 1978, § 74-6-4(K) (“The Commission shall adopt regulations for the dairy industry ...”).

4. The 2009 WQA amendments also state:

The commission shall consider, in addition to the factors listed in Subsection E of this section, the best available scientific information. The regulations may include variations in requirements based on site-specific factors, such as depth and distance to ground water and geological and hydrological conditions. The constituent agency shall establish an advisory committee composed of persons with knowledge and expertise particular to the industry category and other interested stakeholders to advise the constituent agency on appropriate regulations to be proposed for adoption by the commission. The regulations shall be developed and adopted in accordance with a schedule approved by the commission. The schedule shall incorporate an opportunity for public input and stakeholder negotiations.

See NMSA 1978, § 74-6-4(K).

5. In adopting regulations, the Commission shall give weight it deems appropriate to all relevant facts and circumstances, including:

- (1) character and degree of injury to or interference with health, welfare,

- (2) environment and property;
the public interest, including the social and economic value of the sources of water contaminants;
- (3) technical practicability and economic reasonableness of reducing or eliminating water contaminants from the sources involved and previous experience with equipment and methods available to control the water contaminants involved;
- (4) successive uses, including but not limited to domestic, commercial, industrial, pastoral, agricultural, wildlife and recreational uses;
- (5) feasibility of a user or a subsequent user treating the water before a subsequent use;
- (6) property rights and accustomed uses; and
- (7) federal water quality requirements.

NMSA 1978, § 74-6-4(E).

6. The Commission’s decision to adopt a regulation must be based on substantial evidence. “Substantial evidence supporting administrative agency action is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.” *Oil Transportation Co. v. New Mexico State Corporation Commission*, 110 N.M. 568, 571, 798 P.2d 169, 172 (1990). The agency must consider all evidence in the record. *Perkins v. Department of Human Services*, 106 N.M. 651, 654, 748 P.2d 24, 27 (Ct. App. 1987).

FINDINGS OF FACT

20.6.6 – General

7. Changes were made throughout the Dairy Rule to provide correct reference citations due to deletions and additions in 20.6.6 NMAC which change the order of the lettering and numbering of sections and paragraphs in the Rule. These changes are reasonable and necessary to implement the Dairy Rule.

20.6.6.11 – Application Requirements for New Discharge Permits

8. Section 20.6.6.11(C)(1)(b) is amended to delete the requirement that an applicant for a new discharge permit provide the names of corporate directors, officers, members, or

partners. This language was rejected by the Commission in the December 2010 deliberations but was inadvertently included in the version of the Dairy Rule filed with the State Records Office. This change is reasonable and properly reflects the intention of the Commission.

9. Section 20.6.6.11(I) is changed is to remove a requirement that applicants must provide estimates of “other constituents of concern” in wastewater quality. The Commission rejected this language and the relevant language was deleted from other sections but was inadvertently left in this section. This change is reasonable and properly reflects the intention of the Commission.

10. Section 20.6.6.11(J)(4) is changed to remove a requirement that an application identify “additional wastewater and stormwater system requirements.” This change removes an application requirement that is vague. This change is necessary to provide clarity to the information required in the submission of a permit application.

11. Section 20.6.6.11(J)(5) is changed to remove a requirement that an application identify and describe the proposed location of “all manure, silage and compost storage areas at the dairy facility”. The change recognizes that an applicant need not identify the location of these components so long as the application demonstrates that they are adequately protected from stormwater runoff and run-on and leachate is minimized. The location of these features may change relatively frequently. This change is necessary to allow for changes in the location of manure, silage and compost storage operations without a permit modification and provides flexibility to the dairy operator in managing their dairy operations. This change is protective of ground water at dairy facilities since the waste management methods for protection of stormwater runoff and run-on and minimization of leachate will be consistent regardless of the location of these waste management units.

12. Section 20.6.6.11(R)(1) and (3) are changed to remove a requirement that an application provide documentation of irrigation water rights. This change recognizes that dairy operators may only irrigate land application areas if they have sufficient water rights, and requiring this documentation places an unnecessary burden on applicants. The existing language also delves into water rights issues that are the purview of the Office of the State Engineer. This change is necessary to remove a burdensome permit application requirement but is protective of ground water. The words “between the manure solids separator(s) and wastewater impoundment(s)” are removed from paragraph (3) for consistency with the changes to the wastewater sampling locations in 20.6.6.25(C) NMAC.

