

STATE OF NEW MEXICO  
WATER QUALITY CONTROL COMMISSION



IN THE MATTER OF:  
THE PETITION FOR  
HEARING ON RENEWAL OF SEPTIC DISPOSAL  
FACILITY DISCHARGE PERMIT, DP-465 FOR

NO: WQCC 20-14 (A)  
GWB 19-28(P)

S&R SEPTIC (DP-465),

Petitioner.

VERIFIED APPEAL PETITION

COMES NOW the Petitioner S&R Septic, by and through undersigned counsel of record, and, pursuant to §74-6-5(O) and 20.6.2.3112 NMAC, requests review by the Water Quality Control Commission (WQCC) of the Final Order of the Secretary of the New Mexico Environment Department (NMED), entered February 19, 2020, denying the application for renewal of the Discharge Permit No. DP-465 for S&R Septic. The Petitioner requests that the WQCC, after hearing on the matter, either reverse the Secretary's decision or remand to the Hearing Officer to take additional evidence on the issues that are raised for the first time by the Secretary's Order. Because there are issues that were raised for the first time by the Secretary's Order, which was issued after the record was closed, it may be necessary to remand the matter in order to open the record to add documents and evidence that are in the permit file but that are not, at this time, part of the administrative record. These documents include prior inspection reports, correspondence regarding the status of the permit and perhaps other records, which are needed to rebut or address the findings set forth in the Secretary's Order.

As required by 20.6.2.3112 NMAC, this Appeal Petition is being filed within thirty (30) days after the filing of the New Mexico Environment Department Cabinet Secretary's written determination.

**A. Identify the Petitioner and certify that the Petitioner has standing to file the Petition:**

The Petitioner is S&R Septic and the applicant for renewal of Discharge Permit No. DP-465. As the applicant, S&R Septic has standing to file the Petition under §74-6-5(N) NMSA 1978 and 20.6.2.3113 NMAC.

**B. Attach a copy of the permitting action being appealed.**

A copy of the Hearing Officer's Report (Exhibit A) and the Secretary's Final Order (Exhibit B) are attached hereto.

**C. Relevant Procedural and Factual Information**

(i) Renewal of Discharge Permit for S&R Septic

1. On February 22, 2018, S&R Septic submitted an Application for renewal of Ground Water Discharge Permit, DP-465 pursuant to the New Mexico Ground Water Quality Act (the Act), NMSA 1978, §§74-6-1 to 74-6-17, and the New Mexico Water Quality Control Commission Regulations (the regulations), 20.6.2 NMAC.

2. On May 24, 2019, the NMED Ground Water Bureau (Bureau) issued draft DP-465, subject to the conditions set out in the Bureau's post-hearing submittal, as concurred in by Applicant and the District.

3. S&R Septic property is located approximately three miles northwest of Taos on the north side of Highway 74, in Taos County, New Mexico.

4. S&R Septic will discharge up to 9,857 gallons per day of domestic septage into thirteen unlined disposal cells totaling 2.31 acres on a rotational basis; and for the planned discharge of up to 8,333 gallons per month of liquid/semi-solid domestic-wastewater-treatment-facility and/or package-treatment-plant sludge to three cells totaling .46 acres on a rotational basis.

5. The renewal Discharge Permit meets all the applicable regulatory requirements. (Hearing Officer's Report, attached hereto, ¶21).

(ii) Procedural History and Public Hearing

6. The Groundwater Bureau issued a public notice with a draft discharge permit. Public comment and requests for hearing were submitted. A hearing officer was appointed and a hearing was held.

7. Pursuant to 20.6.2.3110 NMAC, statements of intent to present technical testimony were due on October 4, 2019, ten days prior to the public hearing.

8. The Petitioner and NMED timely filed Statements of Intent with the Hearing Clerk on October 4 and October 7, 2019.

9. On October 16 and October 21, 2019 in Taos, New Mexico, a public information meeting was held by the Petitioner and attended by the Petitioner's expert witnesses and NMED staff. At the meeting, information was presented about the draft renewal application for S&R Septic. The Petitioner and NMED answered questions from members of the public concerning the draft renewal permit and the proposed S&R Septic operations. In its Notice of Intent, Exhibit A and testimony, the Groundwater Bureau did not identify any compliance documents, did not suggest or even mention that the applicant/Petitioner should be denied based on any requirements of 74-6-5.E(4)(b) or (e).

The permit writer and person responsible for oversight and compliance at the facility, Jason Hermann, was NMED's only witness. He was aware and involved in all of the issues the Secretary's Order relies upon. His testimony on a question

related directly to the analysis and justification was exactly opposite of the Secretary's Order.

“Q. So he would deny if --- if compliance and there were problems with protocols?

A. So the Water – Water Quality Act, which is the statute that authorizes our regulations, it does have a requirement that no one can hold a permit – an environmental permit or a discharge permit – that has shown wanton disregard for environmental regulation –

Q. Uh – huh.

A. – but the level of noncompliance that's been seen at this facility is generally historically – I can speak only historically, not for anything else – has not risen to that level.” (Hearing Transcript, Pg. 338, Lines 5 – 16)(Exhibit C)

**D. Identify the permitting action appealed from, specify the portions of the permitting action to which the Petitioner objects and generally state the objections.**

The Petitioner hereby appeals the Final Order of the Secretary denying the renewal application for Discharge Permit DP-465 for “Applicant’s history of permit violations and its failure to timely apply for permit renewal were ‘certainly troubling’...and “having deliberated on the nature and persistence of those violations, ...require(s) the denial of this permit application under the New Mexico Water Quality Act, NMSA 1978, § 74-6-5(E).” (Secretary’s Final Order, attached hereto). The Petitioner objects to the Secretary’s Proposed Findings of Fact Nos. 14-71, portions of the “Discussion” section, and Conclusions of Law 13, 16, 17.

As set forth below and as will be explained in more detail in briefing and oral argument, the Secretary’s decision is not supported by the record that the WQCC will review and violated the Petitioner’s due process rights, was an abuse of discretion and not in accordance with the law.

As discussed in the next section, there are issues that were raised for the first time by the Secretary's Order, which was issued after the record was closed, and it may be necessary to remand the matter in order to open the record to add documents and evidence that are in the permit file but that are not, at this time, part of the administrative record. These documents include prior inspection reports, correspondence regarding the status of the permit and perhaps other records, which are needed to rebut or address the findings set forth in the Secretary's Order.

**a) The Final Order denying the permit renewal, and the basis set forth for the Order, is not supported by substantial evidence in the record. Renewal of the Permit will be established by the appropriate burden of persuasion to the WQCC.**

10. The allegations set forth in the preceding paragraphs are incorporated by reference as if the same were set out fully herein.

11. The Final Order includes allegations of violations as follows:

a. The Applicant's 2012 discharge permit expired on December 27, 2017, yet Applicant continued to operate the facility, thereby discharging without a permit in violation of the Water Quality Act and Regulations.

Response: This is directly contradicted by NMED correspondence allowing continued operation while the permit renewal application was pending, indicating this was consistent with similar situations. This asserted basis for permit denial is baseless and deliberately avoids directly contradictory evidence.

b. A December 28, 2017 inspection revealed deficiencies with signage in violation of the permit.

Response: The existing signage was inspected and accepted by prior permit staff from NMED. Jason Herman requested a change in signage under identical permit language. Resolution of his requests are part of normal permit compliance and oversight.

c. The Applicant failed to submit monitoring reports for three years in violation of the permit, law and regulation.

Response: Prior permit staff did not request formatted “monitoring reports”. When Jason Herman was put in charge of S&R, he “requested monitoring reports” that summarize data already provided. The monitoring report summaries were prepared and delivered on the required timeline.

d. As required by the terms of the 2012 discharge permit, for the period December 27, 2017 through August 27, 2018, Applicant had not constructed splash pads, monitoring reports, or signage and the Bureau was compelled to issue a notice of non-compliance.

Response: Prior inspectors and Jason Herman’s boss accepted existing splash pads. New ones were installed at the request of Mr. Herman.

e. On September 27, 2018, a field technician witnessed an S&R Septic pumper truck pumping grease trap waste from a restaurant in Taos, in violation of its permit limitations. The next day, the permittee refused to allow the inspectors entry to the facility and when the inspectors entered and collected soil samples, Total Petroleum Hydrocarbons (TPH) and total recoverable fats, oils and grease (FOG) levels were 100 times greater than septage disposal cells at other facilities. When inspectors requesting all

pumping records and disposal manifests for the relevant dates, the Applicant provided manifests which did not include any documentation for the reported grease trap pumping location.

Response: This event was never established. The FOG readings from other sites were never provided so they could not be reviewed and compared. Using this single, unproven allegation, for which information was not provided, to take away an existing permit by denying renewal is not supported by reliable information, violates due process and is not a supportable basis to deny the renewal.

12. The conclusion of the Secretary that Applicant's recent history reflects multiple refusals and failures to disclose required information under the New Mexico Water Quality Act, and willful disregard for the Act, the terms of its permit and the New Mexico Groundwater Regulations, and poses an undue risk to property is not supported by substantial evidence in the record.

13. "Substantial evidence is evidence that a reasonable mind would recognize as adequate to support the conclusions reached by a fact-finder." *N.M. Mining Assn. v. N.M. Water Quality Control Comm'n*, 2007-NMCA-010, ¶30, 141 N.M. 41; *Santa Fe Exploration Co. v. Oil Conservation Comm'n*, 114, 835 P.2d 819 (S.Ct. 1992).

14. The GWB Hearing Officer, after hearing the evidence and testimony, including testimony of the GWB witness that was based on his technical expertise, concluded that "the proposed renewal discharge permit for S&R Septic with the conditions set out in Attachment 1, meets all the requirements of the regulations and

will not result in a hazard to public health or undue risk to property, in accordance with 20.6.2.3109(C) NMAC.” (Hearing Officer’s Conclusions of Law, ¶21).

15. The Hearing Officer found that “no substantial evidence was presented at the public hearing that the Application should be denied under NMSA 1978, §74-6-5(E).” (Hearing Officer’s Conclusions of Law, ¶19).

16. The Hearing Officer found that the GWQB, “at the public hearing, and in subsequent agreement with the Bureau’s conditions, S&R Septic demonstrated by a preponderance of the evidence that a discharge permit should be issued with conditions.” (Hearing Officer’s Conclusions of Law, ¶17).

