

STATE OF NEW MEXICO
WATER QUALITY CONTROL COMMISSION



In the Matter of the Appeal of
ADOPTED REGULATIONS
AT 20.6.2 NMAC ("Dairy Rules")

WQCC09-13R

February 14, 2011

COPY

**THE COALITION'S¹
OPPOSITION TO MOTION FOR STAY**

The Coalition enters its opposition to the Dairy Industry Group for a Clean Environment ("DIGCE")' Motion for Stay pending appeal of the dairy rules, 20.6.2 NMAC et seq., that the Water Quality Control Commission ("WQCC") enacted on December 15, 2010. The Coalition contends that it would be arbitrary, capricious and an abuse of the WQCC's discretion to grant a stay pending appeal in this matter, as DIGCE's motion does not address the requisites for granting a stay, does not even address two of the stay criteria, and has not made a *prima facie* case on the points it does address. Thus, for the reasons of law and fact set forth below, DIGCE's Motion for Stay must be denied.

I. DIGCE'S MOTION FOR STAY MUST BE DENIED BECAUSE IT FAILS TO SATISFY THE LEGAL REQUIEMENTS FOR A STAY.

The New Mexico Court of Appeals has held, in pertinent part, when reviewing this Commission's rule-making, that, "Rules, regulations, and standards that have been enacted by an agency are presumptively valid and will be upheld if reasonably consistent with the authorizing statutes." *In The Matter Of The Petition To Amend Ground Water Quality Standards Contained In 20.6.2 NMC, New Mexico Mining Association And New Mexico*

¹ The Coalition is comprised of Amigos Bravos, Caballo Concerned Citizens Group, Food & Water Watch, and The Rio Grande Chapter of the Sierra Club.

Oil And Gas Association v. New Mexico Water Quality Control Commission, 141 N.M. 41, 45-46; 2007 NMCA 10; 150 P.3d 991 (Ct. App. 2007), citing *Tenneco Oil Co. v. N.M. Water Quality Control Comm'n*, 107 N.M. 469, 473, 760 P.2d 161, 165 (Ct. App. 1987)) (emphasis added). This is consistent with U.S. Supreme Court precedents on this matter.

"A stay is not a matter of right, even if irreparable injury might otherwise result." *Virginian R. Co.*, 272 U.S. 658 at 672 (1926) (citations omitted). Rather, it is "an exercise of judicial discretion," and "[t]he propriety of its issue is dependent upon the circumstances of the particular case." *Id.*, at 672-673, 672 (citations omitted). The moving party must carry the burden of making a showing that the exercise of discretion is justified under the particular circumstances of the case. See, e.g., *Clinton v. Jones*, 520 U.S. 681 (1997); *Landis v. North American Co.*, 299 U.S. 248, 255 (1936) (citations omitted). However, the fact that issuance of a stay is a matter of discretion "does not mean that no legal standard governs that discretion. . . . '[A] motion to [a court's] discretion is a motion, not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles.'" *Martin v. Franklin Capital Corp.*, 546 U.S. 132 (2005) (quoting *United States v. Burr*, 25 F. Cas. 30, 35 (CC Va. 1807) (Marshall, C. J.)) (citations omitted).

Since Justice Marshall's day these legal principles have been substantially honed into four inquiries: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." Compare *Nken v. Holder*, 129 S.Ct. 1749, 1761 (2009) with *Tenneco Oil Co. v. New Mexico Water Quality Control Commission*, 105 N.M. 708, 736 P.2d 986

(Ct.App.1986) (Court of Appeals held that four objective factors must be addressed in the exercise of discretion underlying the granting or denying a stay from an administrative agency order or regulation). Assaying these factors, the U.S. Supreme Court found, in pertinent part, that:

There is substantial overlap between these and the factors governing preliminary injunctions, not because the two are one and the same, but because similar concerns arise whenever a court order may allow or disallow anticipated action before the legality of that action has been conclusively determined. The first two factors of the traditional standard are the most critical. It is not enough that the chance of success on the merits be "better than negligible." "[M]ore than a mere 'possibility' of By the same token, simply showing some "possibility of irreparable injury" fails to satisfy the second factor. As the Court pointed out earlier this Term, the "possibility standard is too lenient."

