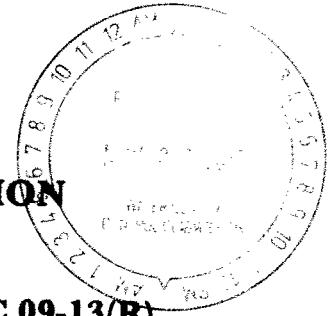


**STATE OF NEW MEXICO  
WATER QUALITY CONTROL COMMISSION**

COPY



*In the Matter of:*  
**PROPOSED AMENDMENT  
TO 20.60.2 NMAC (Dairy Rules)**

**No.: WQCC 09-13(R)**

**November 8, 2010**

**THE COALITION'S  
EXCEPTIONS TO THE HEARING OFFICER'S REPORT**

**I. INTRODUCTION**

The Coalition<sup>1</sup> contends herein that the Hearing Officer's Report fails, in a number of places, to provide the Water Quality Control Commission [WQCC] with proper decision-making guidance on the proposed dairy regulations at issue in this rule-making. As the New Mexico Environmental Department pointed out in its closing arguments, there are statutory requirements that focus the WQCC's considerations in this matter. The Coalition also takes exception to the fact that the Hearing Officer's Report failed to take into account the public testimony in this proceeding. At a minimum, these requirements must form the basis of the WQCC's decision. Based upon the standards restated below, the provision for public testimony under the Water Quality Act, and the argument and supporting citations, The Coalition contend that the WQCC should be guided by The Coalition's Exceptions to the Hearing Officer's Report when making its decision on the regulations at issue in this proceeding.

<sup>1</sup> The Coalition is comprised of the following organizations: Amigos Bravos, Caballo Concerned Citizens Group, Food and Water Watch, and the Rio Grande Chapter of the Sierra Club.

**A. Standards For Decision.**

The standards state that the WQCC shall give what it deems appropriate weight to all relevant facts and circumstances presented in the rule-making process, 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;
- (5) property rights and accustomed uses, and
- (6) federal water quality requirements.

NMSA 1978, § 74-6-4(E).

The WQCC's final decision in this matter, pursuant to 74-6-7(B)(2), must rely upon substantial evidence in the record of the rule making. "Substantial evidence" has been described as "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). When deliberating whether to adopt the regulations, the WQCC must consider all of the evidence contained in the record. *Perkins*

*v. Department of Human Services*, 106 N.M. 651, 654, 748 P.2d 24, 27 (Ct. App. 1987). It must also rest its decision on the "best available scientific information." NMSA § 74-6-4(K). Therefore, The Coalition takes exception to portions of the Hearing Officer's Report that are not based upon these requisite standards.

**B. The Coalition's Exceptions.**

**1. Basis.**

The rationales supporting the decision in the Hearing Officer's Report fail, in a number of places, to adequately set forth: (1) the reason for each recommendation in relation to the statutory requirements set forth above; (2) the test for substantial evidence and a plain statement as to the alleged ways in which proffered evidence failed to meet that test in each instance; (3) any indicia that the entire record was assessed in making particular recommendations, and (4) discussion of the proffered evidence in relation to the "best available scientific information" on each point. Therefore, The Coalition takes exception to the Report as detailed herein below.

**2. Paragraphs to which The Coalition joins NMED's exceptions.**

The Coalition supports, to the extent consistent with The Coalition's positions herein, NMED's exceptions to ¶21, ¶22, ¶51, ¶60, ¶63, ¶64, ¶75, ¶77, ¶78, ¶80, ¶82, ¶88, ¶91, ¶92, ¶¶94-96, ¶99, ¶101, ¶¶103-104, ¶109, ¶114, ¶116, ¶122, ¶123, ¶125, ¶131, and incorporates those exceptions herein by reference.

**3. Additional sections to which The Coalition take exception.**

The Coalition takes differing positions with NMED and the Hearing Officer's Report on the following portions of the portions of the report:

**a. Closure plans and financial assurance:** ¶10 (closure plans to be included with permit applications); ¶15 (closure plans to be included with applications for new facilities); ¶26 (closure plans to be included with applications for renewal or modification).