13. The changes to 20.6.6.11 are reasonable and necessary to adequately implement the dairy rule and to prevent water pollution.

20.6.6.12 – Application Requirements for Discharge Permit Renewal or Modification

14. Section 20.6.6.12(C)(1)(b) is amended to delete the requirement that an applicant for a discharge permit renewal or modification provide the names of corporate directors, officers, members, or partners. This language was rejected by the Commission in the December 2010 deliberations but was inadvertently included in the version of the Dairy Rule filed with the State Records Office. This change is reasonable and properly reflect the intention of the Commission.

15. Section 20.6.6.12(H)(4) is changed to remove a requirement that an application identify “additional wastewater and stormwater system requirements.” This change removes an application requirement that is vague. This change is necessary to provide clarity to the information required in the submission of a permit application.

16. Section 20.6.6.12(H)(7) is changed to remove a requirement that an application identify and describe the location of “all manure, silage and compost storage areas at the dairy

facility”. The change recognizes that an applicant need not identify the location of these components so long as the application demonstrates that they are adequately protected from stormwater runoff and run-on and leachate is minimized. The location of these features may change relatively frequently.

17. Section 20.6.6.12(O)(3) is changed to be consistent with the changes to 20.6.6.17(C)(6) NMAC. A grading and drainage report and plan is only required to be submitted with an application for a new dairy facility, and not for a permit renewal or modification of an existing dairy.

18. Section 20.6.6.12(P)(1) and (4) are changed to remove a requirement that an application provide documentation of irrigation water rights. This change recognizes that dairy operators may only irrigate land application areas if they have sufficient water rights, and requiring this documentation places an unnecessary burden on applicants. This change also removes the language “between the manure solids separator(s) and wastewater impoundment(s)” from paragraph (3). This change is consistent with the changes to 20.6.6.25(C) NMAC.

19. The changes to 20.6.6.12 are reasonable and necessary to adequately implement the dairy rule and to prevent water pollution.

20.6.6.17 – Engineering and Surveying Requirements for All Dairy Facilities

20. Section 20.6.6.17(C)(6) is changed to recognize that creating a grading and drainage plan for an existing dairy places an unnecessary burden on applicants.

21. 20.6.6.17(C)(7) is changed to remove a requirement that an applicant or permittee provide construction plans and specifications for flow meter(s). Instead, an applicant or permittee must provide a description of the location and information the installation or

construction of flow meter(s). These changes are necessary to reduce the burden on dairy operators that would need to hire an engineer to prepare these types of engineering documents.

22. 20.6.6.17(D)(2) is changed to add a new subparagraph to clarify the intent of this provision is not to require the expansion or replacement of existing impoundments that are designed to the capacity required by the last Discharge Permit issued prior to the effective date of the Dairy Rule. The existing language could require replacement or expansion of an existing impoundment or system of impoundments that does not meet the capacity requirements of the Dairy Rule, but meets other operational provisions of the Dairy Rule. This change is necessary to reduce the burden on existing dairy operators for having to expand or replace existing impoundments that are designed to the capacity required by the last Discharge Permit.

23. 20.6.6.17(D)(4) is changed to correct an error in the version of the Dairy Rule filed with the State Records Office. The language approved by the Commission in the December 2010 deliberations provides for the sub-grade to be compacted to 90 percent. This change is reasonable and properly reflects the intention of the Commission.

24. The changes to 20.6.6.17 are reasonable and necessary to adequately implement the dairy rule and to prevent water pollution.