Niken, supra at 1761 (2009) (internal citations omitted).

The *Tenneco* Court held that a moving party for stay must show (and the reviewing Court must consider) these four factors when deciding a stay motion. These factors are identical to those this Commission adopted in its hearing guidelines at section 502 . *Compare* Guidelines for Water Quality Control Commission Regulation Hearings (Approved November 10, 1992; Amended June 8, 1993) at Part V, Section 502² with *Tenneco Oil Co. v. New Mexico Water Quality Control Comm'n*, 105 N.M. 708; 736 P.2d 986, 987 (Ct. App. 1986).³

This Commission, responding to the need for specificity lacking in 74-6-7.C, provided

2 Available at: <http://www.nmenv.state.nm.us/wqcc/regulations.html>

3 The New Mexico Supreme Court noted that this test was first articulated in *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C.Cir.1958), and since that time, it has been it had been commonly used to evaluate motions for preliminary injunctions and for staying court and administrative orders. *Segal v. Goodman*, 115 N.M. 349, 356 and n.5 (1993) (citing *Ohio ex rel. Celebrezze v. NRC*, 812 F.2d 288, 290 (6th Cir.1987); *Arthur Guinness & Sons v. Sterling Publishing Co.*, 732 F.2d 1095, 1099 (2d Cir.1984); *Dataphase Sys., Inc. v. CL Sys., Inc.*, 640 F.2d 109, 113 (8th Cir.1981) (en banc); *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C.Cir.1977); *Sierra Club v. Hickel*, 433 F.2d 24, 33 (9th Cir.1970), *aff'd sub nom. Sierra Club v. Morton*, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972); *Associated Sec. Corp. v. SEC*, 283 F.2d 773, 774-75 (10th Cir.1960)).

specific guidelines that a party seeking stay of regulations pending appeal must follow to show "good cause" that a stay be granted, satisfying the four, well-established criteria the U.S. Supreme Court discussed in *Niken*. Compare the four factors cited in *Nken v. Holder*, 129 S.Ct. at 1755 (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987) (citations omitted)) with the four factors set out in the Guidelines for Water Quality Control Commission Regulation Hearings (Approved November 10, 1992; Amended June 8, 1993) at Part V, Section 502.

In this case, however, DIGCE does not address all four criteria, does not even make a *prima facie* showing on the two criteria it does address, has not met its burden of demonstrating that it meets these requisites sufficiently to warrant additional hearing on the matter and, significantly, provides no case law supporting any of the positions it takes in the motion. Where the moving party cites no authority to support its arguments, the WQCC should not review the issues raised. *In re Adoption of Doe*, 100 N.M. 764, 765, 676 P.2d 1329, 1330 (1984) (unsupported arguments will not be reviewed); accord *High Mesa General Partnership v. Patterson*, 2010 NMCA 72; 242 P.3d 430 (2010). Thus, as a matter of law, DIGCE's Motion to Stay must be denied and no further hearing held on the matter.

A. DIGCE Makes No Prima Facie Showing It Will Prevail On The Merits.

When the Court of Appeals reviews regulations, it does so with deference to the agency, Board or Commission enacting those regulations. The New Mexico Court of Appeals has held, in pertinent part, that

[a]n agency's rule-making function involves the exercise of discretion, and a reviewing court will not substitute its judgment for that of the agency on that issue where there is no showing of an abuse of that discretion. Rules and regulations enacted by an agency are presumed valid and will be upheld if reasonably consistent with the statutes that they implement.

Tenneco Oil Co. v. New Mexico Water Quality Control Comm'n, 107 N.M. 469, 473, 760 P.2d 161, 165 (Ct. App. 1987) (quoting *Hi-Starr, Inc. v. Washington State Liquor Control Bd.*, 106 Wash. 2d 455, 722 P.2d 808, 814 (1986)) (citations omitted), cert. denied sub nom., *Navajo Ref. Co. v. New Mexico Water Quality Control Comm'n*, 106 N.M. 714, 749 P.2d 99 (1988).

