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September 7, 2017

VIA FED EX

WQCC 17-05(A)

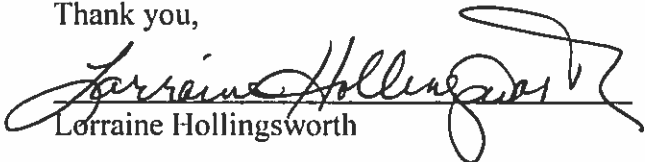
Pam Castaneda
WQCC Hearing Clerk
1190 S. St. Francis, Ste. S-2102
Santa Fe, New Mexico 87502

RE: Appeal Petition

Dear Ms. Castaneda:

Enclosed please find the original and 13 copies of the Appeal Petition to be filed on behalf of John McCatharn. Please return an endorsed copy in the enclosed envelope.

Thank you,


Lorraine Hollingsworth

Encls.

STATE OF NEW MEXICO
WATER QUALITY CONTROL COMMISSION



IN THE MATTER OF THE NOTICE
OF DEFICIENCY: FINAL SITE INVESTIGATION
REPORT AND STAGE 2 ABATEMENT PLAN
FOR McCATHARN DAIRY, ALBUQUERQUE,
NEW MEXICO, DATED AUGUST 10, 2017

NO.: WQCC 17-05(A)

JOHN McCATHARN,

Petitioner.

APPEAL PETITION

THE PETITIONER, John McCatharn, pursuant to 20.1.3.17 NMAC and 20.6.2.4114 NMAC, hereby submits this Appeal Petition and requests review by the Water Quality Control Commission of the "Notice of Deficiency: Final Site Investigation Report and Stage 2 Abatement Plan proposal for McCatharn Dairy, Albuquerque, New Mexico," issued by the New Mexico Environment Department (NMED) on August 10, 2017.

A. Identify the Petitioner and state that the Petitioner has standing under 20.6.2.4114 NMAC to file the petition

The Petitioner is John McCatharn, owner of McCatharn Dairy, which is the subject of the Notice of Deficiency (NOD). The NOD is addressed to Mr. McCatharn, who has participated in this matter and who has been adversely affected by the action of NMED. Mr. McCatharn has standing to file this Petition pursuant to 20.6.2.4114.B.

B. Identify the abatement plan action being appealed, specify the portions of the abatement plan action to which the Petitioner objects and generally state the objections.

The Petitioner is appealing the NOD of the Final Site Investigation Report (FSIR) and of the Stage 2 Abatement Plan proposal as set forth in NMED's August 10, 2017 letter, attached hereto as Exhibit 1. The August 10, 2017 NOD letter was in response to McCatharn Dairy's

Final Site Investigation Report (FSIR), received by NMED on June 24, 2016 and the Stage 2 Abatement Plan proposal, received by NMED on January 25, 2017.

1. The Petitioner objects to the timeliness of the NOD.

Pursuant to 20.6.2.4109(A), the NMED Secretary “shall, within sixty (60) days of receiving...a site investigation report, approve the document, or notify the responsible person of the of the document’s deficiency, based upon the information available.” Pursuant to 20.6.2.4109(C), the Secretary “shall, within ninety (90) days of receiving a Stage 2 abatement plan proposal, approve the plan, or notify the responsible person of the plan’s deficiency, based upon information available.”

The FSIR for McCatharn Dairy was received by NMED on June 24, 2016. (*See Exhibit 1, attached hereto*). NMED was required to respond within 60 days, on or before August 23, 2016. The August 10, 2017 NOD for the FSIR was issued 12 months after the regulatory deadline. The Stage 2 Abatement Plan proposal was received by NMED on January 25, 2017 and NMED was required to respond within 90 days, on or before April 24, 2017. The NOD was issued four months after the regulatory deadline.

2. The NOD is contrary to the agreement reached with NMED on June 23, 2017

On June 7, 2017, counsel for McCatharn Dairy notified Secretary Butch Tongate that the Dairy was initiating dispute resolution pursuant to 20.6.2.4113 NMAC. (*Exhibit 2, attached hereto*). In response to the letter, on June 23, 2017, the Cabinet Secretary and NMED staff met with John McCatharn and his attorney to discuss a resolution to the dispute regarding abatement for the McCatharn Dairy. (*See Exhibit 1*). At that meeting, the Parties reached an agreement on the resolution of the issues. Instead of providing correspondence confirming the agreement,

NMED issued the August 10, 2017 NOD, which is contrary to and misrepresents the agreement reached on June 23, 2017.