17. The Hearing Officer found that the GWQB’s proposed conditions, including those set out in attachment 1, are supported by the testimony of Mr. Snyder, Mr. Herman, and others, and “are reasonable and necessary to ensure compliance with the Water Quality Act and applicable regulations, including site-specific conditions.” NMSA 1978, ¶ 74-6-5(D). (Hearing Officer’s Conclusions of Law, ¶20)

18. Unsupported and speculative public comments do not constitute substantial evidence and the Secretary improperly relied on such evidence to reach his conclusion that there is potential for undue risk to property, rather than technical expertise, to support such statements. (Secretary’s Final Order, ¶17).

**b) The Final Order, and the basis set forth for the Order, constitute a violation of the Applicant’s Procedural Due Process Rights.**

19. The allegations set forth in the preceding paragraphs are incorporated by reference as if the same were set out fully herein.

20. Parties appearing before administrative agencies have the right to a process that is fair and impartial. An essential element of procedural due process is

notice and the opportunity to be heard. *Mills v. New Mexico State Bd. Of Psychologist Exam'rs*, 1997-NMSC-028, ¶19, 123 N.M. 421.; *Santa Fe Exploration Co. v. Oil Conservation Comm'n*, 114 N.M. 103, 111, 835 P.2d 819 (S.Ct. 1992).

21. “The permit and the investment give rise to a vested right in the use of the property in accordance with the permit.”, *KOB-TV, LLC v. City of Albuquerque*, 2005 NMCA 49, 111 P.3d 708, 137 N.M. 388 (N.M. App. 2005), citing *Sandoval County Bd. Of Comm'rs*, 119 N.M. at 589; *In re Sundance Mountain Ranches, Inc.*, 107 N.M. at 194-95.

22. The regulations require persons wishing to present technical testimony to file a statement of intent to present technical testimony that includes a summary or outline of the anticipated direct testimony to be offered and to identify exhibits to be offered at the hearing. 20.6.2.3110.C NMAC.

23. “A person who does not file a statement of intent to present evidence may present a general non-technical statement in support or in opposition to the proposed discharge plan, modification or renewal.” *Id.*

24. The purpose of requiring a statement an intent to be filed is to provide the parties, including the permit applicant and the GWQB, notice of the issues that will likely be raised at the hearing so that each party may be prepared to address the issues either through direct testimony, cross-examination or rebuttal testimony.

**c) The determination denying the renewal permit for S&R Septic is an abuse of discretion and is not in accordance with the law should be denied based on 74-6-5 NMSA 1978.**

25. The allegations set forth in the preceding paragraphs are incorporated by reference as if the same were set out fully herein.

26. “An abuse of discretion is established if the agency...has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence. An abuse of discretion can be found when the decision is contrary to logic and reason.” *Santa Fe Exploration*, 114 N.M. at 115.

27. “A ruling that is not in accordance with the law should be reversed if the agency unreasonably or unlawfully misinterprets or misapplies the law.” *N.M. Mining Assn., supra*, ¶11.

28. The Secretary, relying on what he states is “(t)he Applicant’s recent history reflects multiple refusals and failures to disclose required information under the New Mexico Water Quality Act, and willful disregard for the Act, the terms of its permit and the New Mexico Groundwater Regulations”, concluded that the discharge permit is denied. (Secretary Final Order, at17). The Secretary incorrectly determined, without proper review of the context of compliance issues and contradictory evidence, that Applicant’s failures to disclose required information under the New Mexico Water Quality Act, and willful disregard for the Act, required denial of the application for the discharge permit.

**d.) Standard of Review**

The standard of review for the Water Quality Control Commission, pursuant to 74-6-5(Q), NMSA 1978, “(t)he commission shall review the record compiled before the constitute agency, including the transcript of any public hearing held on the application or draft permit, and shall allow any party to submit arguments. The commission may designate a hearing officer to review the record and the arguments

of the parties and recommend a decision to the commission. The commission shall consider and weigh only the evidence contained in the record before the constitute agency and the recommended decision of the hearing officer, if any, and shall not be bound by the factual findings or legal conclusions of the constitute agency. **Based on the review of the evidence, the arguments of the parties and recommendations of the hearing officer, the commission shall sustain, modify or reverse the action of the constitute agency. The commission shall enter ultimate findings of fact and conclusions of law and keep a record of the review.** (*emphasis added*). As applied in 20.1.3.16(F)(3) for the permit review, “(t)he commission shall consider and weigh only the evidence contained in the record before the department and the recommended decision of the hearing officer, if any, and shall not be bound by the factual findings or legal conclusions of the department. **The commission shall sustain, modify or reverse the action of the department based on a review of the evidence, the arguments of the parties and recommendations of the hearing officer.** The commission shall set forth in the final order the reasons for its actions.” (*emphasis added*).

#### **E. Requested Relief**

As already stated above, because there are issues that were raised for the first time by the Secretary’s Order, which was issued after the record was closed, it may be necessary to remand the matter in order to open the record to add documents and evidence that are in the permit file but that are not, at this time, part of the administrative record. These documents include prior inspection reports, correspondence regarding the status of the permit and perhaps other records, which are needed to rebut or address the findings set forth in the Secretary’s Order.

The Petitioner respectfully requests that the WQCC docket this appeal and schedule a hearing after the briefing is complete on this matter pursuant to §§74-6-5(O) through (Q) NMSA 1978 and 20.1.3.2 NMAC. The Petitioner requests that the Commission reverse the Secretary's denial of the renewal discharge permit application for DP-46 and adopt the Hearing Officer's Report and Proposed Findings of Fact and Conclusions of Law on the renewal discharge permit DP-465 with the conditions set out in Attachment 1 and issue a permit as recommended, or remand to the Hearing Officer to take evidence on issues raised for the first time by the Secretary's Order.

Respectfully submitted,

DOMENICI LAW FIRM, P.C.

/s/ Pete Domenici

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I hereby certify that the foregoing was served on all parties of record on the 27th day of February, 2020.

/s/ Jeanne Cameron Washburn

Jeanne Cameron Washburn, Esq.

STATE OF NEW MEXICO  
BEFORE THE SECRETARY OF ENVIRONMENT



IN THE MATTER OF THE )  
APPLICATION OF S & R SEPTIC )  
FOR THE RENEWAL OF )  
A SEPTAGE DISPOSAL FACILITY )  
DISCHARGE PERMIT, DP-465 )

GWB 19-28 (P)

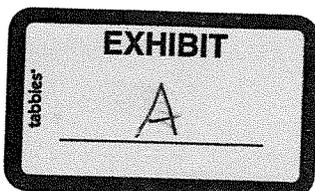
HEARING OFFICER REPORT

**Introduction**

S & R Septic (Applicant) seeks the renewal of its discharge permit for the planned discharge of up to 9,857 gallons per day of domestic septage into thirteen unlined disposal cells totaling 2.31 acres on a rotational basis; and for the planned discharge of up to 8,333 gallons per month of liquid/semi-solid/solid domestic-wastewater-treatment-facility and/or package-treatment-plant sludge to three cells totaling .46 acres on a rotational basis. The property is located approximately three miles northwest of Taos on the north side of Highway 64, in Taos County, New Mexico.

The New Mexico Environment Department (NMED) Ground Water Bureau (Bureau) supports the renewal of the permit with conditions necessary to protect public health and welfare and the environment. Several members of the community urged denial of the application based on Applicant's history of non-compliance, odor, vectors, airborne pathogens, nearby development, and potential contamination of ground water, among other things.

The matter was heard on October 16 and October 21, 2019 in Taos, New Mexico. The Bureau was represented by Owen Johnson of NMED's Office of General Counsel, and the Bureau's position was presented by domestic waste team leader Jason Herman. Those present



on behalf of the Applicant included Counsel Pete Domenici, Jr., expert geological engineer Jay Snyder, well driller Jim McCann, and the owner Steve Rael.

Other parties in the matter included El Prado Water and Sanitation District (District), represented by James C. Brockmann with original District board member John Painter; Jerome B. Hansen, a retired petroleum geologist; and Dion Smith, a board member of the Stagecoach Hills Neighborhood Association.

Many members of the public participated in questioning and testimony as well; those who offered non-technical public comment included Phillip Tafoya, Mary Lane Leslie, Norbert Mondragon, Lois Rodin, Cheryl Atcitty, Douglas Daubert, and Bruce Popham.

The administrative record includes, *inter alia*, the permit application with attachments, and the rest of the Bureau's facility file for DP-465; notices of hearing in English and in Spanish; notices of intent to present technical testimony from the Applicant, the Bureau, the District, Mr. Hansen, and Mr. Smith; exhibits and PowerPoint presentations; the sign-in sheets; hearing transcript in two volumes; post-hearing submittals from all parties except Mr. Smith; a few motions; two procedural orders; an Index to the Bureau's Administrative Record, and this Report.

The hearing was conducted in accordance with the New Mexico Water Quality Control Commission Regulations, 20 NMAC 6.2.3110, and the Department's Permitting Procedures, 20.1.4 NMAC. The hearing lasted approximately seven hours over the course of the first evening, and two hours more on the morning of the second day.

Every participant was allowed full opportunity to call witnesses, present testimony and other evidence, and cross-examine witnesses called by any other participant. The hearing was recorded by the Hearing Clerk and transcribed by Rebecca Fella of Williams and Associates, court

reporter. The record was left open for the purpose of submitting proposed findings of fact and conclusions of law, as well as legal argument on a motion for collateral estoppel offered by the Applicant during the hearing (later withdrawn).

### **Procedural History**

DP-465 was originally issued in 1987 and renewed in 1992, 1999, 2003, and 2012.

DP-465 expired without the submission of a renewal application on December 27, 2017.

The Bureau received Applicant's current renewal application on February 22, 2018.

The Bureau issued draft DP-465 on May 24, 2019.

During the comment period on the draft permit, 10 members of the public requested a hearing.

On October 16 and 21, 2019, a public hearing on the Application was held in Taos, New Mexico.

[See below in the proposed findings of fact for additional procedural history. Mr. Herman's written direct history includes a detailed permit and regulatory history.]

### **Applicable Law**

New Mexico Water Quality Act, NMSA 1978, Sections 74-6-1 to 74-6-17

New Mexico Water Quality Control Regulations, 20.6.2 NMAC

New Mexico Environment Department Permitting Procedures, 20.1.4 NMAC

### **Recommendation and Discussion**

Based on the entire record, I recommend that the discharge permit be issued in the form of the Bureau's May 24, 2019 draft, subject to the conditions set out in the Bureau's post-hearing submittal, Attachment 1, as concurred in by Applicant and the District. I further recommend that the Bureau make certain key documents related to the discharge permit more easily available to

the surrounding community, either on the Department's webpage or by a hard copy in the Taos Field Office, or both.