The Water Quality Control Act, moreover, requires on appeal, that the Court review the entire record of the proceeding--not just the Statement of Reasons--and will not second guess the WQCC's judgments, as the Court of Appeals has noted on many occasions. *See, e.g., id.* at 470-471. DIGCE must show, in part, that, "the rule's requirements are not reasonably related to the legislative purpose, but are arbitrary and capricious." *Id.* at 473. This is a very difficult burden to meet, and the Court of Appeals has held, in pertinent part, that

[a] party challenging a rule adopted by an administrative agency has the burden of showing the invalidity of the rule or regulation. The reasonableness of an administrative rule or regulation is not purely a legal question; a factual basis **must** appear. To successfully challenge a rule promulgated by an agency exercising its delegated legislative authority, the challenger must show, in part, [t]he rule's requirements are not reasonably related to the legislative purpose but are arbitrary and capricious.

Id. (citations omitted) (emphasis added). Yet, DIGCE's Motion for Stay provides no factual basis to support its alleged *prima facie* showing: no supporting affidavits, no citations to the record, no factually based comparisons, nothing of a factual nature, only DIGCE's attorney's unsupported representations.

Mere allegations do not constitute a *prima facie* showing. "By a *prima facie* showing is meant such evidence as is sufficient in law to raise a presumption of fact or establish the fact in question unless rebutted." *Goodman v. Brock*, 83 N.M. 789, 792-793, 498 P.2d 676, 679-680 (1972). Furthermore, DIGCE's counsel's assertions, allegations, arguments and representations

are not evidence. *Garcia v. Garcia*, 147 N.M. 652, 227 P.3d 621 (Ct.App.2009) (quoting *Muse v. Muse*, 145 N.M. 451, 200 P.3d 104 (Ct. App.2008); see also *Henning v. Rounds*, 142 N.M. 803, 171 P.3d 317 ("We observe, [h]owever, arguments of counsel are not evidence"); *G & G Servs., Inc. v. Agora Syndicate, Inc.*, 128 N.M. 434, 993 P.2d 751 (Ct.App.1999) ("[A]rguments of counsel are not evidence."); *Fitzsimmons v. Fitzsimmons*, 104 N.M. 420, 427, 722 P.2d 671, 678 (Ct. App. 1986) ("[C]ounsel's beliefs and statements cannot be considered as evidence.") (citations omitted)). DIGCE's motion contains nothing more than "counsel's beliefs and statements" so there can be no *prima facie* showing in the motion. DIGCE's Motion for Stay provides nothing sufficient in law to raise a presumption of fact or establish the facts in question--rather, DIGCE does not make its *prima facie* case that an appeal is likely to prevail on the merits.

If DIGCE believes, as appears to be the heart of its argument, that the Commission's decision was arbitrary and capricious, it needs to make a *prima facie* showing of that. A *prima facie* showing on this point would require DIGCE to offer up to the WQCC sufficient evidence of the invalidity of the rule as a matter of law to support a factual assertion that it is likely to prevail on the merits of its case. Instead, DIGCE suggests that the WQCC would be prejudiced against any argument that the appeal has merit and, therefore, should not hold DIGCE to that requirement. This is as irrational as DIGCE's assertion that because the description of the showing required for a stay is in a section called "guidelines" it constitutes no more than mere "guidance" to the parties. As the case law cited above shows, the criteria for deciding a motion to stay are well-settled in law and are not mere "guidance." They are the criteria utilized by adjudicators to decide how best to exercise discretion in relation to a motion for stay.

DIGCE needed to make at least a *prima facie* showing that the Commission's action in approving the dairy regulations was "willful and unreasoning action, without consideration and in disregard of facts and circumstances" and that the decision was one in which there was no "room for two opinions" or else, "[the] action is not arbitrary and capricious even though one may believe an erroneous conclusion has been reached." *Tenneco, supra*, 107 N.M. at 473. That is the legal standard DIGCE must meet in order to prevail in the Court of Appeals. DIGCE's failure to make a *prima facie* showing on this crucial issue is a sufficient basis for denying the motion.