New Section – 20.6.6.18 – Variances

25. A new section is added to allow for a variance from the requirements of the Dairy Rule when its requirements are not appropriate due to site-specific conditions. Variances are provided for under existing Commission regulations in 20.6.2.1210 NMAC. However, the existing Commission variance rule limits the approval of variances to a five year time period. This does not provide sufficient certainty to dairy operators to construct a facility under a variance when its expected life is more than five years. Construction of a system granted a

variance could be a substantial cost investment to the dairy operator and have a design life greater than a five year period. Construction of such substantial investments should be allowed to continue in operation as long as the granted variance is achieving its designated purpose and is not causing an exceedance of Commission water quality standards. The new Section also allows for a variance to be granted for longer than five years and for the Department to review a variance every five years to evaluate whether the variance is achieving its designated purpose and that it is not causing an exceedance of Commission water quality standards.

26. The new section 20.6.6.18 is reasonable and necessary to adequately implement the dairy rule and to prevent water pollution.

20.6.6.20 – Operational Requirements for All Dairy Facilities

27. 20.6.6.20(A) is changed to clarify that the presence of lactating cows at a dairy facility means that milking operations are commencing and that a discharge from the milking barn to the wastewater impoundments will occur. This change is not intended to require a dairy facility to notify the Department when individual lactating cows are removed or reintroduced to a dairy facility once milking operations begin. This change is necessary to provide the Department with advance notice of the commencement, cessation or recommencement of discharges to the wastewater impoundments.

28. 20.6.6.20(D) is changed to allow a method for determining whether the amount of sludge that has accumulated in a wastewater impoundment is in excess of its designed solids capacity. These changes acknowledge an impoundment may have a designed depth for sludge accumulation. Above this designed sludge level the free-liquid design capacities for impoundment of wastewater as specified in 20.6.6.17(D) would still be met. This change is

necessary to provide greater flexibility in the methods used by a dairy operator to determine the free-liquid capacity of an impoundment while still being protective of ground water quality.

29. 20.6.6.20(G) is changed to be consistent with the changes to 20.6.6.17(C)(6) requiring only applicants for permits for a new dairy facility to submit a grading and drainage report and plan.

30. 20.6.6.20(J) is changed to be consistent with the changes to the engineering requirements of 20.6.6.17(C)(7) NMAC that removes the requirement for the submission of engineering specifications for flow meters.

31. 20.6.6.20(N) is changed to allow a dairy existing on the effective date of the Dairy Rule, that does not utilize flow meters that meet the requirements of the Dairy Rule, the option to install flow meters on the fresh water supply lines in lieu of installing a flow meter on the discharge lines to the wastewater impoundment. This change recognizes that it may be costly and difficult to retrofit existing dairies that do not already have flow meters between wastewater sources and the impoundment. This change will be protective of ground water at dairy facilities but will allow greater flexibility for existing dairy operators in the management of their facilities.

32. 20.6.6.20(O) is changed to be consistent with the changes to the engineering requirements of 20.6.6.17(C)(7) NMAC that removes the requirement for the submission of engineering specifications for flow meters.

33. 20.6.6.20(U) is changed to clarify that dairies are not required to create new maps when there are existing maps available that could be submitted to the Department that otherwise meet the requirements of Subsection U. This change is necessary to allow for the use of multiple maps when the use of different scales are appropriate to show different features for large scale

areas of the dairy facility, such as land application areas, versus smaller scale areas of the dairy facility, such as detailed features in the production area.

34. The changes to 20.6.6.20 are reasonable and necessary to adequately implement the dairy rule and to prevent water pollution.

20.6.6.21 – Additional Operational Requirements for Dairy Facilities With A Land Application Area

35. 20.6.6.21(B) is changed to allow dairy operators to utilize an alternate method for mixing of irrigation water with wastewater or stormwater prior to land application. This method will allow the continuation of this current practice at some dairies and reduce the economic burden on those dairy facilities that would be required to construct new wastewater/irrigation water blending systems. With the addition of the conditions in 20.6.6.21(F), this change will allow greater flexibility for dairy operators in the management of their facilities.

36. 20.6.6.21(D) is changed to be consistent with the changes to 20.6.6.12(P).

37. 20.6.6.21(F) is changed to be consistent with the changes to 20.6.6.21(B). This change will permit the blending of fresh water with wastewater in an impoundment provided certain requirements are met. The conditions are intended to ensure that fresh water volumes used for blending are accounted for in the nutrient management plan, and to protect the integrity of impoundment liners, while maintaining impoundment capacity. These changes will allow greater flexibility for dairy operators in the management of their facilities.