**b. Setbacks:** ¶11 (certification that new facilities meet a one (1) mile setback provision); ¶48 (setbacks for dairies applying for new discharge permits).

**c. Monitoring groundwater and stormwater:** ¶110 (monitoring for other constituents of concern in groundwater samples); ¶119 (monitoring for other constituents of concern in stormwater samples).

**II. THE COALITION'S EXCEPTIONS TO THE REPORT CONTENTS.**

**A. Closure Plans and Financial Assurance.**

The Hearing Officer's Report states, in relation to The Coalition's proposals on closure plans, that The Coalition did not provide "substantial evidence" supporting its proposals. Hearing Officer's Report at ¶¶ 10, 15, 26. Substantial evidence, as noted above, is "relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Oil Transportation Co., supra*, at 568, 571. Examination of the record reveals that The Coalition's witness, Brian Shields, was nowhere disqualified to offer an expert

opinion nor, significantly, was there any challenge to the relevance of his testimony by any party or the WQCC Hearing Officer. *See generally*, Tr. at. 284:6-295:23 (direct); 284:20-285:14 (direct); *see also* 348:12-362:11(cross-examination); 375:6-376:20; 386:10-391:1; 395:15-398:2 (WQCC questions). Mr. Shields testified that he has been involved in regulatory proceedings since the late 1980s and, in particular, involved in regulatory proceedings for the past twenty-two (22) years, in which the central issues were site closure and financial assurance requirements. Direct Testimony of Brian Shields (March 8, 2010), *see also* Tr. at 284:21-285:14.

Given his twenty-two (22) years of experience, where, in this proceeding, Mr. Shields testified as an expert, offering an expert opinion on the need for "up-front" site closure plans and financial assurance based upon the projected costs of remediation of a site, without objection to his expertise, and significantly, given that there was no challenge to the relevancy of Mr. Shield's testimony, it is improper for the Hearing Officer's Report to discount Mr. Shield's testimony as not meeting the "substantial evidence" test. His testimony was relevant (without objection) and based upon substantial expertise and experience with closure planning and financial assurance (without objection).

The Coalition provided the WQCC with proposed language on site closure and financial assurance. *See* Coalition Exhibit 2 at 3-5 (recommended revisions concerning New Discharge Permits, §§ 20.6.6.306(S) (Closure Plan), and (T) (Financial Assurance)); at 5-6 (recommended revisions concerning Requirements For Discharge Permit Renewal or

Modification, §§20.6.2.3207(Q) (Closure Plan), and (R) (Financial Assurance)); at 6 (recommended revisions concerning Application Requirements For A Discharge Permit For Closure, § 20.6.6.3208)). These proposals must be adopted if the WQCC is to ensure that both adequate planning for closure and adequate financial resources to cover site remediation are assured prior to permitting new dairy facilities or renewing permits on existing facilities. In this way, the water quality of the state is safeguarded, the state's citizens are protected: both dairy operators and the people living around dairies.

**B. Setbacks.**

In ¶11(certification that new facilities meet a one (1) mile setback provision) and ¶48 (setbacks for dairies applying for new discharge permits), the Hearing Officer's Report recommends denying The Coalition's proposals for increased setbacks. Under ¶11, The Hearing Officer's Report makes no conclusion, yet incorrectly references only The Coalition's proposed one (1) mile setback in Coalition Exhibit C-2 as The Coalition's support for the proposed rule. In its reasons for Decision, The Coalition went far beyond citing to its proposed changes in the regulations, stating in pertinent part:

The need for these increased setbacks is carefully analyzed and discussed in Coalition testimony and exhibits. *See* Prefiled Direct Testimony of K. J. Martin, P.E., at 2-3 (setbacks are of special concern for human consumptive food crops in proximity to dairy production facilities and land application areas due to fecal pathogen contamination); *id.* at 5 (State Parks are a significant investment of state and federal funding and important contributors to state and local economies; protecting these investments should be a high priority for New Mexico--which necessitates adequate protection of these resources similar to that under Oklahoma regulations,

where CAFOs must be setback three (3) miles from recreational sites and the regulation does not limit the setback to State Parks).