Generally, although the parties opposing the issuance of the discharge permit in its draft form were active and thoughtful participants in the hearing process, they raised a number of concerns that are beyond the reach of the regulatory scheme under which discharge permits are issued by the Department. Many of these issues are best addressed by local ordinances adopted around planning and zoning to avoid incompatible land uses, or the prevention of nuisance.

They do point to language in the applicable regulations meant to preclude the issuance of a discharge permit posing a "hazard to public health" or "undue risk to property," neither of which is apt here. "Hazard to public health" is narrowly defined in the regulations to mean water exceeding express numerical standards for certain contaminants or toxic pollutants. See Section 20.6.2.7.AA NMAC. "Undue risk to property" has not, over the forty years of the ground water permitting program, been accepted by this Department or the Water Quality Control Commission to mean that "quality of life" concerns like odor or mosquitoes would result in permit denial. I respectfully disagree with their assertion that the Environmental Improvement Act requires the Department to address air quality, vectors, and nuisance as part of the ground water permitting process. That said, the permit includes a number of operational conditions which, if complied with, will make the facility less of a potential nuisance, including adding lime to the septage, which reduces vector attraction.

What follows are proposed findings of fact and conclusions of law drawn primarily from those submitted by the Bureau, with some additional findings and conclusions prompted by the

post-hearing submittals of Applicant and the District. Certain special permit conditions proposed by parties but not included below include:

- a. A requirement that Applicant retain a consultant of Mr. Snyder's qualifications to assure permit compliance in the future. This was proposed by the District but not included for an apparent lack of authority to order such a requirement.
- b. A condition that Applicant is required to discharge septage only at the Taos Municipal Wastewater Treatment facility. This was proposed by Mr. Hansen but not included, again, for an apparent lack of authority: the Act and regulations require an evaluation of the renewal application as submitted.
- c. A condition that the term of the permit be shortened to account for the time during which Applicant has been operating without a valid permit, such that it would expire on December 26, 2022. This was proposed by Mr. Hansen but not included, again, for an apparent lack of authority: the Act and regulations require that a discharge permit be issued for a term of five years.

Applicant's history of permit violations and its failure to timely apply for permit renewal are certainly troubling. The concerns expressed by Mr. Hansen and the Stagecoach Neighborhood Association about Applicant's operations and the Bureau's uneven history of enforcement do have a substantial basis. Mr. Herman testified that the Bureau's staffing will soon be more robust, and I recommend that the geohydrological evaluation required in the discharge permit be completed as soon as practicable.

Several commenters noted the residential and other development that has occurred in the vicinity of the facility since the original permit was issued in 1987. Several noted that

Applicant is the only one of 12 septage haulers in the Taos area which does not dispose of its waste at the municipal wastewater treatment plant, and encouraged the Department to discontinue the approval of open pit disposal altogether. The Bureau is implementing existing ground water regulations. If the disposal of human waste into unlined open pits is to be discontinued in New Mexico, it is the Water Quality Control Commission or the New Mexico legislature where that action would be taken.

Finally, although in its post-hearing submittal Applicant withdrew its motion for collateral estoppel, the Bureau, in its post-hearing submittal, set out the basis on which that motion would have been denied.

Attachment 1 to the Bureau's post-hearing submittal has been attached to this report as well for ease of reference. It reflects the two permit conditions negotiated among the Applicant, the Bureau, and the District.

### **PROPOSED FINDINGS OF FACT**

#### **A. The Facility**

1. S & R Septic (Applicant) is a domestic-septage and sludge disposal company originally permitted in 1987. Since then, it has gone through several permit renewals, the most recent of which was in December 2012. The 2012 permit allowed discharge of up to 9,857 gallons per day (not to exceed 69,000 gallons per week) of domestic septage to 13 unlined disposal cells totaling 2.31 acres on a rotational basis. It also allowed discharge of up to 8,333 gallons per month (not to exceed 100,000 gallons per year) of liquid/semi-solid/solid domestic-wastewater-treatment-facility and/or package-treatment-plant sludge to three cells totaling

.46 acres on a rotational basis. The Applicant has applied to retain those limits. **AR Doc. 4.**

2. When measured on a *per-acre* basis, the allowable discharge is 4,267 gallons per day. That is more than any other active septage facility in New Mexico, excepting Barry's Septage (DP-1878), the elevated limit for which is effectively nullified by an additional restriction limiting it to 200 pounds of total nitrogen per year. **NMED Exh. 8; Testimony Vol II, pg. 326.**
3. The facility is located on Tune Drive approximately three miles northwest of Taos, NM on the north side of Highway 64.
4. Contaminants of concern to the Department are nitrogen species and pathogens in particular, but may also include other chemicals such as formaldehyde due to varying materials and strategies associated with septic-tank use. **NMED Exh. 1, pgs. 6-7.**

#### **B. History of the Permit**

5. The Department first issued a permit to the Applicant on April 7, 1987, authorizing the discharge of 12,000 gallons per day of septage into shallow ponds.
6. The Department approved an increase to 20,000 gallons per day on July 25, 1990.
7. The Department renewed the permit on June 10, 1992.
8. Simultaneous with a decrease in discharge volume to 10,000 gallons per day and a transition from shallow ponds to 12 shallow disposal cells, the permit was renewed on July 28, 1999.

9. A public hearing on the Applicant's next renewal application was held October 8, 2002. The renewed permit was issued May 22, 2003.
10. A joint NMED and Environmental Protection Agency inspection found operational deficiencies in March 2005 and proposed a \$32,000 penalty that was reduced to \$1,800 in a May 2007 consent agreement.
11. On April 11, 2008, the Department de-authorized grease-trap and carwash-grit waste disposal at the facility.
12. The Department renewed the permit on December 27, 2012.
13. The 2012 permit expired without submission of a renewal application on December 27, 2017.
14. The Department received the renewal application presently at issue on February 22, 2018. **AR Doc. 4.**
15. On September 27, 2018, a Department field technician witnessed an S&R Septic pumper truck pumping what appeared to be grease-trap waste from a restaurant in Taos. The following day, Applicant refused entry by inspectors into the facility. Three days later, on October 1, inspectors gained access and gathered samples that tested 100 times greater for total petroleum hydrocarbons and fats/oils/grease than similar facilities.

#### **C. Geology and Hydrology of the Site**

16. The facility is located on the Costilla Plains between the Taos Plateau and the Sangre de Cristo Mountains. In this area, groundwater is typically found in the alluvial sediments, which consist of deposits from the Holocene, early Quaternary

and late Tertiary Ages known, collectively, as the Santa Fe Group. That Group, in turn, is interbedded with clay deposits and volcanic rocks such as servilleta basalt.

**NMED Exh. 1, p. 6.**

17. The facility is also within the Los Cordovas Fault Zone, which has a north-south orientation. There is fracturing of bedrock and, in general, the fractures are not cemented. **NMED Exh. 1, p. 6, referencing NMED Exhs. 3, 4 and 5.**
18. Based on a well located one mile away, the New Mexico State Engineer (OSE) recorded water depth at approximately 500 feet. Records are insufficient regarding perched groundwater. **NMED Exh. 1, p. 6.**
19. The OSE well log for the Waste Management of New Mexico well profiled 102 feet of brown gravel and clay from eight to 110 feet below surface. The Mark D. Miller well log profiled 89 feet of clay and gravel from 10 to 99 feet below surface. **Exh. Snyder 1, part 2.**
20. The 1999 Shomaker Report estimated nitrogen migration below the Applicant's facility at 15-30 feet after 12 years of operation. **AR Doc. 1.**
21. Modeling in the 2000 Duke Engineering Report predicts said migration of nitrogen contaminants below the facility to have reached depths of at least 70 feet after 32 years of operation. **AR Doc. 2; NMED Exh. 1, pg. 6.**
22. Until Applicant's environmental consultant performed a site investigation in October of 2019, no follow-up studies had been performed at the facility regarding vertical migration of contaminants since the Shomaker/Duke reports. **NMED Exh. 1, p. 7.**

23. EA Engineering describes the 2019 investigation as “limited.” **Exh. Snyder 1, p. 1.** Near-surface gravels prevented air-rotary drilling beyond 35 feet below ground surface. Three grab samples and one split-spoon sample were obtained. **Exh. Snyder 1, part 4.**

#### **D. Public Notice and Requests for Hearing**

24. Pursuant to 20.6.2.3108(A) NMAC, Applicant undertook the initial public-notice responsibilities, making its renewal application known, on June 22, 2018. **AR Doc. 10.**
25. Pursuant to 20.6.2.3108(J) NMAC, the comment period for the draft permit began May 24, 2019, following publication in the Taos News and Albuquerque Journal, as well as mailing to all interested parties. **AR Docs 38, 39.**
26. The Applicant did not submit any comments, but more than 10 members of the public requested a hearing. These included individual residents, a neighborhood association, adjacent business owners, and a water and sanitation district. **AR Docs. 40-53.**
27. The Public Involvement Plan was duly revised, **AR Doc. 54**, and notice of a public hearing – in both English and Spanish – was published in the Albuquerque Journal and Santa Fe New Mexican on or before September 15, 2019. **AR Docs. 55, 56.**
28. When the initial evening of testimony ran long, notice of a continuance was sent to all interested parties informing them of the new day, time and location.

