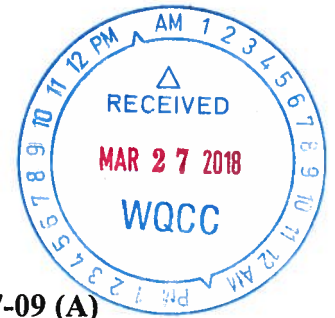


**STATE OF NEW MEXICO
WATER QUALITY CONTROL COMMISSION**

**CHAMPS INVESTMENTS
DBA LA VISTA MOBILE HOME PARK
GWQB 17-21 (CO)**

WQCC 17-09 (A)



**HEARING COMPILATION INCLUDING
FINDINGS OF FACTS AND PROPOSED FORM OF ORDER**

On February 12, 2018, the appointed Hearing Officer conducted a public hearing pursuant to 20.1.3 NMAC and the Water Quality Act NMSA 1978 at Mabry Hall, Jerry Apodaca Education Building, 300 Don Gaspar, Santa Fe, 87501. Jason Wallace, Office of General Counsel, appeared on behalf of the Ground Water Quality Bureau of the New Mexico Environment Department (“Department”). Moses Anserlian, President, and Alice Apelian, CEO, (“Champs Investments III, LLC dba as La Vista Mobile Home Park”) hereafter (“Champs”).

Champs appealed a compliance order and requested a hearing. The Hearing Officer in preparation for the compilation reviewed the record proper, transcript, exhibits, post hearing submission of exhibits, and the proposed findings of facts and conclusions of law submitted by the department. The appellant, Champs, presented testimony by Moses Anserlian and submitted exhibits at the hearing and post hearing. The Department presented testimony by Michelle Hunter, Bureau Chief of the Ground Water Quality Bureau. The Department requests that the Commission approve their compliance order finding. Champs presented it evidence at the hearing, they did not prepare finding of facts or conclusions of law or an Order with a requested outcome.

The public hearing was scheduled during the regularly scheduled WQCC meeting. The hearing commenced at 10:55 a.m. and concluded at 1:53 p.m. NMED submitted proposed findings of fact and conclusions of law, which the Hearing Officer included in relevant part as set forth herein.

FINDINGS OF FACT

1. NMED is an agency of the executive branch within the government of the State of New Mexico.
2. NMED is a constituent agency of the New Mexico Water Quality Control Commission (“WQCC”).
3. La Vista Del Canyon Mobile Home Park (the “MHP”) is located at 711 S. Canyon Road, Alamogordo, New Mexico 88310. Hrg. Trans. p.11, 23-24.
4. The depth to ground water beneath the MHP is approximately two-hundred and fifty (250) feet. Hrg. Trans. p.83, 17-20.
5. Respondents, Moses Anserlian, Alice Apelian, and Champs Investments III, LLC are the owners and operators of the MHP, which contains approximately twenty-five (25) mobile home spaces/connections used for residential purposes. Hrg. Trans. p.11, 18-20; p. 12, 7-9.
6. On June 12, 2012, NMED sent Respondents a letter stating that Respondents were discharging wastewater from the MHP without a discharge permit in violation of 20.6.2.3104 NMAC, that Respondents were required to apply for and obtain a valid discharge permit under 20.6.2.3.3106 NMAC, and that Respondents could appeal the determination that a discharge permit was required within 30 days of receipt of the letter under 20.6.2.3112.B NMAC.
7. Respondents failed to appeal the determination within 30 days, they never obtained a valid discharge permit, and they continued to discharge. *See* NMED Exhibit. 3.
8. On October 15, 2015, NMED received a complaint from an owner of property located adjacent to the MHP regarding a horrible smell emanating from the sewage, that it was breeding mosquitos, and that the sewage discharge on the ground had been an on-going concern for two years prior to that. Hrg. Trans. pp.29-30, 23-3; p.39, 11-17; p12, 16-23; p.13, 6-10.