*Id.* at 3 (emphasis added). The Coalition argued in its Reasons For Decision that a one (1) mile setback is appropriate to protect residential and other water supplies. The Coalition stated, in pertinent part:

Setback distances are in part established to protect the property rights of neighbors, to allow NMED to correct a pollution problem, and to attempt to contain pollution within the site boundaries. Testimony of Bill Olson, Tr. at 480: 2-11; 505:7-24. NMED acknowledged that increased numbers of monitoring wells would better detect the location of a plume of pollution under a facility. Yet, NMED made a concession to the Dairy Industry by changing the proposed regulations so as to not require more than two monitoring wells. Testimony of Bill Olson, Tr. at 490-491:24-25. Significantly, in this regard, Mr. Olson conceded that if a monitoring well at a waste lagoon does not catch contamination, only adequate setbacks would offer protection to domestic wells. Testimony of Bill Olson, Tr. at 493:18-23. NMED also conceded that the same arguments apply to land application areas. Testimony of Bill Olson, Tr. at 506: 17-25.

*Id.* at 15-16 (emphasis added). The Coalition further argued, citing the testimony of Dr. Thu, Mr. Olsen and Mr. Farris:

As Dr. Thu testified, studies have shown that persons living within a two-mile radius of a CAFO are at increased risk for health problems and degradation of quality of life. *Id.* at 723: 4-8; *see also* Dr. Kendall Thu, Prefiled Rebuttal, at 1-3. Studies have also shown that CAFOs have a severe negative impact upon the health and quality of life of neighboring residents, so much so that setback distances of at least a mile between a dairy facility and the nearest occupied residence is well-founded and, in most cases, adequately protective of water quality, public health and safety, and the quiet use and enjoyment of private property. *Id.* at 721-724:15-17.

Dr. Thu recommended that setback distances for land application areas should also be at least one mile from where the manure is spread and the nearest property line of an occupied residence, unless there is an agreement

made between the dairy and the residence for a lesser distance. Testimony of Dr. Kendall Thu, Tr. at 723:9-14. NMED made a similar finding, noting that ground water contamination at existing dairy facilities can migrate distances of up to one mile. Compare Bill Olsen, Prefiled Direct (NMED Attachment 8) at 21 (asserting ground water contamination at existing dairy facilities can migrate to distances greater than 1/3 of a mile) with Bart Farris, Prefiled Direct (NMED Attachment 3) at 8 (stating that in some areas groundwater contaminant plumes extend beyond a mile in length).

*Id.* at 16-17 (emphasis added). Dr. Thu's testimony was based upon a review of the most recent scientific literature on these issues. See Coalition's Reasons for Decision at 6-7, see also, Rebuttal Testimony of Dr. Kendall Thu with attached copies of scientific literature related to setback issues at Coalition Exhibits 12-23; and Tr. at 720-725:19-9. Mr. Olson and Mr. Ferris testified based upon their direct experience with dairy pollution and attempted enforcement and abatement in New Mexico. There was no evidence adduced in the entire rule making process and record that contradicts or undermines this testimony--and this testimony--Thu plus Olson and Farris--based on direct experience of experts and the best scientific evidence, leads to the inexorable conclusion that setbacks of one (1) mile are necessary to protect the public health and New Mexico's water quality.

As The Coalition stated in its Reasons for Decision as the basis for its proposed changes to the regulations submitted as Coalition Exhibit C-2:

Setback distance requirements in the final rule must be increased. See sections 20.6.2.3205, 20.6.2.3206, 20.6.2.3207, 20.6.2.3216 [As proposed in Coalition Exhibit C-2]. In each applicable section of the final rules, to be sufficiently protective of water quality, human life and property, there must be sufficient setback requirements from irrigation supply wells, ditch irrigation systems, acequias, irrigation canals or drains, human consumptive crops, occupied residences and businesses, populated areas, municipalities,

state parks, and public surface water drinking supplies. For the same reason, there must also be sufficiently protective *land application area* setback requirements for those dairies applying for a permit renewal or modification to assure that land application of dairy wastes does not endanger human health, private property, and erode state water quality.