38. 20.6.6.21(N) is changed in recognition that it is not necessary that irrigation ditches have sealed expansion joints so long as they are kept in good repair and operate as designed. This change also gives a permittee a reasonable amount of time to make repairs to ditches. This change is protective of ground water at dairy facilities while allowing greater flexibility for dairy operators in the management of their facilities.

39. 20.6.6.21(P) is changed to recognize that there may be limited availability of persons in New Mexico with the certification required by the Dairy Rule and that a person qualified by the manufacturer should be allowed to perform inspections and testing on these devices.

40. The changes to 20.6.6.21 are reasonable and necessary to adequately implement the dairy rule and to prevent water pollution.

20.6.6.23 – Ground Water Monitoring Requirements for All Dairy Facilities

41. A new subsection is added to create a dispute resolution process for disputes over the proposed location of ground water monitoring wells. The new subsection provides a formal mechanism to resolve disputes concerning the proposed location of a monitoring well. It is intended to reduce the number of potential permit hearings and appeals that might otherwise take place. This change is reasonable and necessary to adequately implement the dairy rule and to monitor water quality.

20.6.6.25 – Additional Monitoring Requirements for Dairy Facilities With A Land Application Area

42. 36.20.6.6.25(C) is changed to allow for a sampling method and location for wastewater sampling that is less burdensome on dairy operators but still provides a representative sample of wastewater quality. It requires an eight-point composite sample from each impoundment used to store wastewater for land application. The composite sample from each impoundment consists of samples collected from eight different sample locations throughout each impoundment. This change will allow greater flexibility for dairy operators in the management of their facilities. This change is reasonable and necessary to adequately implement the dairy rule and to protect ground water and monitor water quality.

20.6.6.27 – Contingency Requirements for All Dairy Facilities

43. 20.6.6.27(A) and (B) are changed to account for situations where a corrective action previously has been taken by a dairy operator and ground water quality has stabilized or improved, but still exceeds Commission ground water quality standards as well as upgradient groundwater quality. Under the existing rule, a contingency action may be triggered by a second exceedance for a water quality constituent in a monitoring well that occurs years after the initial exceedance and is not repeated. The changes also allow for comparison of data from on-site upgradient and downgradient monitoring wells that are collected at different time periods. In addition, these changes avoid situations where corrective action may be triggered under the Dairy Rule even when the dairy is subject to corrective action requirements for water pollution under an abatement plan pursuant to Commission rules in 20.6.2.4101, 20.6.2.4103, 20.6.2.4104, and 20.6.2.4106 through 20.6.2.4115 NMAC.

44. 20.6.6.27(E), (F), and (G) are changed to address certain situations at existing dairies, for example, where the existing Dairy Rule could require a new or expanded impoundment at an existing dairy where clay-lined impoundments previously have been approved and the use of the impoundment has not caused an exceedance of ground water quality standards. According to the existing Dairy Rule, should the permittee propose to install a new impoundment as a corrective action, the new impoundment would be required to have a 60-mil synthetic liner even if the existing clay-lined impoundment has not caused ground water contamination in excess of Commission water quality standards. These changes allow the permittee for an existing dairy facility with existing clay-lined impoundments to install additional clay-lined impoundments if the following requirements are met: (1) the ground water in monitoring wells located hydrologically downgradient of the existing impoundment cannot

have exceeded ground water quality standards in the four quarters proceeding submission of the corrective action plan; (2) the permittee has proposed a liner for the new wastewater impoundment that is consistent with the liner design approved by the Department in the last discharge permit issued before the effective date of the rule; and (3) the Department approves the proposed liner design for the new impoundment at the dairy facility. These changes allow a permittee to continue to use a clay-lined impoundment in situations where the existing clay-lined impoundment system may not have caused ground water contamination in excess of Commission standards without the need for a variance.

45. The changes to 20.6.6.27 are reasonable and necessary to adequately implement the dairy rule and to prevent water pollution and monitor water quality.

Statutory Criteria for Adoption of Proposed Rule.