### E. The Hearing

29. A hearing was held October 16, 2019, at the Taos County Commission Chambers beginning at 5:30 p.m. Exceeding the available time, it was continued on October 21, 2019, at the Taos Civic Plaza and Convention Center beginning at 10 a.m.
30. In addition to the Applicant and the Department, three others made entries of appearance and/or submitted notices to present technical information. These were the El Prado Water and Sanitation District, Jerome Hansen and Dion Smith.
31. In total, 14 people testified or delivered verbal comment. The Applicant presented three witnesses – Jay Snyder, Jim McCann and Steve Rael – and the Department presented one: Jason Herman. Of the public comments, eight generally opposed the permit or sought additional investigation before issuance while two generally supported the permit.
32. Jay Snyder has bachelor's degrees in geology and meteorology, and master's degrees in geophysics and geological engineering. Mr. Snyder is a licensed professional engineer in New Mexico, a licensed geologist in 14 states, certified as a hydrogeologist by the state of California and as a professional hydrologist by the American Institute of Hydrology. Mr. Snyder has done contaminant study for 30 years, site investigations and characterization, all the way to cleanup and closure. Mr. Snyder has been qualified as an expert witness with the Water Quality Control Commission and in NMED public hearings. Mr. Snyder works for EPA Regions 6 and 9, and has worked directly for the state of New Mexico, responsible parties,

- and permittees. Mr. Snyder was accepted as an expert witness in geology, hydrogeology and geologic engineering. **Testimony Vol. 1, pgs. 88-89, 97.**
33. Jim McCann has been licensed as a well driller in New Mexico for at least four years and has drilled hundreds of wells in the state, including wells near the Applicant's site. He is also licensed in other states. **Testimony Vol. 1, pg. 165.**
  34. Steve Rael is the owner of Applicant S & R Septic.
  35. Jason Herman is the domestic waste team leader for the Bureau's Pollution Prevention Section, has worked for the Bureau for two years, and has written thirty ground water permits. He worked in ground water treatment and regulatory industries in Florida for more than eight years. Mr. Herman has a bachelor's degree in environmental planning and design, a master's degree in community regional planning, and a second master's degree in water resources management. **Testimony Vol. 2, pgs. 314-316.**
  36. Jerome Hansen, a trained geologist and member of the Stagecoach Neighborhood Association, made extensive use of Google-Earth slides depicting the facility over 2-3 decades. He expressed concern about permeability of the underlying rock and potential contamination of groundwater. **Testimony Vol. 1, pg. 20.**
  37. Phillip Tafoya testified to the value of the service provided by the Applicant and asked how the hearing was initiated. The hearing officer provided a response to his question. **Testimony Vol. 1, pg. 178.** Tafoya favored renewal of the permit.
  38. Mary Lane Leslie spoke on behalf of the Stagecoach Neighborhood Association. She testified that other septage haulers in the area utilize the municipal

wastewater-treatment plant for disposal rather than exposed cells. She asserted that pathogens in the septage are dangerous to human health and asked that permit conditions address vectors and potential airborne contaminants. She worried that the Department lacks adequate resources to oversee and monitor the facility based on historical violations of the permit. She ultimately asked that the Applicant be required to use the wastewater-treatment plant. **Testimony Vol. I, pgs. 183-197.**

39. Norbert Mondragon disfavored renewal of the permit due in part to reservations about the Department's lack of manpower and reliance on self-reporting by the facility. He also expressed frustration with the narrow focus on groundwater when he considers airborne pathogens similarly concerning. **Testimony Vol. I, pgs. 204-06.**
40. Dion Smith, a member of the Stagecoach Hills Neighborhood Association, also objected to airborne contaminants as a potential cause of disease. He has received complaints about odors and conducted research on the health effects of breathing sewage fumes. He listed hydrogen sulfide, carbon dioxide, methane and ammonia as gases typically associated with septage. He expressed concern about the Department's lack of manpower for enforcement and encouraged disposal at the wastewater-treatment plant. **Testimony Vol. I, pgs. 267-273.**
41. John Painter spoke on behalf of the El Prado Water and Sanitation District, located north of Taos. He holds a level-4 certification and operator's license from the Department's drinking water bureau. The District relies on several production

wells, including one near the Applicant's facility. While Painter did not think it is currently impacted, he expressed concern about the future and stressed the need for additional monitoring. He encouraged drilling at least one borehole at the facility and ensuring that the Applicant does not dispose of fats/oils/grease or hydrocarbons at the facility. **Testimony Vol. II, pg. 303-304.**

42. Lois Rodin discussed the functioning of sewage-cell systems and what distinguishes an effective one from a poor one. She felt the Applicant could dispose at the wastewater-treatment plant. **Testimony Vol. II, pgs. 311-312.**
43. Cherylin Atcitty is the environmental program manager for the Taos Pueblo Environmental Office. She expressed concern that renewal of the permit could harm subsurface water and, by extension, wildlife, such as bison herds. **Testimony Vol. II, pg. 313.**
44. Douglas Daubert read a statement from prior witness Jerome Hansen, who could not appear for the second day of proceedings. Through Daubert, Hansen stated that the Applicant's counsel failed to serve him with a significant amount of information, which resulted in his being caught off guard during cross-examination. **Testimony Vol. II, pg. 346.** For his part, Daubert was uncomfortable with a proposed reduction in boreholes from five to one and did not think it could adequately test for off-site seepage. He also emphasized the Applicant's gaps in monitoring reports, encouraged disposal at the wastewater-treatment plant, and called for denial of the permit. He also submitted a newspaper article about

Applicant's operations from 1995 that drew an objection on the grounds of hearsay. **Testimony Vol. II, pg. 348-351.**

45. Bruce Popham, who worked closely with the Florida environment department, related his surprise at discovering open-pit dumping upon his relocation to Taos. He considers the facility a risk to the well fields. **Testimony Vol. II, pg. 354.**

#### **F. Negotiation of Two Permit Conditions**

46. The Bureau met with the Applicant on August 13, 2019 and with El Prado Water and Sanitation District on August 20, 2019. Both meetings focused on discussion and information gathering but no commitments to alter the draft permit.
47. On October 21, 2019, just prior to commencing the continued hearing, the Applicant, the Bureau, and El Prado verbally negotiated modifications to Conditions 21 and 22 of the permit. These were first summarized in the testimony of Jason Herman, **Testimony Vol. II, pgs. 319-323**, and are more formally captured in **Attachment 1**.
48. In their post-hearing submittals, Applicant and the District both indicated that they support the Bureau's proposed findings and conclusions, and Conditions 21 and 22 as reflected in Bureau's Attachment 1.

#### **G. Permit Conditions**

49. The conditions in the draft permit are divided into five subsections with a total of 51 conditions.
50. Features of the operational plan include requiring 24-inch berms around the facility and a stormwater-diversion-bar trench (at least six inches deep) at the

facility entrance. Fencing and a locking gate will surround the entire facility to control access by animals and the public. Signs shall be posted every 500 feet stating it is a waste-disposal area with non-potable water. Contact information for both the facility operator and the Department will be posted at the entrance. Each disposal cell will be marked with a number and the authorized waste type. Depth of liquid shall not exceed three inches in any cell at any time. Different waste types shall not be combined. Cell vegetation shall be removed, and the permittee shall inspect the facility weekly for residual trash. Erosion-preventing splash pads shall be maintained. Each septage or sludge load will be mixed with lime and held at a pH of 12.0 for a minimum of 30 minutes. This shall be documented in a manifest. Sludge is allowed only in cells 3, 4 and 5. **NMED Exhibit 1, pgs. 8-10.**

51. Features of the monitoring/reporting plan include semi-annual reporting and ensuring that a detailed manifest is kept for each load of waste. The permittee shall demonstrate compliance with 40 CFR 503. If monitoring wells are installed, ongoing sampling for nitrogen species, total dissolved solids and chloride will be required. The permittee shall complete a surface-disposal data sheet for each cell documenting the amount of nitrogen applied each month; these will be part of the semi-annual reports. Sludge discharges will be monitored for by type and percent total solids to determine the dry weight; each type will be analyzed for TKN and NO<sub>3</sub>-N. Composite samples from five locations within each cell will be collected semi-annually and analyzed for TKN, NO<sub>3</sub>-N, FOG and TPH. **NMED Exhibit 1, pgs. 11-14.**

52. The Department invites John Painter, of the El Prado Water and Sanitation District, and Jerome Hansen to provide input on the “work plan” mentioned in the revised first paragraph of Condition 21 (as depicted in **Attachment 1**), thus according the public ongoing involvement in the process. **Testimony, Vol. II, pg. 321.**
53. Modifications to Conditions 21 and 22 (as depicted in **Attachment 1** of this document) have had repercussions for Conditions 23-28, which are contingent on the need for monitoring wells. Where similar language does not already exist, they should now be interpreted with the following phrase preceding them: “If for any reason monitoring wells are required to be installed....” Applicant concurs with this interpretation, as well as all of Attachment 1.
54. The permit includes a contingency plan that can be triggered by, among other things, exceedance of groundwater standards, FOG/TPH levels above 3,000 mg/kg, damage to the structural integrity of a cell or a spill/unauthorized discharge. Ensuing actions can include contacting the Department, excavation of contaminated soil, submission of a Corrective Action Plan, repair of damaged infrastructure, and abatement actions. **NMED Exhibit 1, pgs. 14-16.**
55. A closure plan includes backfilling the cells with clean fill and revegetating both the cells and any associated disturbed areas with native plants. **NMED Exhibit 1, pg. 16.**
56. Based upon the interest expressed by the District and others from the community during the hearing, the Hearing Officer recommends that copies of the Applicant’s monitoring reports required by DP-465, and reports of any inspection conducted

by the Bureau, be placed online and/or in the NMED Field Office for viewing during business hours.

**PROPOSED CONCLUSIONS OF LAW**

1. The Water Quality Control Commission (WQCC) "may require persons to obtain from a constituent agency designated by the commission a permit for the discharge of any water contaminant." NMSA 1978, § 74-6-5(A).
2. The WQCC has adopted regulations implementing the Water Quality Act at 20.6.2 NMAC.
3. The regulations at 20.6.2.3104 NMAC provide that "no person shall cause or allow effluent or leachate to discharge so that it may move directly or indirectly into ground water unless he is discharging pursuant to a discharge permit issued by the secretary."
4. Applicant S & R Septic is a "person" within the meaning of the regulations. 20.6.2.7(JJ) NMAC.
5. The Department is an agency of the executive branch of the state of New Mexico, created by statute. NMSA 1978, § 9-7A-6(B)(3) (1991).
6. The Department is charged with evaluating applications for discharge permits and recommending approval or disapproval by the Secretary. 20.6.2.3018 NMAC.
7. The Secretary has jurisdiction over the subject matter of the Application and the parties to this proceeding, and has authority to issue or deny ground water discharge permits based upon information submitted in a permit application and

- relevant information received during the public hearing. NMSA 1978, §74-6-5, 20.6.2.3109 NMAC.
8. Activities described by S & R Septic in the Application require a groundwater discharge permit to be evaluated by the Department. 20.6.2.3104 and 20.6.2.3018 NMAC.
  9. The permit application complied with the requirements of 20.6.2.3106 NMAC.
  10. The Water Quality Act provides that a constituent agency shall "either grant the permit, grant the permit subject to conditions, or deny the permit." NMSA 1978, § 74-6-5(D).
  11. The Department provided the public, including the Applicant, with notice of the proposed discharge permit in accordance with the regulations at section 20.6.2.3108(H) NMAC.
  12. The Department provided the public, including the Applicant, an opportunity to comment on the proposed discharge permit in accordance with the regulations at 20.6.2.3108(K) NMAC.
  13. The Department provided the public, including the Applicant, with notice of the public hearing in accordance with the regulations at 20.6.2.3110 and 20.1.4.200 NMAC.
  14. A public hearing was held on the proposed discharge permit in accordance with the regulations at 20.6.2.3110 and 20.1.4 NMAC.
  15. The Applicant bears the burden of proving that a permit should be issued and not denied. Paragraph (1) of Subsection A of 20.1.4.400 NMAC.