*Id.* at 17-18.

The Hearing Officer's Report at ¶48 (setbacks for dairies applying for new discharge permits) states, correctly, that The Coalition's proposals for setbacks are for "at least one (1) mile between the dairy and the nearest occupied residence." *Id.* However, the Hearing Officer then counterposes DIGCE's objection that it is not fair to retroactively impose setback conditions, and then concludes that NMED's expertise and experience "is persuasive" on this issue. *Id.* The problem with this conclusion is that The Coalition does not recommend retroactively requiring a one (1) mile setback.

In point of fact, in response to the sole "best scientific" information on this subject (provided by Ms. Martin and Dr. Thu for The Coalition, as cited above), The Coalition's proposed rules for setbacks of one (1) mile only apply to NEW discharge permits. *See* Coalition Ex. 2 at §§ 20.6.2.3206(D) and 20.6.2.3216. A different set of setback standards are proposed for renewed or modified discharge permits. Coalition Ex. 2 at § 20.6.4.3217.

The Coalition's proposed setbacks are based upon the best scientific information, as required by 74-6-4(K). They were not contravened by any scientific information submitted by either DIGCE or NEMD--therefore, they provide the best information available to the WQCC and should be dispositive in their determination.

### **C. Monitoring Groundwater and Stormwater.**

The Hearing Officer's Report recommends denying The Coalition's requests that the final rule contain requirements for monitoring additional constituents in groundwater (§110), and stormwater (§119). The rationale for the Hearing Officer's recommendation on groundwater is that "WQCC Regulations do not include groundwater criteria for total water chemistry, total coliforms or E.Coli." This is repeated as the basis for denying stormwater monitoring for such contaminants. Hearing Officer's Report at §§110, 119. The Hearing Officer distinguishes a specific case (Parasol Dairy) where such monitoring was required in the discharge permit, stating that "it would be difficult to justify generalizing the Parasol Dairy situation to all dairies." *Id.* at §110.

Coalition's witness Elanor Starmer's unrefuted, "best scientific information" testimony stated that The Coalition's position is that the contaminants proposed to be monitored add to and "alter the quality of the water and do have impacts on either plant, animal or human health, and therefore would fall under the narrative standards that are included in the Water Quality Act" so it is appropriate for the WQCC to regulate them. Tr. at 306:22-307:10. Moreover, Ms. Starmer's uncontroverted testimony placed in the record expert opinion based upon the best available science that this type of testing is reasonable and affordable. *See. e.g.*, Tr. at 409:15-23; 411:4-412:19; 414:15-415:8.

Ms. Starmer's direct testimony was that industrial-scale, CAFO-type dairy waste contains many contaminants which have an adverse impact on human health and that

such contaminants include, but are not limited to: nitrate, nitrogen, ammonia nitrogen, fecal coliform bacteria, phosphorous, dissolved mineral salts, and, in some cases, pharmaceuticals. She also testified that she has surveyed the scientific literature on this point which she summarized as thoroughly documenting these contaminants reaching and contaminating groundwater. Testimony of Elanor Starmer, Tr. at 274:4-25. Recapping a 2006 EPA review of the applicable scientific literature, Ms. Starmer noted that the EPA found that, "Viral and bacterial pathogens associated with fecal contamination can reach groundwater via pathways in the subsurface and near surface" and "improper management of manure or runoff from land-applied manure can reach the groundwater source by traveling sometimes great distances through the subsurface." *Id.* at 275:1-25.