46. NMSA 1978, Section 74-6-4(E) states that in adopting regulations to prevent or abate water pollution, the Commission shall give weight it deems appropriate to all relevant facts and circumstances, including the following:

47. (1) character and degree of injury to or interference with health, welfare, environment and property. The amendments to the Dairy Rule were proposed jointly by the Department, DIGCE, and the Coalition in consideration of this criteria and should not result in any injury to or interference with health, welfare, environment or property. The amendments are intended to allow greater flexibility for dairy operators in the management and operation of dairy facilities while still being protective of ground water quality.

48. (2) the public interest, including the social and economic value of the sources of water contaminants. The amendments are protective of the public interest. The amendments are the result of extended negotiations between the Department, the dairy industry, and citizen

groups. The amendments are intended to strike a balance between the public's interest in protecting ground water quality for social and economic use, and the social and economic value the dairy industry provides for New Mexico.

49. (3) technical practicability and economic reasonableness of reducing or eliminating water contaminants from the sources involved and previous experience with equipment and methods available to control the water contaminants involved. The measures and techniques in the amendments are technically practicable and economically reasonable for controlling and managing water contaminants generated at dairy facilities, and reducing the potential for water contaminants to cause an exceedance of Commission ground water quality standards using available equipment and methods.

50. (4) successive uses, including but not limited to domestic, commercial, industrial, pastoral, agricultural, wildlife and recreational uses. The amendments are intended to prevent ground water contamination and to monitor ground water to detect any contamination that does occur. The measures in the amended Dairy Rule are intended to protect ground water for successive uses, including use for domestic, commercial, industrial, pastoral, agricultural, wildlife and recreational purposes.

51. (5) feasibility of a user or a subsequent user treating the water before a subsequent use. The amendments should not result in contamination of ground water in excess of Commission ground water quality standards. Should contamination occur, the Commission's water quality regulations require abatement of contaminated water by the responsible party which could include treatment of ground water contaminated in excess of Commission standards.

The Dairy Rule also requires corrective actions/contingency measures if contamination is detected.

52. (6) property rights and accustomed uses. The amendments to the Dairy Rule will not affect property rights or accustomed uses.

53. (7) federal water quality requirements. The amendments will not affect federal water quality requirements and are proposed to prevent ground water contamination, monitor ground water quality to detect any contamination in excess of water quality standards, and protect public health and the environment.

54. NMSA 1978, Section 74-6-4(K) requires that the Commission must consider the “best available scientific information.” The amendments are supported by scientific information presented at the hearing on the Dairy Rule and in the testimony presented by the Department, DIGCE and the Coalition at this hearing. While in some cases the amendments propose different methods or requirements than were adopted in the initial Dairy Rule, the amendments contain adequate safeguards to ensure these methods and requirements are protective of ground water quality using the best available scientific information.

CONCLUSIONS OF LAW

1. This case is to consider the adoption of amendments to Title 20, Chapter 6, Part 6, Rules Governing Ground Water Protection - Supplemental Permitting Requirements For Dairy Facilities, as proposed by the New Mexico Environment Department, Dairy Industry Group for a Clean Environment (“DIGCE”), and Amigos Bravos, the Caballo Concerned Citizens, and the Sierra Club Rio Grande Chapter.

2. The Commission has authority to adopt the rule amendments pursuant to NMSA 1978, Section 74-6-4(D).

3. The decisions of this Commission with regard to adoption of amendments to Title 20, Chapter 6, Part 6 in this proceeding shall not be (1) arbitrary, capricious or an abuse of discretion, (2) unsupported by substantial evidence in the record, or (3) otherwise not in accordance with the law. NMSA 1978, Section 74-6-7(B).

4. Public notice has been given and a hearing held regarding the proposed amendments to the Dairy Rule in accordance with NMSA 1978, Section 74-6-6. The notice in this proceeding encompass the proposed amendments to the Dairy Rule. The actions taken by the Commission to adopt regulations in this proceeding are within the scope set forth in the public notice, or are a “logical outgrowth” of the proposed rule. *Small Refiner Lead Phase-Down Task Force v. United States Environmental Protection Agency*, 705 F.2d 506 (D.C. Cir. 1983).