16. In administrative hearings under the Water Quality Act, the standard of proof is a preponderance of the evidence. Paragraph (3) of Subsection A of 20.1.4.400 NMAC.
17. At the public hearing, and in subsequent agreement with the Bureau's conditions, S & R Septic demonstrated by a preponderance of the evidence that a discharge permit should be issued with conditions.
18. The Act sets forth the grounds for which the Secretary shall deny an application for a discharge permit. NMSA 1978, § 74-6-5(E).
19. No substantial evidence was presented at the public hearing that the Application should be denied under NMSA 1978, §74-6-5(E).
20. The proposed conditions, including those set out in Attachment 1, are supported by the testimony of Mr. Snyder, Mr. Herman, and others, and "are reasonable and necessary to ensure compliance with the Water Quality Act and applicable regulations, including site-specific conditions." NMSA 1978, § 74-6-5(D).
21. The proposed discharge permit with the conditions set out in Attachment 1 meets the requirements of the regulations and will not result in a hazard to public health or undue risk to property, in accordance with 20.6.2.3109(C) NMAC.

#### **RECOMMENDED FINAL ORDER**

A draft Final Order consistent with the recommendation above is attached.

Respectfully submitted,

Original signed by

Felicia Orth

Hearing Officer for GWB 19-28 (P)

Certificate of Service

I hereby certify that on January 3, 2020 a copy of the foregoing Hearing Officer's Report was emailed to the persons listed below. A copy can be mailed via U.S. first-class mail upon request.

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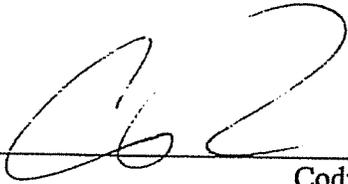
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## ATTACHMENT 1

### *Monitoring Actions with Implementation Deadlines*

| #   | Terms and Conditions   |
|-----|--|
| 21. | <p>Within 60 days of the effective date of this Discharge Permit the permittee shall submit a work plan for NMED's approval outlining a shallow geohydrological evaluation beneath the facility. The goals of the work plan will be to identify the depth and concentration of all facility related contaminants, the existence of any saturated zones at or above the first encountered basalt layer, and any lithological zones capable of creating a perched aquifer. Members of the community shall have opportunity to provide input on the work plan.</p> <p>Within 120 days following NMED's approval of the work plan, the permittee shall implement the work plan at a location that NMED agrees is most likely to be representative of subsurface conditions. NMED shall be notified at least 30 days prior to implementing the work plan.</p> <p>Geohydrological evaluation will be completed in the following manner:</p> <ul style="list-style-type: none"> <li>• A minimum of one borehole shall be drilled using a drilling technique most apt to produce continuous representative core, e.g., a hollow-stem auger or sonic drill.</li> <li>• Installation of a minimum of one moisture monitoring device, e.g., suction lysimeter.</li> <li>• Drilling shall be conducted in such a manner most apt to detect groundwater if present.</li> <li>• At a minimum, a borehole shall be advanced to the first occurrence of a basalt layer.</li> <li>• If moisture is encountered during drilling, boring shall cease and the borehole will be allowed to rest for two hours and an evaluation shall be made to determine whether fluid accumulates at the bottom of the hole.</li> <li>• If a saturated zone is identified above the first basalt layer, a monitoring well will be constructed into the zone. A second borehole shall be drilled nearby utilizing surface casing that isolates the saturated interval. The intent of the second borehole will be to continue characterization of lithology and moisture content to total depth. The lateral extent of any contaminated perched water will be fully delineated.</li> <li>• Continuous core samples shall be collected and retained during the advancement of the borehole.</li> <li>• All representative soil or lithology types (a minimum of five samples) shall be submitted for laboratory analysis for the following physical properties:             <ul style="list-style-type: none"> <li>○ Bulk density</li> <li>○ Particle size distribution</li> <li>○ Porosity</li> <li>○ Hydraulic conductivity</li> <li>○ Moisture content</li> </ul> </li> <li>• Soil or lithologic samples shall be collected at 10-foot intervals and submitted for laboratory analysis of for the following chemical analytes:             <ul style="list-style-type: none"> <li>○ TKN</li> <li>○ NO<sub>3</sub>-N</li> <li>○ NH<sub>3</sub>-N</li> <li>○ Cl</li> <li>○ TOC</li> </ul> </li> <li>• All samples shall be collected and analyzed in accordance with EPA Soil Sampling Science and Ecosystem Support Division Operating Procedure, SESDPROC-300-R3 (enclosed) or ASTM methods D 420-93, D 1452-80, D 1586-84, D2488-93, D 4220-89, D 4700-91 and D 5434-93.</li> </ul> |

| #   | Terms and Conditions   |
|-----|--|
|     | <ul style="list-style-type: none"> <li>• If chemical analysis of soil or lithologic samples indicate elevated nitrogen content (as defined by exceedance of the Table 11 concentrations specified in the 1999 study titled "Evaluation of the Migration of Nitrogen Compounds at the City of Santa Fe Sludge Disposal Site Near Santa Fe, New Mexico and at the S&amp;R Septage Disposal Site Near Taos, New Mexico" [attached]) extends to the top of the first basalt layer, the permittee shall perform complete vertical characterization of contamination through and below the basalt.</li> <li>• If chemical analysis soil or lithologic samples indicates elevated nitrogen content at 150 feet below ground surface, the facility shall immediately cease discharging at the facility and shall implement the closure plan.</li> <li>• Soil moisture monitoring systems shall be installed, and the associated borehole shall be completed in accordance with industry standards and the methodology determined during the development of the work plan.</li> <li>• Ninety (90) days after completion of the soil borehole sampling, the permittee shall submit a work plan completion report to NMED detailing the physical and laboratory analysis of all sampling performed including a narrative describing the project, preparations, methodology used. The report shall also include the geologic logs from the coring and any other pertinent information collected during the study.</li> </ul> <p>[Subsection C of 20.6.2.3106 NMAC, Subsection A of 20.6.2.3107 NMAC]</p>                 |
| 22. | <p>If total nitrogen content is found to be elevated above the non-impacted levels identified by Table 11 in any of the soils to lithologic samples collected at a depth of 100 feet or deeper, the permittee shall submit a written moisture monitoring proposal for review and approval by NMED. This submittal shall occur within 60 days of the completion of the sampling required by Condition 21 of this Discharge Permit. The proposal shall designate the locations and design of vadose-zone monitoring systems sufficient to evaluate total nitrogen content migration. The proposal shall include, at a minimum, the following information.</p> <ol style="list-style-type: none"> <li>a) A map showing the proposed location of the vadose-zone monitoring system.</li> <li>b) A written description of the specific location and design proposed for the monitoring system including the distance (in feet) and direction of the monitoring system from the edge of the source it is intended to monitor. Examples include: 35 feet north-northwest of the northern berm of the synthetically lined impoundment; 45 feet due south of the leachfield; 30 feet southeast of the re-use area 150 degrees from north. Design details of the vadose-zone monitoring system will also be provided.</li> <li>c) A statement describing the groundwater flow direction beneath the facility, and documentation and/or data supporting the determination.</li> </ol> <p>All monitoring system locations shall be approved by NMED prior to installation.</p> <p>[Subsection A of 20.6.2.3107 NMAC]</p> |

**STATE OF NEW MEXICO  
BEFORE THE SECRETARY OF ENVIRONMENT**

**IN THE MATTER OF THE )  
APPLICATION OF S & R SEPTIC )  
FOR THE RENEWAL OF )  
A SEPTAGE DISPOSAL FACILITY )  
DISCHARGE PERMIT, DP-465 )**

**GWB 19-28 (P)**

**DRAFT FINAL ORDER**

This matter comes before the Secretary of Environment following a hearing before a Hearing Officer on October 16 and 21, 2019, in Taos, New Mexico.

S & R Septic (Applicant) seeks the renewal of its discharge permit for the planned discharge of up to 9,857 gallons per day of domestic septage into thirteen unlined disposal cells totaling 2.31 acres on a rotational basis; and for the planned discharge of up to 8,333 gallons per month of liquid/semi-solid/solid domestic-wastewater-treatment-facility and/or package-treatment-plant sludge to three cells totaling .46 acres on a rotational basis.

The Ground Water Bureau (Bureau) supports the issuance of the permit with conditions necessary to protect public health and welfare and the environment.

Having considered the administrative record in its entirety, including all post-hearing submittals and the Hearing Officer's Report; and being otherwise fully advised regarding this matter;

**THE SECRETARY HEREBY ADOPTS THE HEARING OFFICER'S REPORT AND PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW.**

IT IS THEREFORE ORDERED:

1. The time for the Hearing Officer to submit her report was extended from January 2 to January 3, 2020.
2. The application for the discharge permit is granted.
3. The permit shall be issued by the Ground Water Bureau in the form set forth in the May 24, 2019 Draft Permit with the adjustments reflected in Bureau Attachment 1.
4. In order to make key documents related to the permit more accessible to the surrounding community, the Bureau shall maintain copies of the Applicant's monitoring reports, and reports of any inspection conducted by the Bureau, either online or in the NMED Field Office for viewing during business hours, or both.