She also testified that the literature identifies shallow groundwater conditions--precisely those conditions that are in effect here in New Mexico--as perhaps the most important factor affecting groundwater vulnerability to contamination from animal waste. Infiltrating wastewater or waste constituents have a short travel distance to the groundwater and a shorter soil column to attenuate waste concentrations. *Id.* In short, she provided a more than adequate "best science information" basis for the WQCC requiring that monitoring in and around dairies include conductivity, dissolved oxygen, ammonia nitrogen, total coliform bacteria and E.coli. She also identified, under questioning by WQCC members, that California, Wisconsin, Nebraska, Pennsylvania

(and possibly other states) require monitoring for ammonia nitrogen along with total Kjeldahl nitrogen and nitrates. California requires this for both groundwater and stormwater monitoring at dairies, and a number of the dissolved mineral salts listed in The Coalition's proposed rules are constituents in both groundwater and stormwater that must be monitored under dairy regulations in California, Nebraska and Texas. Tr. at 373:3-374:5. In addition, Ms. Starmer also testified in response to WQCC questioning that the cost of conducting the testing that The Coalition recommends in its proposed rules is negligible. Tr. at 379:18-383:20.

Ms. Starmer provided substantial, relevant scientific information--unrefuted by any other party's examination or contribution to this rule making--upon which the WQCC can rely in utilizing The Coalition's proposed rules on groundwater and stormwater monitoring.

#### **IV. THE COALITION'S EXCEPTION TO THE HEARING OFFICER'S REPORT FAILING TO TAKE ACCOUNT OF PUBLIC TESTIMONY ON DIARY POLLUTION IMPACTS UPON THE QUALITY OF LIFE.**

Significantly absent from the Hearing Officer's Report is any account of the public testimony. The Coalition is not taking exception to the absence of reference to the testimony of financially self-interested dairy farmers, their families, friends, employees, consultants, "economic development" planners, representatives of various dairy-agricultural bureaus and agencies, lobbyists, and even some cowed legislators. The Coalition takes exception to the failure to address the testimony of the ordinary people

whose lives and property have been and continued to be damaged on a daily basis by this industry: the people who testified that dairy pollution degrades the quality of their lives.

This testimony must be taken into account, as the legislature intended, else the opportunity for such public testimony would not have been provided in the statute. *See generally*, 2010 NMSA 1978 § 74-6-6. Where the legislature specifically provides for public testimony at hearing, the Hearing Officer's report must take account of that testimony. *See generally*, *Colonias Development Council v. Rhino Environmental Services, Inc.*, 138 N.M. 133, 117 P.3d 939 (2005), online at <http://www.supremecourt.nm.org/pastopinion/VIEW/05sc-024.html> (although *Rhino* was a permit case under the Solid Waste Act, the principle is identical: where the legislature provides for public participation in a proceeding, the Hearing Officer (or tribunal) must take account of that participation in the report, deliberations and decision, including testimony on the environmental impacts of an industry on the quality of life, as such testimony is relevant).

In this case, the voices of the affected communities were present, but not accounted for in the Hearing Officer's Report, to which absence The Coalition takes exception.

**A. The Public Testimony of Betty Gonzales:**

Members of the Commission, I'm Betty Gonzales. I'm a newly elected trustee from the incorporated Town of Anthony, New Mexico. I live in a subdivision that is less than a quarter mile from the Del Oro Dairy. The issue of groundwater in our part of New Mexico is a very serious concern, and I'd like to provide some background information that will show my reason for making the five-hour trip to Santa Fe to speak to you

Commissioners. Anthony, New Mexico, is located about 20 miles from the border of Mexico and is one of the first stops as immigrants enter our country. Many of these immigrants have continued to make Anthony their home with residency status.

My reason for this statement is that, as a resident, they are very hesitant to get involved with issues such as this. They do not participate in the election process and many are employed by the dairy or racing industry. However, we are all concerned about the quality of our lives. The Del Oro Dairy is located on the northern boundary of our newly incorporated city. Residential areas are located across the highway to the west and southwest of this dairy.