Significantly, not only has DIGCE's Motion for Stay failed to demonstrate *any* basis for this Commission finding that DIGCE has a likelihood of prevailing on the merits of the case, but DIGCE has not even provided any case law to support the novel theory that a Commission's enactment of regulations prejudices it against fairly hearing argument that there is a likelihood of success on the merits of an appeal of those regulations. Neither does DIGCE provide any case law to support its suggestion that the Commission should use a more permissive standard for the first part of the the four-part test for granting a stay--likelihood of prevailing on the merits. *See In re Adoption of Doe, supra*, 100 N.M. at 765 (unsupported arguments will not be reviewed). Without a basis in law to support the factual assertions, there is no *prima facie* case--and DIGCE has not made one. Were the WQCC inclined to accept DIGCE's inference that the WQCC is prejudiced on the merits of the appeal and cannot, therefore, make the "likelihood of prevailing on the merits" determination without bias against DIGCE, the proper remedy is to deny the Motion for Stay and let DIGCE make these arguments to the Court of Appeals, as is its right under the statute. 74-6-7(C), NMSA 1978.

As a matter of law, this Board must deny DIGCE's Motion for Stay. DIGCE has utterly failed to demonstrate a likelihood of prevailing on the merits of its appeal--which is a legal and factual argument based upon the entire record in this case--a matter not requiring live witnesses, merely correct citation to the record. Thus, on the basis of DIGCE's Motion for Stay, there is no warrant to provide further argument that could have been--but was not--made in the motion.

B. DIGCE Makes No *Prima Facie* Showing Its Members Will Be Harmed.

DIGCE makes no showing to this Commission that it will be harmed without a stay of the dairy rules pending a decision of its appeal. This Commission's guidelines for issuing a stay require that this showing be made. Guidelines at 502(2). DIGCE's allegations concerning its members are identical to those it raised at hearing. No references, no attached affidavits, no citations to the transcript--nothing substantive is offered to the WQCC on this point other than the representations of DIGCE's counsel. As set forth above, the mere assertions, allegations and arguments of DIGCE's counsel are not evidence and do not take the place of a making a *prima facie* case.

Moreover, to the extent DIGCE even bothers to discuss the new requirements under the dairy regulations, it fails to demonstrate that there would be any substantive difference for its members under the new regulations than under the old ones. How many members will be affected? What will be specific effects be upon each? What evidence supports any assertions concerning such members' financial situations over, say, the past five years versus the present circumstances and the hypothetical circumstances under the old regulations versus the new ones. Without this information, the WQCC would merely be accepting anecdotes, allegation and arguments of DIGCE's counsel. DIGCE provided nothing in its motion that comes close to

making a *prima facie* case.

The facts in the record of this proceeding show that the rule not only does not harm the dairy industry, but, quite the contrary, reveals that the New Mexico Environment Department ("NMED") tried to work with the industry to solve very serious pollution problems that are due to dairy industry operations. It did so by coming up with pollution control and monitoring requirements that will allow operators who implement them to avoid costly groundwater contamination. *See, on this point, citations to the record below at D.*

The current regulations were designed to deal with the impacts of dairy industry pollution upon the industry itself, other persons that receive a direct impact from dairy industry pollution, and the public interest in having dairy industry pollution cleaned up by the polluters. The substantial and unrefuted testimony of NMED's experts to the WQCC revealed that 57% of the dairies in New Mexico have groundwater contamination and 53% are operating on expired permits. Testimony of William Olson, Bureau Chief, Groundwater Quality Bureau, New Mexico Environment Department, Tr. at 198:23-199:15.

However, Mr. Olson also addressed the fact that the Bureau was not insensitive to the dairy industry's concerns, and, in fact, stated that an objective of the rules was to "try to reduce the impacts on existing dairies." *Id.* at 199:16-200:7; see NMED's NOI attachment 8 and NMED Rebuttal at attachment 2; and Tr. at 202:3-5; 202:14-21 (DIGCE provided no rebuttal testimony to the scientific and technical rationale NMED gave for the regulations; NMED provided five (5) technical witnesses on rebuttal, over one thousand (1,000) pages of technical, scientific exhibits supporting the regulations, and addressed all of the criteria required to be considered under NMSA 74-6-4(e)).

Absent a showing of harm based upon any shred of supported factual information related to its members, DIGCE has utterly failed to meet its burden of making a *prima facie* showing as to harm. This failure is fatal to granting the Motion for Stay and it should, therefore, be denied.