9. Sewage contains pathogens and total Kjeldahl nitrogen, consisting of ammonia nitrogen and organic nitrogen. ACO p.12, para. 48.
10. NMED conducted inspections of the MHP on the 16th and 26th of October 2015, and issued Respondents a Notice of Violation (“NOV”), providing that Respondents did not have a groundwater discharge permit, and that waste water was observed surfacing and pooling on the property as well as the neighboring property. The NOV also stated that the tanks had been pumped at least twice, but that sewage continued to surface. *See* NMED Exhibit. 4.
11. Respondents did not orally notify the Chief of the GWQB within twenty-four (24) hours of learning of the sewage discharges. *See* NMED Exhibits 3, 4, and 5.
12. Respondents did not submit written notification to the Department within one week of the sewage discharges. *Id.*
13. On October 27, 2015, Respondents told NMED that they were in discussions with the City of Alamogordo to connect the MHP to the City’s sewer system, but, as of the date of this filing, the MHP remains unconnected to the City, and Respondents have not: 1) received a loan to pay for the connection; 2) applied to the City for a connection; 3) received *proper* easements; or 4) contracted with anyone to perform the work. Hrg. Trans. pp.60-65.
14. On February 8, 2016, NMED issued a second NOV to Respondents for discharging without a discharge permit in violation of 20.6.2.3104 NMAC. The NOV required Respondents to complete and submit a discharge permit application to NMED by March 3, 2016. NMED Exhibit 5.
15. Respondents did not file a corrective action report with the Department within fifteen (15) days after learning of the discharge. *Id.*
16. Respondents failed to contact NMED by March 3, 2016. Hrg. Trans. p.18, 15-17.

17. Respondents did not take action to contain and remove or otherwise mitigate the damage caused by the sewage discharges as soon as possible after learning of the discharges. *See* NMED Exhibits 3, 4, and 5.
18. On August 1, 2016, Respondents submitted an incomplete application to NMED, and on August 5, 2016, NMED requested that Respondents complete the application. Hrg. Trans. pp.19-26.
19. Respondents never completed the application. Hrg. Trans. *Id.*
20. On September 27, 2017, NMED issued an Administrative Compliance Order (“ACO”) to Respondents for: 1) discharging without a permit in violation of 20.6.2.3104 NMAC; 2) failure to obtain a discharge permit in violation of 20.6.2.3106 and 20.6.2.3114 NMAC; 3) failure to report and notify NMED of discharges in violation of 20.6.2.1203.A(1) & (2) NMAC; and 4) failure to take corrective action of the discharges in violation of 20.6.2.1203.A(5) NMAC. *See* ACO WQCC 17-09(A), pp.15-16.
21. The ACO assessed \$28,500.00 in civil penalties for the above-listed violations pursuant to the Ground Water Quality Bureau’s (“GWQB”) civil penalty policy. *Id.* at p.17.
22. On October 27, 2017, Respondents filed a letter requesting a hearing and the letter adhered to none of the specific Answer requirements under 20.1.3 NMAC. *See* Answer WQCC 17-09(A).
23. The hearing was scheduled and conducted on January 9, 2018 before the WQCC at approximately 10:55a.m. In the New Mexico Public Education Department, Mabry Hall, located at 300 Don Gaspar Avenue in Santa Fe, New Mexico. Hrg. Trans. p.1, 17-22.

CONCLUSIONS OF LAW

24. Pursuant to NMSA 1978, § 74-6-10(A)(1), NMED properly issued a compliance order requiring compliance and assessing a civil penalty, because NMED determined that Respondents violated and continue to violate the Regulations adopted pursuant to the WQA.
25. Respondents are a “person” as defined by the WQA, § 74-6-2(I), and the Regulations, 20.6.2.7.JJ NMAC.
26. Pathogens and total Kjeldahl nitrogen, consisting of ammonia nitrogen and organic nitrogen are water contaminants within the meaning of the Regulations, 20.6.2.7.AAA NMAC, and could create water pollution within the meaning of 20.6.2.7.CCC NMAC.
27. 20.6.2.3104 NMAC prohibits Respondents from discharging effluent or leachate directly or indirectly into ground water without a discharge permit issued by NMED, which Respondents have done, continuously, since at least 2012.
28. 20.6.2.3106.A NMAC required Respondents to submit a discharge plan to NMED for approval within 120 days of receipt of a written notice that a discharge permit is required, which Respondents failed to do.
29. 20.6.2.3106 NMAC provides the procedures by which Respondents should have submitted an application for a discharge permit, which Respondents failed to follow.
30. 20.6.2.3114.F and Table 2 NMAC require the MHP to pay a \$100.00 filing fee at the time of the submittal of the application to NMED.
31. 20.6.2.1203.A(1) & (2) NMAC required Respondents to, upon discharge of the sewage in such quantity as may, with reasonable probability, injure or be detrimental to human health, animal or plant life, or property, or unreasonably interfere with the public welfare of the use of property to: (a) orally notify the GWQB no later than 24 hours after learning of the discharge; (b)

submit written notification to the GWQB no later than one week; (c) take corrective action as soon as possible to contain and remove or mitigate the damage caused by the discharge; and (d) file a corrective action report with the GWQB no later than 15 days after learning of the discharge—all of which Respondents failed to do.