At the June 23, 2017 meeting, NMED agreed to approve the FSIR, which is an accurate compilation of the available information related to the site and which meets all the applicable regulatory requirements. NMED agreed to approve the Stage 2 Abatement Plan proposal, which is complete and meets all of the applicable regulatory requirements, subject to public notice. The parties agreed that no more wells would be required. The parties agreed that the only additional information required would be the delineation of the southern edge of the nitrate plume. Mr. McCatharn, who is a licensed civil engineer, has prepared the documentation delineating the plume, which is attached hereto as Exhibit 3.

3. The requested information is unnecessary and there is no basis for the NOD

Paragraphs 1 through 6 of the NOD identify information that NMED claims is needed for an approved FSIR and Stage 2 Abatement Plan. The information identified in Paragraphs 1, 2, and 3 has either already been provided and is part of the record in this matter, or is not necessary for NMED approval of the FSIR. The information identified in Paragraphs 3, 4, 5, and 6 regarding the Stage 2 Abatement Plan has either already been provided and is part of the record in this matter, or is not necessary for NMED approval of the Stage 2 Abatement Plan.

With the document attached as Exhibit 3, the FSIR and the Stage 2 Abatement Plan are complete and no additional information is necessary or required.

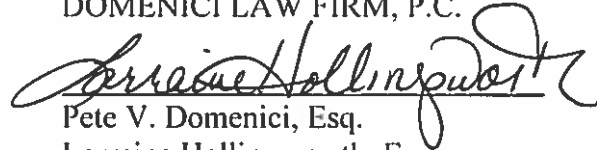
In the NOD, NMED states that Mr. McCatharn should “hire an environmental consultant to assist in preparing a revised FSIR.” (Exhibit 1 at pp. 2, 3). Mr. McCatharn is a licensed civil engineer and there are no allegations that he is not qualified to prepare documents related to the

McCatharn Dairy or that his actions have been improper. NMED does not have any authority to direct Mr. McCatharn to hire an environmental consultant.

Petitioner reserves the right to set forth additional objections as additional information is developed or becomes available.

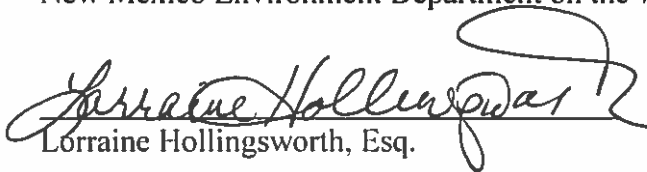
Respectfully submitted,

DOMENICI LAW FIRM, P.C.



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Lorraine Hollingsworth, Esq.
320 Gold Ave. SW, Suite 1000
Albuquerque, New Mexico 87102
505-883-6250
pdomenici@domicilaw.com
lhollingsworth@domicilaw.com


I hereby certify that a true and correct copy of the foregoing Appeal Petition was served on the New Mexico Environment Department on the 7th day of September, 2017.



Lorraine Hollingsworth, Esq.

AFFIRMATION

I hereby attest that the information contained in the foregoing Appeal Petition is, to the best of my knowledge and information, true and correct.



John McCatharn
Owner, McCatharn Dairy



SUSANA MARTINEZ
Governor

JOHN A. SANCHEZ
Lieutenant Governor

NEW MEXICO
ENVIRONMENT DEPARTMENT

Ground Water Quality Bureau
1190 South St. Francis Drive (87505)
P.O. Box 5469, Santa Fe, New Mexico 87502-5469
Phone (505) 827-2900 Fax (505) 827-2965
www.env.nm.gov



BUTCH TONGATE
Cabinet Secretary

J.C. BORREGO
Deputy Secretary

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

August 10, 2017

Mr. John McCatharn, Owner
McCatharn Dairy
6363 State Highway 47 SE
Albuquerque, NM 87105
Also sent via email: johnmccatharn@aol.com

Re: Notice of Deficiency: Final Site Investigation Report and Stage 2 Abatement Plan proposal for McCatharn Dairy, Albuquerque, New Mexico

Dear Mr. McCatharn:

Thank you for meeting with New Mexico Environment Department (NMED) staff and the Cabinet Secretary on June 23, 2017 to resolve disputes regarding abatement for McCatharn Dairy. The Site is located at 6363 State Highway 47 SE, Albuquerque, New Mexico. NMED is encouraged by your commitment to take the steps necessary to move the Site along in the abatement process to the benefit of everyone involved. NMED is committed to assist you where possible in this process. The following notification is required by our regulations and should not be interpreted as a change in the attitude of cooperation expressed at the June 23, 2017 meeting.