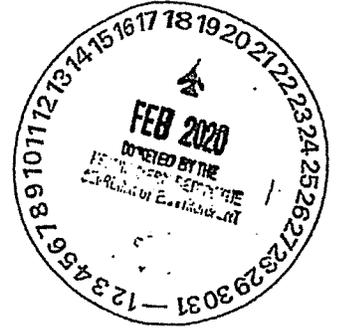
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JAMES C. KENNEY, Secretary of Environment

NOTICE OF RIGHT TO REVIEW

Any person who participated in this permitting action and who is adversely affected by the action may file a petition for review by the Water Quality Control Commission, c/o Cody Barnes, 1190 St. Francis Drive, Suite 2100 S, Santa Fe, New Mexico 87502. The petition shall be made in writing to the Commission within thirty days from the date notice is given of this action.

STATE OF NEW MEXICO  
BEFORE THE SECRETARY OF ENVIRONMENT



IN THE MATTER OF THE )  
APPLICATION OF S & R SEPTIC )  
FOR THE RENEWAL OF )  
A SEPTAGE DISPOSAL FACILITY )  
DISCHARGE PERMIT, DP-465 )

GWB 19-28 (P)

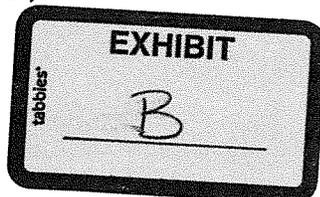
FINAL ORDER

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The Ground Water Bureau (Bureau) supported the renewal of the permit with conditions staff believed necessary to protect public health and welfare and the environment. Several members of the community urged denial of the application based on Applicant's history of non-compliance, odor, vectors, airborne pathogens, nearby development, and potential contamination of ground water, among other things.

Having considered the administrative record in its entirety, including all post-hearing submittals, the Hearing Officer's Report and comments thereon; and being otherwise fully advised regarding this matter;



THE SECRETARY HEREBY DENIES THE PERMIT APPLICATION FOR THE REASONS STATED BELOW, AND ADOPTS THESE FINDINGS OF FACT AND CONCLUSIONS OF LAW.

**FINDINGS OF FACT**

**A. The Facility**

1. S & R Septic (Applicant) is a domestic-septage and sludge disposal company originally permitted in 1987. Since then, it has gone through several permit renewals, the most recent of which was in December 2012. The 2012 permit allowed discharge of up to 9,857 gallons per day (not to exceed 69,000 gallons per week) of domestic septage to 13 unlined disposal cells totaling 2.31 acres on a rotational basis. It also allowed discharge of up to 8,333 gallons per month (not to exceed 100,000 gallons per year) of liquid/semi-solid/solid domestic-wastewater-treatment-facility and/or package-treatment-plant sludge to three cells totaling 0.46 acres on a rotational basis. Applicant applied to retain those limits; its application was not timely. AR Doc. 4.
2. The term of a discharge permit is generally five years from the date the permit is issued. 20.6.2.3109(H) NMAC. The holder of a discharge permit must submit an application for renewal at least 120 days before the permit expires for it to be administratively continued. 20.6.2.3106(G) NMAC. NMED Exh. 1, p.2.
3. When measured on a *per-acre* basis, the allowable discharge is 4,267 gallons per day. That is more than any other active septage facility in New Mexico, excepting Barry's Septage (DP-1878), the elevated limit for which is effectively nullified by an additional restriction limiting it to 200 pounds of total nitrogen per year. NMED Exh. 8; Testimony Vol II, pg. 326.

4. The facility is located on Tune Drive approximately three miles northwest of Taos, NM on the north side of Highway 64.
5. Contaminants of concern to the Department are nitrogen species and pathogens in particular, but may also include other chemicals such as formaldehyde due to varying materials and strategies associated with septic-tank use. **NMED Exh. 1, pgs. 6-7.**

#### **B. Geology and Hydrology of the Site**

6. The facility is located on the Costilla Plains between the Taos Plateau and the Sangre de Cristo Mountains. In this area, groundwater is typically found in the alluvial sediments, which consist of deposits from the Holocene, early Quaternary and late Tertiary Ages known, collectively, as the Santa Fe Group. That Group, in turn, is interbedded with clay deposits and volcanic rocks such as servilleta basalt. **NMED Exh. 1, p. 6.**
7. The facility is also within the Los Cordovas Fault Zone, which has a north-south orientation. There is fracturing of bedrock and, in general, the fractures are not cemented. **NMED Exh. 1, p. 6, referencing NMED Exhs. 3, 4 and 5.**
8. Based on a well located one mile away, the New Mexico State Engineer (OSE) recorded water depth at approximately 500 feet. Records are insufficient regarding perched groundwater. **NMED Exh. 1, p. 6.**
9. The OSE well log for the Waste Management of New Mexico well profiled 102 feet of brown gravel and clay from eight to 110 feet below surface. The Mark D. Miller well log profiled 89 feet of clay and gravel from 10 to 99 feet below surface. **Exh. Snyder 1, part 2.**

10. The 1999 Shomaker Report estimated nitrogen migration below the Applicant's facility at 15-30 feet after 12 years of operation. AR Doc. 1.
11. Modeling in the 2000 Duke Engineering Report predicts said migration of nitrogen contaminants below the facility to have reached depths of at least 70 feet after 32 years of operation. AR Doc. 2; NMED Exh. 1, pg. 6.
12. Until Applicant's environmental consultant performed a site investigation in October of 2019, no follow-up studies had been performed at the facility regarding vertical migration of contaminants since the Shomaker/Duke reports. NMED Exh. 1, p. 7.
13. EA Engineering describes the 2019 investigation as "limited." Exh. Snyder 1, p. 1. Near-surface gravels prevented air-rotary drilling beyond 35 feet below ground surface. Three grab samples and one split-spoon sample were obtained. Exh. Snyder 1, part 4.

#### C. Regulatory History of the Permit

14. On February 4, 1987, Mr. Steve Rael submitted a discharge permit application for the S&R Septic septage disposal facility.
15. On April 7, 1987, NMED issued discharge permit DP-465 to Mr. Rael authorizing the discharge of 12,000 gallons per day (gpd) of septage into shallow ponds at the facility.
16. On July 25, 1990, NMED approved a modification to DP-465 increasing the allowable discharge volume to 20,000 gpd.
17. On June 10, 1992, NMED approved the renewal of DP-465.
18. On July 28, 1999, NMED approved the modification and renewal of DP-465, which decreased the allowable discharge volume to 10,000 gpd and changed the operational plan from shallow ponds to twelve shallow disposal cells.

19. On May 14, 2001, NMED required Mr. Rael to modify DP-465 to install additional fencing around the perimeter of the facility.
20. On September 12, 2001, Dr. William Mansker, on behalf of Mr. and Mrs. Rael, submitted a request and application for renewal of DP-465.
21. On October 18, 2001, NMED deemed Mr. Rael's application administratively complete in accordance with 20.6.2.3108.A NMAC.
22. Following public notice of the proposed discharge permit renewal, NMED received a number of letters from members of the community, including requests for a public hearing from Doug West of the Stagecoach Neighborhood Association, Wayne Ludvigson of the Hondo Mesa Community Association, Roger C. Sanders of the Council of Neighborhood Associations, Carol Richman, and Alex Kurtz.
23. On December 6, 2001, the Secretary of NMED determined that a public hearing would be held regarding the proposed renewal of DP-465 because of significant public interest.
24. On February 21, 2002 and March 22, 2002, NMED held meetings with Mr. and Mrs. Rael to discuss the concerns of NMED and the public pertaining to the facility's proposed method of disposal. At those meetings, NMED requested Mr. and Mrs. Rael to submit additional information and a revision to the permit renewal application.
25. On April 12, 2002, Dr. Mansker, on behalf of S&R Septic, submitted an amended permit renewal application to NMED.
26. On July 17, 2002, NMED entered the draft discharge permit renewal into the administrative record.

27. On July 19, 2002, NMED received a letter from Dr. Mansker on behalf of S&R Septic stipulating to all conditions contained in the draft discharge permit renewal dated July 17, 2002.
28. On October 8, 2002, following public notice, NMED held a public hearing regarding the renewal of DP-465. During the hearing, NMED, the Permittee and ten members of the public provide testimony. On April 30, 2003, NMED issued a final order approving the permit with additional conditions based on the hearing record.
29. On May 22, 2003, the renewal permit was issued by the GWQB with conditions.
30. On March 1, 2005, a joint NMED and U.S. EPA inspection found further operational deficiencies. The U.S. EPA proposed a \$32,500 penalty, which was reduced in a consent agreement to \$1,800 on May 2, 2007.
31. Between August 10, 2005 and January 25, 2008, NMED received five complaints about the facility. NMED inspected the facility once in response to a complaint and three times as routine inspections.
32. On April 11, 2008, grease trap and carwash grit waste was de-authorized by NMED, which required the facility to discontinue accepting these types of wastes for onsite disposal.
33. Between May 16, 2008 and August 31, 2012, NMED received multiple renewal applications and application amendments from the permittee. During this time NMED also received complaints, objections, and comments from many members of the public and from the permittee.
34. On October 29, 2012, NMED issued a response to comments and a revised draft permit with additional conditions and revisions.

35. Between November 13 and November 28, 2012, NMED received additional objections and complaints from members of the public on the revised draft of the renewal permit.
36. On December 27, 2012, NMED issued a revised renewal permit.
37. On December 27, 2017, the 2012 discharge permit expired without the submission of an application for renewal.
38. On December 28, 2017, NMED inspected the facility, informed the permittee of the expired permit term, and provided copies of the application form. The inspection revealed deficiencies with the signage at the front gate, which was supposed to provide emergency contact information and warn against unauthorized entry; and signage within the facility, which was supposed to facilitate a rotational disposal schedule among the cells, as required by the permit. Additionally, the permittee was informed that he had failed to submit monitoring reports for the previous three years, and had not constructed the splash pads required by the 2012 renewal permit.
39. On February 22, 2018, NMED received the renewal application for the expired discharge permit, DP-465. **AR Doc 4.**
40. On May 15, 2018, the application was deemed administratively complete and public notice instructions were provided to the Applicant.
41. Pursuant to 20.6.2.3108(A) NMAC, Applicant undertook the initial public-notice, making its renewal application known, on June 22, 2018. **AR Doc. 10.**
42. On June 22, 2018, NMED fulfilled the department's first public notice responsibilities 20.6.2.3108.A NMAC

43. On September 24, 2018, the Applicant provided the required affidavit of completion and proof of first public notice completion. 20.6.2.3108.C NMAC
44. On August 27, 2018, having failed to achieve voluntary compliance following the December 28, 2017 inspection, NMED issued a Notice of Non-Compliance (NONC) to the permittee for the signs, missing monitoring reports, and lack of splash pads. The permittee completed construction of the splash pads, and submitted photo documentation and the missing monitoring reports by October 25, 2018.
45. On September 27, 2018, the Bureau received a report from the NMED Environmental Health Bureau field office that a NMED field technician witnessed an S&R Septic pumper truck pumping grease trap waste from a restaurant in Taos. NMED inspectors attempted to perform an inspection at the facility the next day (September 28, 2018). The permittee refused to allow the inspectors entry to the facility. Inspectors returned on Monday, October 1, 2018, and observed Cell 13 covered in a thin layer of fresh dirt. The inspectors collected soil samples from the cell and tested for Total Petroleum Hydrocarbons (TPH) and total recoverable fats, oils and grease (FOG). Results from the samples showed elevated levels of both TPH and FOG. Samples were collected from two other septage disposal facilities and compared to the results from Cell 13. The comparison showed that levels of TPH and FOG in Cell 13 were 100 times greater than septage disposal cells at other facilities. Inspectors requested all pumping records and disposal manifests for the reported time frame. The permittee provided the requested manifests, which did not include any documentation for the reported pumping of the restaurant grease trap.