We have many environmental issues that affect our citizens. Odors from the dairy no longer allow us to enjoy our backyards. Flies are a nuisance. So even our young children cannot play outside in their yards due to the unsanitary conditions that flies create. People cannot sleep comfortably, because the smell from the dairy gets sucked into our air-conditioning systems. As you pass the dairy at night, the odors get into your vehicle, so you have to open your windows just to let out the odor.

We have had issues with the spraying of wastewater 15 to 20 feet into the air in an area where children were waiting to board buses. Notification to the New Mexico Environmental Department did put a stop to this, but the spraying at lower levels continues 24 hours a day. This contaminated water is set into motion in the air, and with our windy conditions in our part of the state, one can see how particles must be carried to surrounding areas.

A small group of concerned citizens has asked for relief from these conditions to no avail. We have -- we do not have the monetary means to have anyone fight for our rights, as does the dairy industry. I feel that many of our state senators and representatives are not willing to fight this industry, either, because of the lobbying that goes on in Santa Fe from the Dairy Association.

So who is representing the common folk?

Who is trying to see that our children and families can enjoy a decent quality of life?

I feel that your Commission needs to have some background information to see our reason for concern.

We have very serious issues, such as the possibility of groundwater contamination. Not until just a few years ago were dairies required to line their holding ponds. Prior to that, where did the water go? It's obvious that it had to seep into the ground. We've been told by the NMED that our nitrate levels have increased over the years. But what is being done about this?

The one dairy I'm talking about is only one of several that are located along the I-10 corridor. To compound all these issues, we have a Department in Santa Fe, NMED, that continues to allow dairy permit renewals on a continual basis, even when a dairy has been cited with infractions. Just taking a look at the permitting records will show you that dairy permits expire, and some have gone on two or more years without a legal permit and they continue to operate. There is no enforcement from NMED, and the dairy industry knows this. I'm not sure how many and if any dairies have been fined for infractions, but I doubt that there are many. Now is the time to do something about this. I have to give you another example of enforcement.

The Priestley Dairy was located south of the present Del Oro Dairy in the Anthony town proper. The dairy closed and the owners left town about 20 years ago. I understand that it was sold to another dairy; however, there was never any cleanup and no enforcement for cleaning up the area. So the land sits in the middle of our community while litigation goes on. The Priestley owners left us with a mess, and they relocated to another state and continue to stay in the business, and we are left with the land to this day, 20 years later, that cannot be used. When is this type of abuse going to be stopped?

We need to reclaim this land for use in our newly incorporated town. This is acreage that could be used as a business park, since it is a rather large parcel.

At this point, I would like to read some of the concerns that were made at a meeting that was held in Anthony, New Mexico, on January 21st, this year, 2010, by members of the Environmental Department. Dr. Tony Latta, an analytical chemist and professor at New Mexico State University, had these

concerns. Mr. Latta is a resident of Berino, a community about three miles north of Anthony, and he, too, is located near a dairy.

Mr. Latta had a serious concern with our fly problem. He had a concern for better dust control techniques. He felt there should be studies done on dust, as these particles can hold many contaminants, including bacteria. These can cause serious health effects and should be of concern. He had a concern for the use of copper salts, foot baths that the cows walk through and then wash off in the wastewater, iodine, and the use of hormones. He also felt that the introduction of chemicals could be destroying the ecosystem of the ponds. He also noted visible changes to muskrats in the agricultural return ditches that are suggestive of chemically-induced defects.

These notes, by the way, were recorded by Thomas Reese of the New Mexico Environmental Department. The visit was made prior to a visit he was going to make to Atlanta to the Environmental Justice Training Session, and he hoped that some of this would be introduced at that time. I believe this is an opportune time to get some new, more stringent regulations for the dairy industry. Government is often so unresponsive, until it is asked to strike, just as the oil spill which is taking place in the Gulf today.

Why do we need to wait for disaster to happen? Who knows how our generation of grandchildren will be affected in the later years of their lives?

Therefore, I would like to see the following addressed immediately.

One, get all permits up to date and get all infractions remedied within a specific time frame; hopefully, one year or less.