**REQUESTS FROM COMMISSIONERS FOR
SUBMISSION OF EXHIBITS POST HEARING**

The Commissioners had questions for the parties and requested additional information that would aid them in their deliberation process. The administrative record was left open accordingly, for two weeks, so parties could submit exhibits and records that were not readily available at the time of the Hearing. A subsequent conference call was scheduled with NMED and Champs to review the request for submission of documents and exhibits and to determine a timeline of submissions. The teleconference occurred on February 18, 2018, NMED appeared by phone and Champs did not call in. NMED gave permission for the Hearing Officer to discuss the submission of post hearing exhibits with Champs in the event they called in at a later time. Champs did contact the Office of Public Facilitation and the Hearing Officer reviewed the requested submission of post hearing exhibits so that both parties were given a filing deadline for their exhibits. Both Champs and NMED submitted their respective post hearing exhibits in a timely fashion. The last post hearing submission of exhibits was dated March 9, 2018.

The submission of the Post hearing exhibits prompted, limited motion practice, where NMED objected to the captions on Exhibits proposed by Champs, and Champs objected to the removal of the offending captions on the Exhibits Proposed by Champs. The Hearing Officer overruled the objection by NMED as the Captioning of Exhibits would be given whatever evidentiary weight the commission chose to assign to them. The Exhibits and supplemental information

requested by the Commissioners has been attached to this Hearing Officer Compilation, as Post Hearing Submissions.

**SUMMARY OF PROPOSED POST HEARING EXHIBITS
AS REQUESTED BY COMMISSIONERS**

Commissioner Payne: Nay

Commissioner Vigil: Nay

Commissioner Waters: Yea, water bill, Exhibit #9, water sampling conducted by NMED in vicinity from Groundwater bureau or the Drinking Water Bureau

Commissioner Dawson: Yea, documents related to both tanks from both testers, documents from the city sewage department, estimates from the City on the cost of connecting with the MHP, and an estimated time frame for when the project (if authorized) could be completed.

Chair Dominguez: Yea, any evidence from Champs bank that they are working with the city to extend sewer line to the MHP, and copy of price estimate.

Commissioner De Rose-Bamman: Yea, list of correspondence, seconded Commissioner Waters request to obtain any water fair testing, information on wells in the area based on a summary found on the State Engineer's report.

Commissioner Hutchinson: Yea, a written confirmation of the easements that have been created, points of diversion mentioned by Ms. Hunter as she referenced the State Engineers' water data site.

Commissioner Dunbar: Nay

Commissioner Borrego: Nay

FACTUAL ISSUES

In reviewing the transcript and record proper there appears to be a limited area of factual contention. Overall, Champs and NMED have been in communication regarding the MHP since

June of 2012. (TP 16). Two letters were sent to Champs one in June of 2012 and a subsequent letter in October 2015. (TP 16). Both parties were aware of the complaints triggered by third parties which prompted the request by NMED to have Champs complete a permit. (TP 13). The permit application process was very lengthy and the permit itself, once submitted, lacked the required information. (TP 19). NMED recommended that Champs hire an environmental consultant help them complete the permit. (TP 25). Multiple attempts were made to resolve the matter prior to issuing a compliance order violation. Based on a report by Jace Ensor, the Bureau recommended that the septic system be replaced, since it had failed. (TP 27). It is worth noting that NMED had prepared an extensive exhibit list prior to the hearing which is part of the administrative record. They focused on key documents during the hearing to keep the hearing within the allocated time slot. After the hearing, based on commission questions, both parties submitted post hearing exhibits.