46. On November 14, 2018, the Bureau received and responded in the negative to a request for temporary closure of the facility from the Stagecoach Neighborhood Association.
47. On April 29, 2019, the Bureau provided the Applicant with the draft permit prior to the second public notice and comment period. 20.6.2.3108.J NMAC.
48. On May 24, 2019, public notice was published in the Taos News and Albuquerque Journal and mailed out to all required interested parties. 20.6.2.3108.J NMAC. **AR Docs 38, 39.**
49. Between May 24 and June 24, 2019, the second public notice comment period, multiple concerned members of the public contacted Mr. Herman to voice their objections to the facility and to permit renewal. The Bureau received ten requests for a hearing, from individual residents, a neighborhood association, a local water district and multiple adjacent business owners. The Bureau also received objections and complaints that did not include a request for hearing from one resident, a retired petroleum geologist, and an adjacent business owner. **AR Docs. 40-53.**
50. The Public Involvement Plan was duly revised, **AR Doc. 54**, and notice of a public hearing – in both English and Spanish – was published in the Albuquerque Journal and Santa Fe New Mexican on or before September 15, 2019. **AR Docs. 55, 56.**

#### **D. The Hearing**

51. A hearing was held October 16, 2019, at the Taos County Commission Chambers beginning at 5:30 p.m. Exceeding the available time, it was continued on October 21, 2019, at the Taos Civic Plaza and Convention Center beginning at 10 a.m. When the

initial evening of testimony ran long, notice of a continuance was sent to all interested parties informing them of the new day, time and location.

52. In addition to the Applicant and the Department, three others made entries of appearance and/or submitted notices to present technical information. These were the El Prado Water and Sanitation District, Jerome Hansen and Dion Smith.
53. In total, 14 people testified or delivered verbal comment. The Applicant presented three witnesses – Jay Snyder, Jim McCann and Steve Rael – and the Department presented one: Jason Herman. Of the public comments, eight generally opposed the permit or sought additional investigation before issuance while two generally supported the permit.
54. Jay Snyder has bachelor's degrees in geology and meteorology, and master's degrees in geophysics and geological engineering. Mr. Snyder is a licensed professional engineer in New Mexico, a licensed geologist in 14 states, certified as a hydrogeologist by the state of California and as a professional hydrologist by the American Institute of Hydrology. Mr. Snyder has done contaminant study for 30 years, site investigations and characterization, all the way to cleanup and closure. Mr. Snyder has been qualified as an expert witness with the Water Quality Control Commission and in NMED public hearings. Mr. Snyder works for EPA Regions 6 and 9, and has worked directly for the state of New Mexico, responsible parties, and permittees. Mr. Snyder was accepted as an expert witness in geology, hydrogeology and geologic engineering. **Testimony Vol. 1, pgs. 88-89, 97.**

55. Jim McCann has been licensed as a well driller in New Mexico for at least four years and has drilled hundreds of wells in the state, including wells near the Applicant's site. He is also licensed in other states. **Testimony Vol. 1, pg. 165.**
56. Steve Rael is the owner of Applicant S & R Septic.
57. Jason Herman is the domestic waste team leader for the Bureau's Pollution Prevention Section, has worked for the Bureau for two years, and has written thirty ground water permits. He worked in ground water treatment and regulatory industries in Florida for more than eight years. Mr. Herman has a bachelor's degree in environmental planning and design, a master's degree in community regional planning, and a second master's degree in water resources management. **Testimony Vol. 2, pgs. 314-316.**
58. Jerome Hansen, a trained geologist and member of the Stagecoach Neighborhood Association, made extensive use of Google-Earth slides depicting the facility over 2-3 decades. He expressed concern about permeability of the underlying rock and potential contamination of groundwater. **Testimony Vol. 1, pg. 20.**
59. Phillip Tafoya testified to the value of the service provided by the Applicant and asked how the hearing was initiated. The hearing officer provided a response to his question. **Testimony Vol. 1, pg. 178.** Tafoya favored renewal of the permit.
60. Mary Lane Leslie spoke on behalf of the Stagecoach Neighborhood Association. She testified that other septage haulers in the area utilize the municipal wastewater-treatment plant for disposal rather than exposed cells. She asserted that pathogens in the septage are dangerous to human health and asked that permit conditions address vectors and potential airborne contaminants. She worried that the

Department lacks adequate resources to oversee and monitor the facility based on historical violations of the permit. She ultimately asked that the Applicant be required to use the wastewater-treatment plant. **Testimony Vol. I, pgs. 183-197.**

61. Norbert Mondragon disfavored renewal of the permit due in part to reservations about the Department's lack of manpower and reliance on self-reporting by the facility. He also expressed frustration with the narrow focus on groundwater when he considers airborne pathogens similarly concerning. **Testimony Vol. I, pgs. 204-06.**
62. Dion Smith, a member of the Stagecoach Hills Neighborhood Association, also objected to airborne contaminants as a potential cause of disease. He has received complaints about odors and conducted research on the health effects of breathing sewage fumes. He listed hydrogen sulfide, carbon dioxide, methane and ammonia as gases typically associated with septage. He expressed concern about the Department's lack of manpower for enforcement and encouraged disposal at the wastewater-treatment plant. **Testimony Vol. I, pgs. 267-273.**
63. John Painter spoke on behalf of the El Prado Water and Sanitation District, located north of Taos. He holds a level-4 certification and operator's license from the Department's drinking water bureau. The District relies on several production wells, including one near the Applicant's facility. While Painter did not think it is currently impacted, he expressed concern about the future and stressed the need for additional monitoring. He encouraged drilling at least one borehole at the facility and ensuring that the Applicant does not dispose of fats/oils/grease or hydrocarbons at the facility. **Testimony Vol. II, pg. 303-304.**

64. Lois Rodin discussed the functioning of sewage-cell systems and what distinguishes an effective one from a poor one. She felt the Applicant could dispose at the wastewater-treatment plant. **Testimony Vol. II, pgs. 311-312.**
65. Cherylin Atcitty is the environmental program manager for the Taos Pueblo Environmental Office. She expressed concern that renewal of the permit could harm subsurface water and, by extension, wildlife, such as bison herds. **Testimony Vol. II, pg. 313.**
66. Douglas Daubert read a statement from prior witness Jerome Hansen, who could not appear for the second day of proceedings. Through Daubert, Hansen stated that the Applicant's counsel failed to serve him with a significant amount of information, which resulted in his being caught off guard during cross-examination. **Testimony Vol. II, pg. 346.**
67. Daubert was uncomfortable with a proposed reduction in boreholes from five to one and did not think it could adequately test for off-site seepage. He also emphasized the Applicant's gaps in monitoring reports, encouraged disposal at the wastewater-treatment plant, and called for denial of the permit. He also submitted a newspaper article about Applicant's operations from 1995 that drew an objection on the grounds of hearsay. **Testimony Vol. II, pg. 348-351.**
68. Bruce Popham, who worked closely with the Florida environment department, related his surprise at discovering open-pit dumping upon his relocation to Taos. He considers the facility a risk to the well fields. **Testimony Vol. II, pg. 354.**

### E. Negotiated Permit Conditions

69. On October 21, 2019, just prior to commencing the continued hearing, the Applicant, the Bureau, and El Prado verbally negotiated modifications to Conditions 21 and 22 of the discharge permit, relating to a geohydrological evaluation beneath the facility. Testimony Vol. II, pgs. 319-323, and Attachment 1.
70. The evaluation required in the draft permit included a minimum of one borehole going to the basalt layer, at least one moisture monitoring device, a monitoring well and a second borehole in the event a saturated zone above the basalt was identified, several representative soil or lithologic samples, chemical analysis, and potentially a vadose-zone monitoring system. Id.
71. The negotiated permit conditions did not include any provision for financial assurance to guarantee that the work would be carried out as required, notwithstanding the significant expense and the permittee's poor compliance history.

### DISCUSSION

The Hearing Officer noted that Applicant's history of permit violations and its failure to timely apply for permit renewal were "certainly troubling." Having reviewed that history in full, and having deliberated on the nature and persistence of those violations, I believe they require the denial of this permit application under the New Mexico Water Quality Act, NMSA 1978, § 74-6-5(E).

Section E provides that "the constituent agency shall deny any application for a permit.... if: .....(4) the applicant has, within the ten years immediately preceding the date of submission of the permit application: ..... (b) refused or failed to disclose any

information required under the Water Quality Act; ..... [or] (e) exhibited a history of willful disregard for environmental laws of any state .....

Setting aside the 2005 violations found in the joint inspection by NMED and the U.S. EPA as outside the ten-year timeframe preceding the most recent permit application, and setting aside the newspaper article from October 1995 as both out of time and hearsay, the Applicant's recent history reflects multiple refusals and failures to disclose required information and willful disregard for the terms of its permit and the New Mexico Groundwater Regulations.