Two, increase the number of monitoring wells surrounding all areas and let these not be self monitoring wells.

Three, work with the county, state and federal agencies to see how issues of contamination can be addressed and remedied. All of these agencies should be concerned about the health and safety issues.

Four, include the water quality monitoring process.

Five, improve monitoring of dairy lagoons and ponds, including the reserve ponds, and require that they be maintained.

Six, more on-site monitoring at various times of the day. Since dairies operate on a 24-hour basis, much of the infractions occur during the night.

Seven, have dairies put up a monetary bond, so that if they leave without cleanup, the job can still get done and communities can reclaim the land for their use.

Eight, seek ways in which dairies can get rid of their manure for other uses.

Nine, air quality is a direct effect of the dairy industry. It, too, needs regulation.

Ten, health and safety issues of workers at the dairies needs to be addressed. Dairies in floodplains should not be permitted. Our present Del Oro Dairy is located in a floodplain.

I am asking the New Mexico Water Commission today to work with all of the concerned parties in establishing regulations that will protect the health and safety of our citizens. Let's communicate to the dairy industry that the money they spend on lobbying be used to make safer, cleaner dairies, so that we can protect our most precious commodity, water.

Public Testimony of Betty Gonzales, Tr. at 1376:19; *see also* Tr. at 1376:20-25 (questions from WQCC).

**B. The Public Testimony of Maria Bajarano:**

[M]y name is Maria Bajarano. I'm retired federal employee. I'm glad to have this opportunity to personally talk to you and express my feelings regarding the dairies and rewriting of the dairy regulations. I would like to say that I am also echoing the concerns of many other community residents. I have taken the time to be here because I feel that a rewriting of the dairy regulations is extremely important for the protection of our resources and especially for the quality of life of communities living around the dairies.

I have lived near a dairy, the Del Oro Dairy, for over 30 years. When I first moved to my present home, the dairy was not that big, and, of course, the town, now the City of Anthony, had not grown anywhere close to the dairy. Now, the City of Anthony limits butt up to the south fence of the dairy. I don't believe groundwater permits were even required then.

Now, there is a large housing community west and across the street from the dairy, and also to the west and across the street, businesses are starting to come in to our vibrant and growing city, in spite of dairy smells, flies, et cetera, that are forever present.

In my heart, I had really trusted the dairy industry to be doing the best they could, complying with rules, being good stewards of the natural resources they use, and being good neighbors.

In the years I have lived near a dairy, I have put up with a few things.

Smells so bad that you can hardly -- you had a hard time getting it out of your mouth and throat, especially when the smell is so bad that it wakes you up at night. When cows move, putting up with the thick clouds of dust they make. We clean our cars in the morning. By the evening, little brown spots have appeared again, hundreds of them, fly droppings. You don't -- you shouldn't have to choose which door has the least flies to go out or come in at your own home.

My granddaughter, now six years old, cannot even enjoying being outside without being careful that the pesky flies don't go into her mouth. She cannot have a pool outside, because it's an open invitation for a fly party. They say, "It's just that smell, it will pass." Okay, it's just us, it will pass. Okay, it's just flies, they'll die eventually.

Four or five years ago, I found out about groundwater permitting, groundwater contamination, dangerous airborne particles and pathogens, et cetera, unseen contaminations, all complements of the dairy industry. I don't think these contaminations will pass or go away.

Last year, I was appointed to the Dairy Advisory -- Regulations Advisory Board as the public representative. I was, and still am, glad to serve on this board for the good of the community. At these meetings, I got the distinct feeling that the dairy industry, as a whole, does not want change, regardless

of irreparable future consequences and at whose expense these consequences will fall on.

As you know, our water is a precious resource that none of us can afford to waste, let alone contaminate. Technology has improved, and, hopefully, the data gathered from the dairies has not been for nothing. Obviously, changes to the current regulations need to be made.