5. This case is to consider the adoption of amendments to rules for the dairy industry to prevent water pollution. NMSA 1978, Section 74-6-4(E) sets forth the duties of the Commission and matters to be considered in the adoption of regulations to prevent or abate water pollution.

6. NMSA 1978, Section 74-6-4(E) states that in adopting regulations to prevent or abate water pollution, the Commission shall give weight it deems appropriate to all relevant facts and circumstances, including:

- (1) character and degree of injury to or interference with health, welfare, environment and property;
- (2) the public interest, including the social and economic value of the sources of water contaminants;
- (3) technical practicability and economic reasonableness of reducing or eliminating water contaminants from the sources involved and previous experience with

- equipment and methods available to control the water contaminants involved;
- (4) successive uses, including but not limited to domestic, commercial, industrial, pastoral, agricultural, wildlife and recreational uses;
- (5) feasibility of a user or a subsequent user treating the water before a subsequent use;
- (6) property rights and accustomed uses; and
- (7) federal water quality requirements.

7. Substantial evidence in this proceeding supports adopting the Petitioners' proposed amendments to the Dairy Rule.

8. Credible scientific data in this proceeding supports adopting the Petitioners' proposed amendments to the Dairy Rule.

9. The Petitioners' proposed amendments to the Dairy Rule are based on the best available scientific information.

10. The Petitioners' proposed amendments to the Dairy Rule specifies the measures to be taken to prevent water pollution and to monitor water quality.

11. The Petitioners' proposed amendments to the Dairy Rule will institute ground water protections and monitoring that will prevent water pollution.

12. The Petitioners' proposed amendments to the Dairy Rule are in the public interest, considering the social and economic value of the sources of water contaminants.

13. Adoption of the Petitioners' proposed amendments to the Dairy Rule will ensure that discharges from dairies will not injure or interfere with health, welfare, environment and property.

14. Contamination in excess of the water quality standards promulgated by the Commission presents a risk to health, welfare, the environment and property.

15. Compliance with the Petitioners' proposed amendments will not unreasonably impair the social and economic value of the sources of the water contaminants.

16. The Petitioners' proposed amendments will help assure that ground water is not contaminated beyond allowable standards. The proposed amendments strikes a fair balance between the interests of the state and public in maintaining uncontaminated ground water, and the social and economic value of the industrial source of the water contaminants.

17. Compliance with the Petitioners' proposed amendments to the Dairy Rule is technically practical and economically reasonable for controlling and managing water contaminants generated at dairy facilities, and reducing the potential for water contaminants to cause an exceedance of Commission ground water quality standards using available equipment and methods. On a site specific basis, permittees have the opportunity to petition for a variance from the requirements of the dairy rule.

18. The Petitioners' proposed amendments will prevent ground water contamination and to monitor ground water to detect any contamination that does occur. The measures proposed in the amended Dairy Rule are intended to protect ground water for successive uses, including use for domestic, commercial, industrial, pastoral, agricultural, wildlife and recreational purposes.

19. The Petitioners' proposed amendments will help prevent ground water pollution, thereby protecting property rights and allow for accustomed uses of ground-water resources.

20. The Petitioners' proposed amendments are consistent with federal water quality requirements.

21. The Petitioners' proposed amendments meet all statutory criteria.

22. In administrative hearings under the Water Quality Act, the standard of proof is a preponderance of the evidence. See, *Matter of D'Angelo*, 105 N.M. 391 (1986) ("absent an

allegation of fraud or a statute or court rule requiring the higher standard, the standard of proof in administrative hearings is a preponderance of the evidence.”); See also, *Foster v. Board of Dentistry*, 103 N.M. 776 (1986) (“In New Mexico the standard of proof applied in administrative proceedings, with few exceptions, is a preponderance of the evidence.”).

23. The preponderance of the evidence demonstrates that the Petitioners’ proposed amendments should be approved as amended by the Commission.

ORDER

The Petitioners’ Proposed Amendments, with any non-substantive amendments necessary for reformatting and filing with the State Records Center, is hereby adopted, to be effective in accordance with applicable State Records Center procedures.



Butch Tongate, Chair
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