C. DIGCE Has Not Addressed The Issue Of Harm To Others.

DIGCE does not bother to address this point--the Coalition reserves the right to challenge whatever evidence DIGCE may offer at hearing if WQCC chooses to grant one, but reasserts, per the argument above, that DIGCE did not make *any* showing on this point, and therefore is not entitled to a hearing on the Motion for Stay. The WQCC should also consider that DIGCE's failure to even indicate its position on this point means that any opposing parties will be ambushed by whatever DIGCE does present. In which case, the Coalition reserves the right to respond to legal and factual issues raised without prior notice through a post-hearing briefing with additional evidence provided by affidavit. The fact that other persons than the dairy industry owners and their communities have been (and will continue to be harmed) absent NMED applying the current regulations was addressed at hearing--see examples cited below--and it is something that DIGCE must address in order to obtain a hearing, not merely at hearing. It is a showing that DIGCE must make on a preliminary basis in order to have its motion heard. DIGCE does not address this issue. Therefore, the Motion for Stay must be denied.

D. DIGCE Does Not Address Public Impacts, Hence, A Stay Must Be Denied.

In the light of the evidence that the New Mexico Environment Department ("NMED"), the Coalition and live witnesses from the communities abutting the Dona Ana dairies, DIGCE's failure to even address the public interest in its Motion for Stay should mean denial of the motion. *See, e.g., The Coalition's Exceptions to the Hearing Officer's Report* at 13-20

(November 8, 2010) (quoting portions of the hearing transcript wherein two local residents describe their horrendous plight and that of their families and community who live near dairies in Dona Ana county); *see also* Testimony of William Olson, Bureau Chief, Groundwater Quality Bureau, New Mexico Environment Department, Tr. at 198:23-199:15; 480:2-11; 490-491:24-25; 493:18-23; 505:7-24; and William Olson, Prefiled Direct, NMED Attachment 3 at 8 (groundwater contamination from existing dairy operations documented as migrating greater than 1/3 of a mile); Prefiled Direct Testimony of Bart Farris, NMED Attachment 3 at 8 (in some areas groundwater contamination plumes extend beyond a mile in length), *see also* Testimony of Dr. Kendall Thu, Tr. at 721-724:15-17; 723: 4-8, 9-14; Prefiled Rebuttal of Dr. Kendall Thu at 1-3; Coalition Exhibits C-2, 12 through 23.

These above citations are not meant to be definitive, merely to demonstrate that there is evidence in the record that DIGCE made no attempt to refute in its alleged *prima facie* showing. The Coalition reserves the right to present additional citations in a pre-hearing brief in the event the WQCC sets this matter for hearing. However, the testimony and exhibits referenced above make an evidentiary showing from the record that constitutes more than mere *prima facie* evidence of the significant public health and safety problems that dairy pollution has caused. This has had--and continues to have--serious impacts upon persons living near dairy operations. It also has an impact upon the general public, due to the adverse effects of this pollution on New Mexico's natural and human environment, particularly its limited water supply, the costs of remediation, and the potential costs to taxpayers if responsible parties do not pay for their own clean-up.

DIGCE's failure to even indicate its position on this factor means that any opposing

parties will be ambushed by whatever DIGCE might present if given a hearing on the motion-- a second bite of the proverbial apple that it should not receive. In the event of a hearing, the Coalition reserves the right to respond to any legal and factual issues raised without prior notice through a post-hearing brief with additional evidence provided by affidavit.

II. CONCLUSION.

For the reasons set forth above, as a matter of law, DIGCE's Motion for Stay provides no *prima facie* evidence of either a likelihood it will prevail on the merits of its case or that the absence of a stay will harm its members. DIGCE failed to address, let alone satisfy on a *prima facie* basis, any of the other requirements for issuance of a stay under WQCC Guidelines at Part V, Section 502. As a matter of law, DIGCE's motion must, therefore, be denied--and the Coalition requests that the WQCC deny the motion. If the WQCC decides to set this matter for hearing, the Coalition requests issuance of an order directing that: (1) DIGCE provide a list of any witnesses it intends to call at least one week prior to hearing; and, (2) the parties be provided with an opportunity for post-hearing briefing on the issues raised at the hearing.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I, Jonathan M. Block, certify that per the WQCC Order of January 26, 2010, I have filed with the WQCC Administrator a signed original paper copy of this Opposition as well as five paper copies for the Commission members and filed the same document by electronic means with the Administrator and all persons listed below at the listed email addresses.


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