Given the high percentage of dairies being in different stages of abatement, changes to the regulations must be made. Status quo is just not working. Stringent guidelines, with tougher and tighter enforcement, must be written into these regulations. I feel that for decades upon decades that the dairy industry has enjoyed certain liberties and freedoms in running their business. The public -- at least for me -- never thought that damage to our natural resource was happening right in front of us. The public has finally begun to speak out, and it seems the dairy industry is upset about it. It seems to me, we, the public, should be the ones to be upset.

On December 11th, 2009, I sent an e-mail to Secretary Curry, and as I told him in that e-mail, that the New Mexico Environment Department, I know, has its hands full, but New Mexico government, at any level, cannot afford to have NMED with limited resources, internal and external, as it is New Mexico's residents' technical expert and voice, environmentally and healthwise. NMED is also New Mexico's resource predictor of water, air, et cetera.

NMED, the Environment Department, needs to continue to do its duty to protect our resources with as much and as many controls as necessary to accomplish its mission.

We, the public, look to you, Commissioners, to do more than your best to protect our resources. You, Commissioners, have the decision to stop the seemingly unbridled harm the dairy industry is doing to our precious and limited resources. Dairy regulations, with more stringent and enforceable language, needs to be written in the regulations. It's a no-brainer.

The community's quality of life will also be improved when and as these new rules are implemented. Please don't fail us, the public. Now and -- step up to the plate, do the right thing. Remember, it is not a crime to be

proactive, especially in this critical issue, as there is so much for us -- all of us to lose.

Public Testimony of Maria Bejarano, Tr. at 1378:12-1382:20; *see also* Tr. at 1382:25-1383:19 (WQCC questions); *and see* Tr. at 33:13-36:20; 37:12-41:21; 42:11-44:25 (WQCC questions); 425:11-431:16; 431:20-434:1 (WQCC questions); 710:21-715:1; 1027:14-1035:2; 10:35:9-1039:5 (WQCC questions); 1136:14-1135:21; 954:23-955:10 (additional public testimony).

## **V. CONCLUSION.**

The testimony before the WQCC in this rule making reveals that real people living in the vicinity of New Mexico's dairies experience a degraded quality of life. They are subjected to dust, dirt, legions of flies, odors, filth and water pollution.

The Coalition asks only that the WQCC not act with indifference to the character and degree of injury--decline in property values and the interference with health, welfare, environment, and the quiet use and enjoyment of one's property--that underlie the need for regulation of the state's dairy industry.

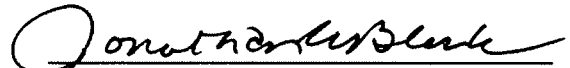
The Coalition asks only that the WQCC consider the simple justice at stake in this rule making when it balances the profit-making interests of a highly profitable industry in this state against people of comparably insignificant financial and property interests. The Coalition contends that the balance should be struck in this case in a way that assures a safe, clean environment for children and families who live around industrial-scale Confined Animal Feeding Operation-type dairies.

The record of this rule making demonstrates that the technological means for cleaning up dairy operations are economically feasible and readily available. The Coalition contends NMSA 74-6-4(E) and the record before the WQCC require the passage of rules that will do no less.

For the reasons set forth above, the WQCC should modify the Hearing Officer's Report to conform with the exceptions stated and incorporated by reference herein, and base its decision upon the modified report and the record, adopting rules consistent with those The Coalition proposed.

DATED: At Santa Fe, New Mexico, this 8th day of November, 2010.

Respectfully submitted on behalf of The Coalition:



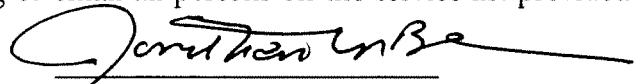
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**The Coalition:**

Amigos Bravos, Caballo Concerned Citizens Group,  
Food and Water Watch and Sierra Club Rio Grande Chapter

**CERTIFICATION OF SERVICE**

I, Jonathan Block, certify that on this 8th day of November, 2010, I served five paper copies of this pleading by hand and emailed a digital copy of the same to the WQCC Administrator and served by First Class mailing or email all persons on the service list provided to me by the Administrator.

  
Jonathan M. Block