Champs explained that when they purchased the MHP they were unaware that they needed a permit. (TP 48,49). According to Mr. Anserlian the city suffered from an economic downturn and did not extend city sewer to the park. (TP 41). Champs believed that they are not required to obtain a permit since the amount they discharge is not above the statutory cap of 5,000 gallons per day. (TP 14). Champs believes that NMED has miscalculated its bill based on the City of Alamogordo water system bills. (TP 35). NMED explains its calculation based on its view that the bill is in units. (TP 35). To determine gallons per unit a calculation needs to be performed. (TP 35). NMED estimates the average daily volume of 6000 gallons per day based on city record. (TP 24). Champs calculation and NMED's calculation of the are in dispute. NMED contends that the MHP is too small for the volume of waste generated and must obtain a permit. (TP 15).

Champs purchased the MHP park in 2009. (TP 38). They obtained a USDA loan and believed that the due diligence had been performed. (TP 38). The property was built in the 1950's. (TP 38). There are two sewer tanks each containing up to 6000 gallons. (TP 38). Champs states that the sewage spill in 2012 was the result of a clean out due to MHP tenants flushing diapers and clogging the system. (TP 39). A second spill occurred, but Champs testified that the leach field is working. The water in the septic tank goes down. (TP 39). They pump the sewer out twice a year. (TP 39). Champs indicates that the calculation of 5,000 gallons is impossible because the water bill for the park is \$700 and they have a separate well to water the gardens. (TP 40).

Mr. Anserlian, is a licensed plumber in California, states that the septic tank is in good shape, but to demonstrate that, he would need to expose the area all around it. (TP 42). Champs major objection to repairing or rebuilding the current system is that it is cost prohibitive. He signed a contract with General Hydronics to sign on to the sewer. (TP 42, 43). NMED objected to the admission of the "contract" as they claimed it was indeterminate. (TP 46). The hearing officer admitted the document and will leave the Commission to determine its weight and validity. The administrative record contains documents related to the penalty that NMED assessed. Lastly during the hearing testimony was taken regarding the bamboo grove ("bamboo") near one of the leach fields. (TP 50). The evidence presented about the bamboo may or may not indicate actual notice of raw sewage and attempts to ameliorate the problem with plant life. (TP 49). The bamboo also made it difficult for inspectors to get a good visual on the MHP. The bamboo height ranged from 4 feet to 12 feet. (TP 50). The parties marked the exhibit and oriented the MHP in relation to its neighbors and potential areas to sign on to city sewer if when it could be arranged. (Defendant's Exhibit A marked at hearing).

The Commission needs to determine the amount of waste generated and if it triggers the requirement for a permit or if the failure of the septic system requires replacement. NMED's contention is that the MHP is discharging without a domestic wastewater permit and that the septic tank leach field has failed. (TP 12). The parties dispute the amount of waste generated and the necessity for a permit.

If the Commission determines that a violation occurred, it is up to the Commission to uphold the civil penalty assessed by NMED or fashion a new resolution based on the totality of the evidence. The Commission may wish to review the penalty determination in the administrative record which was admitted as ACO WQCC 17-09 (A) to determine if the assessment should be upheld.

SUMMARY OF EVIDENCE PRESENTED AND NEXT STEPS

The Hearing Officer is not acting in a fact-finding capacity and has not issued a conclusion or recommended decision pursuant to the request of the Commission at the Hearing. The Hearing Officer has included the proposed findings of facts and conclusions of law as submitted by NMED and the proposed form of order as it adequately summarizes the history of the compliance action and regulatory standards. The Commission is free to adopt, reject, or revise the proposed finding of facts and form of order as they choose. Champs did not submit proposed findings of facts and conclusion of law and a proposed form of Order. The standard to apply in compliance order hearings is a preponderance of evidence pursuant to 20.1.3.19 J NMAC.

J. At a compliance order hearing, the department has the burden of going forward with the evidence and of proving by a preponderance of the evidence that the violation occurred, and that the proposed civil penalty, revocation, or suspension, as the case may be, is appropriate. Following

the establishment of a prima facie case, the respondent shall have the burden of going forward with any adverse evidence or defense to the allegations.

In addition, pursuant to Commission's direction and the verbal order issued at the Hearing, the Commission requested that the Hearing Officer compile the information tendered at the hearing but not issue an order or a recommend decision including a review of the penalty assessment that was issued under the administrative compliance order. This differs from the procedural steps listed under 20.1.3.21 Sections C, D, E, and F, NMAC. Therefore, comment on section (2) will not issue.