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First, although its 2012 discharge permit expired on December 27, 2017, the Applicant continued to operate the facility, thereby discharging without a permit in violation of the Water Quality Act and Regulations. Second, a December 28, 2017 inspection revealed deficiencies with signage both at the front gate and within the facility, in violation of the permit. Third, Applicant failed to submit monitoring reports for three years, in violation of the permit, law, and regulation. Fourth, as of December 27, 2017, Applicant had not constructed splash pads required by the terms of the 2012 discharge permit. Fifth, Applicant had still not come into voluntary compliance eight months later, on August 27, 2018 as to splash pads, monitoring reports, or signage, and the Bureau was compelled to issue a subsequent notice of non-compliance. Sixth, on September 27, 2018, a field technician witnessed an S&R Septic pumper truck pumping grease trap waste from a restaurant in Taos, in violation of its permit limitations. Seventh, when the inspectors attempted to perform an inspection at the facility the next day, the permittee refused to allow the inspectors entry to the facility. Eighth, when the inspectors did enter and collect soil samples, Total Petroleum Hydrocarbons (TPH) and total recoverable fats, oils and

grease (FOG) levels were 100 times greater than septage disposal cells at other facilities.

Ninth, when inspectors requested all pumping records and disposal manifests for the ~~relevant~~ relevant dates, the Applicant provided manifests which did not include any documentation for the reported grease trap pumping location.

The Groundwater Regulations and the discharge permits issued by the Bureau are designed to protect public health and the environment. When a permittee violates those provisions, it puts public health and the environment at risk. Applicant's refusal to allow the inspectors to enter the facility, its failure to submit monitoring reports for three years, and its failure to document by manifest the grease trap pumping location were violations of the Water Quality Act, the Regulations, and the permit, and undermined the Bureau's ability to provide regulatory oversight for a discharging facility.

With limited enforcement staff, the Department must rely upon permittees to honor the terms of their permits, and to provide the required records and site access. Where a permittee has shown an unwillingness to do so, future permits shall be denied.

Finally, in this matter, had Applicant's poor compliance history not been the basis for the decision to deny the permit application, approval would not have been granted without including an appropriate amount of financial assurance to guarantee that the necessary work would have been performed. As the Bureau notes, after 33 years of operation, and a projection that contaminants would have reached at least 70 feet below the surface by this time, it would be critical to understand the depth and concentration of all facility-related contaminants, and to know whether there are any saturated zones above the basalt, or lithological zones capable of creating a perched aquifer.

### CONCLUSIONS OF LAW

1. The Water Quality Control Commission (WQCC) "may require persons to obtain from a constituent agency designated by the commission a permit for the discharge of any water contaminant." NMSA 1978, § 74-6-5(A).
2. The WQCC has adopted regulations implementing the Water Quality Act at 20.6.2 NMAC.
3. The regulations at 20.6.2.3104 NMAC provide that "no person shall cause or allow effluent or leachate to discharge so that it may move directly or indirectly into ground water unless he is discharging pursuant to a discharge permit issued by the secretary."
4. Applicant S & R Septic is a "person" within the meaning of the regulations. 20.6.2.7(JJ) NMAC.
5. The Department is an agency of the executive branch of the state of New Mexico, created by statute. NMSA 1978, § 9-7A-6(B)(3) (1991).
6. The Secretary has jurisdiction over the subject matter of the Application and the parties to this proceeding, and has authority to issue or deny ground water discharge permits based upon information submitted in a permit application and relevant information received during the public hearing. NMSA 1978, §74-6-5, 20.6.2.3109 NMAC.
7. Activities described by S & R Septic in the Application require a groundwater discharge permit to be evaluated by the Department. 20.6.2.3104 and 20.6.2.3018 NMAC.

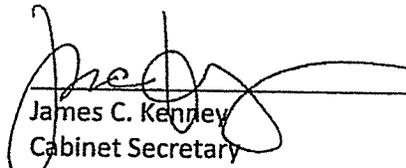
8. The Water Quality Act provides that a constituent agency shall "either grant the permit, grant the permit subject to conditions, or deny the permit." NMSA 1978, § 74-6-5(D).
9. The Department provided the public, including the Applicant, with notice of the proposed discharge permit in accordance with the regulations at section 20.6.2.3108(H) NMAC.
10. The Department provided the public, including the Applicant, an opportunity to comment on the proposed discharge permit in accordance with the regulations at 20.6.2.3108(K) NMAC.
11. The Department provided the public, including the Applicant, with notice of the public hearing in accordance with the regulations at 20.6.2.3110 and 20.1.4.200 NMAC.
12. A public hearing was held on the proposed discharge permit in accordance with the regulations at 20.6.2.3110 and 20.1.4 NMAC.
13. The Applicant bears the burden of proving that a permit should be issued and not denied. Paragraph (1) of Subsection A of 20.1.4.400 NMAC.
14. In administrative hearings under the Water Quality Act, the standard of proof is a preponderance of the evidence. Paragraph (3) of Subsection A of 20.1.4.400 NMAC.
15. The Act sets forth the grounds for which the Secretary shall deny an application for a discharge permit. NMSA 1978, § 74-6-5(E).
16. Substantial evidence is present in the administrative record and was presented at the public hearing that the Application should be denied under NMSA 1978, §74-6-5(E)(4)(b) and (e).

17.

The Applicant's recent history reflects multiple refusals and failures to disclose required information under the New Mexico Water Quality Act, and willful disregard for the Act, the terms of its permit and the New Mexico Groundwater Regulations.

IT IS THEREFORE ORDERED:

1. The time for the Hearing Officer to submit her report was extended from January 2 to January 3, 2020.
2. The application for the discharge permit is denied.
3. The permittee shall begin closure of the facility consistent with the provisions of discharge permit DP-465 and the provisions of the Groundwater Regulations.

  
James C. Kenney  
Cabinet Secretary  
New Mexico Environment Department

NOTICE OF RIGHT TO REVIEW

Any person who participated in this permitting action and who is adversely affected by the action may file a petition for review by the Water Quality Control Commission, c/o Cody Barnes, 1190 St. Francis Drive, Suite 2100 S, Santa Fe, New Mexico 87505. The petition shall be made in writing to the Commission within thirty days from the date notice is given of this action.

Certificate of Service

I hereby certify that on February 19, 2020 a copy of the foregoing Final Order was emailed to the persons listed below. A copy can be mailed via U.S. first-class mail upon request.

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1 Groundwater Quality Bureau, but also something that's also  
 2 ultimately beneficial to the air quality issues that are  
 3 associated with the discharge.  
 4 Q. My other question is, I know that you have had  
 5 staff shortage, and there has been commentary in the past  
 6 that you were not allowed to deny a permit or an extension  
 7 of a permit.  
 8 Is that true?  
 9 A. There's very specific provisions that are set  
 10 out in our regulations for denial of a permit.  
 11 For me to deny a permit is for me to say that  
 12 discharge -- this discharge cannot be done in a way that  
 13 is protective of groundwater.  
 14 My Cabinet Secretary has a completely different  
 15 set of -- of rules and requirements that govern his  
 16 ability to deny a permit.  
 17 Q. Which is?  
 18 A. I don't know them by heart, but I could look  
 19 them up and -- and read them to you, but it's going to be  
 20 mind numbing to listen to if you want --  
 21 Q. Well, the short story.  
 22 A. The short story? I have -- I have them right  
 23 now.  
 24 Essentially, I mean, it comes down to he's  
 25 determined that human health cannot be protected in

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1 accordance with how human health is defined -- defined in  
 2 the 20.6.2 definitions, and that if it can't be proven  
 3 that groundwater is being protected, then he has to deny  
 4 it.  
 5 Q. So he would deny if -- if compliance and there  
 6 were problems with protocols?  
 7 A. So the Water -- Water Quality Act, which is the  
 8 statute that authorizes our regulations, it does have a  
 9 requirement that no one can hold a permit -- an  
 10 environmental permit or a discharge permit -- that has  
 11 shown wanton disregard for environmental regulation --  
 12 Q. Uh-huh.  
 13 A. -- but the level of noncompliance that's been  
 14 seen at this facility is generally historically -- I can  
 15 speak only historically, not for anything else -- has not  
 16 risen to that level.  
 17 MR. SMITH: Okay. I would like it to be on the  
 18 record that I think it's important, considering those  
 19 threats, that the State -- your agency -- look into ways  
 20 of implementing better protection or guarding against  
 21 those threats and the ability to deny a permit when there  
 22 is, you know, disregard -- blatant disregard -- in the  
 23 future.  
 24 I think as an agency that your vision is to  
 25 protect environment and human health, so in order to have

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1 teeth and power to do so, you need to be able to have  
 2 consequences that are appropriate.  
 3 THE WITNESS: Yes, sir.  
 4 MR. SMITH: So I would like that on the record.  
 5 Thank you.  
 6 HEARING OFFICER ORTH: All right. Thank you,  
 7 Mr. Smith.  
 8 Mr. Daubert?  
 9 CROSS-EXAMINATION  
 10 BY MR. DAUBERT:  
 11 Q. Mr. Herman, during your tenure at NMED, how many  
 12 sites that are unlined and opened pits have you guys  
 13 approved to be opened?  
 14 A. There's -- by my estimation or by my --  
 15 Q. I'm talking new pits, new -- new --  
 16 A. New facility?  
 17 Q. -- new facilities that have opened.  
 18 A. So the -- there's one in the county with a Berry  
 19 Septage.  
 20 Q. One?  
 21 A. Yes.  
 22 Q. Okay. Do you know when that was approved to be  
 23 opened?  
 24 A. Yeah. It just was issued its permit last month.  
 25 Q. Last month. Is it standard or is this a common

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1 practice to be opening new septic lagoons or pits or cells  
 2 or whatever term we'd like to use?  
 3 A. So out of those previous permits that have been  
 4 issued in the recent term -- within the last five years --  
 5 many of them are evaporative systems that are  
 6 synthetically-lined lagoon systems.  
 7 Berry Septage is an exception, I would say, to  
 8 the other five that were issued.  
 9 There's another facility that is in the process  
 10 of getting a permit that's on the plateau -- I think in  
 11 the San Ysidro area -- that will also be doing open cells.  
 12 The permitting process for these facilities is  
 13 weighted in a couple of different ways.  
 14 In the southeast portions of the state, we have  
 15 a lot of illegal dumping occurring and a high need for  
 16 facilities for disposal of septage, so we've -- we've been  
 17 pushing for additional facilities to accept that waste  
 18 down there.  
 19 Q. So in your opinion, most of the -- would it be  
 20 accurate to say that most of the -- those new permitted  
 21 facilities are based on not having the ability or not  
 22 having a treatment facility plant accessible?  
 23 A. That would be one of the factors that definitely  
 24 feeds into it. There's -- there's limitations to that  
 25 ability to evaluate where people are getting their septic