(1) Filing and contents: Unless otherwise ordered by the commission, the hearing officer shall issue a recommended decision within 30 days after the deadline for filing of proposed findings and conclusions under Subsection B of 20.1.3.21 NMAC. The recommended decision shall contain the hearing officer's:

- (a) findings of fact;
- (b) conclusions regarding all material issues of law or discretion, as well as reasons therefor;
- (c) a proposed final order; and
- (d) for compliance order hearings, if the hearing officer determines that a violation has

occurred, the hearing officer shall review the proposed civil penalty to determine if the department acted within its discretion in setting the penalty amount; if the hearing officer decides to recommend a penalty different in amount or nature from the department's proposed penalty, the hearing officer shall set forth the reasons for the change.

(2) Comment on recommended decision: At the commission's discretion, any party may file, within 15 days after service of the recommended decision, comments regarding the recommended decision, including arguments to adopt, reject or modify the recommended decision.

(3) Argument before the commission: The commission may, upon request of a party or its own initiative, allow oral argument on the recommended decision. If oral argument is allowed, the commission shall specify the time and place for such oral argument after giving due consideration to the convenience of the parties and the need for expeditious resolution of the proceeding.

D. Final order by commission: The commission shall reach a final decision at a public meeting, but may deliberate on the decision in closed session in accordance with the Open Meetings Act. The commission may circulate a draft order during closed session so long as no final decision is reached during closed session. After reaching a decision, the commission shall direct a member, its counsel or a party to prepare a final order. The commission may approve the order at a meeting or direct the commission chair to sign the order.

(1) Decision: The commission may adopt, modify, or set aside the hearing officer's recommended decision, and shall set forth in the final order the reasons for its actions.

(2) Penalty: For a compliance order hearing, the commission may change the amount and nature of the civil penalty, if any, recommended by the hearing officer and shall set forth the reasons for the change.

(3) The hearing clerk shall send copies of the final order to each party, and to all other persons who have made written requests for notification of the action taken.

E. Payment of civil penalty: The respondent shall pay the full amount of the civil penalty, if any, assessed in the final order within 60 days after receipt of the final order, unless otherwise ordered by the commission. Payment shall be made by forwarding to the hearing clerk a cashier's check or certified check in the amount of the penalty assessed, payable to the fund specified in the act.

F. Judicial review: Judicial review of the final order shall be as provided by law. The filing of an appeal does not stay any action or payment of penalty required by the final order, unless otherwise ordered by the commission or a court.



Erin Anderson, Administrative Law Judge
New Mexico Environment Department
Hearing Officer for WQCC 17-09 (A)

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

**NEW MEXICO ENVIRONMENT
DEPARTMENT,**

Complainant,

No. WQCC 17-09(A)

v.

**CHAMPS INVESTMENTS D.B.A.
LA VISTA MOBILE HOME PARK,**

Respondent.

FINAL ORDER

Pursuant to authority vested under the New Mexico Water Quality Act (“WQA”), NMSA 1978, §§ 74-6-1 through -17, and pursuant to the Ground and Surface Water Protection Regulations (“Regulations”), 20.6.2 NMAC, and 20.1.3.21.D NMAC, the New Mexico Water Quality Control Commission (“WQCC”) hereby issues this Final Order in the matter of the Administrative Compliance Order (“ACO”) issued by the New Mexico Environment Department (“NMED”) to Champs Investments III, LLC, doing business as La Vista Mobile Home Park (“Respondent”) in Alamogordo, New Mexico on September 27, 2017 (GWQB 17-21 (CO)).

The WQCC appointed a hearing officer in this matter who conducted a properly noticed public hearing on January 9, 2018. Upon review of the ACO, Respondent’s answer, Respondent’s request for hearing, the administrative record in this case, the parties’ proposed findings of facts and conclusions of law, the WQA, and the Regulations, the WQCC hereby orders that the ACO issued by NMED to Respondent be upheld in its entirety. Respondent is ordered to pay the civil penalties assessed therein and complete the corrective actions according

to the timeline provided in Section III of the ACO, which shall begin upon the date of issuance of this Order.

LARRY DOMINGUEZ, Chair
New Mexico Water Quality Control Commission

CERTIFICATE OF SERVICE

I hereby certify that a copy of the **Hearing Compilation Including Findings of Facts and Proposed Form of Order** was sent via email on March 27, 2018 and First-Class U.S. Mail on March 28, 2018:

Via hand delivery:

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