Final Site Investigation Report Status

NMED hereby notifies McCatharn Dairy (Site) that the Final Site Investigation Report (FSIR) received June 24, 2016, for the Site referenced above is deficient, and the Stage 2 Abatement Plan (S2AP) proposal for the Site received on January 25, 2017, is deficient and premature. This Notice of Deficiency is made pursuant to Sections 4106.D and 4109.C of the New Mexico Ground and Surface Water Protection Regulations (20.6.2 NMAC).

The FSIR was submitted in response to NMED's January 22, 2016 Notice of Deficiency for a combined FSIR and S2AP proposal received on December 2, 2015. A meeting was held on January 11, 2016, with you and NMED staff to discuss future activities at the Site. After this meeting, NMED understood that you would: 1) propose to move from an active pump and evaporate remedial option to Monitored Natural Attenuation (MNA); and 2) hire an environmental consultant to assist in preparing a revised FSIR. However, the June 24, 2016 FSIR and the January 25, 2017 S2AP proposal were both self-prepared. The S2AP is not timely



because, pursuant to 20.6.2.4106.D NMAC, an approved FSIR is required before a S2AP may be approved. Additionally, the submitted documents are deficient for the following reasons:

1. The FSIR did not address the following issues raised in the January 22, 2016 Notice of Deficiency:
 - a. Presentation of soil data;
 - b. Assessment of the effects of pumping of Site production wells upon the Site potentiometric surface and gradient (this is no longer relevant);
 - c. Assessment of the vertical distribution of chemicals of concern in groundwater;
 - d. Presentation of a hydrogeology cross section;
 - e. Presentation of aquifer testing upon monitoring wells (this is no longer relevant);
 - f. Discussion of surface water bodies within the vicinity of the Site;
 - g. Presentation of lagoon water quality data prior to clean-out and lining;
 - h. Presentation of a Monitoring Program, Quality Assurance Plan, or Site Health and Safety Plan;
 - i. Presentation of downgradient groundwater wells;
 - j. Discussion of the requirements in the Discharge Permit for closure of the impoundments and how these requirements affect abatement options, steps and timelines; and
 - k. Description of the current liner integrity in the two storage impoundments.
2. The FSIR submitted to NMED implies that site characterization has been completed to a level necessary to choose an appropriate remedial option. NMED's letter of August 15, 2014, states that the two parties agreed that two additional monitoring wells would complete plume delineation and you would implement an active pump and evaporate S2AP. While the two additional groundwater monitoring wells have been installed (MW- 5 and MW-6) and sampled, these wells fail to adequately define the full horizontal and vertical extent of the nitrate plume, specifically for the MNA remedial option chosen, though they may have been sufficient for the previous chosen active pump and evaporate S2AP option. The width and vertical extent of the nitrate plume is insufficiently defined over the McCatharn Dairy property line to the south and potentially to the east. To cure this deficiency, a Supplemental FSIR proposal shall be submitted to NMED that includes installation of additional monitoring wells to the south and east, development of a groundwater contaminant distribution model, or some other comparable method to delineate the plume.
3. As part of the August 15, 2014, agreement, as documented in the NMED letter, the proposed plan was to implement an active pump and evaporate Stage 2 abatement effort. As indicated by the January 25, 2017, S2AP proposal, you subsequently chose MNA as the most effective remedial option. While NMED is receptive to this proposal, MNA requires a higher standard of plume delineation and monitoring. The FSIR and S2AP proposal do not include sufficient data and monitoring to support the selection of MNA as the remedy for nitrate at the Site, and, thus, are not approvable as submitted.
4. The S2AP proposal states that denitrification is occurring at the Site. The FSIR and S2AP proposal do not contain sufficient evidence to support this claim. Geochemical

data was not included; the oxidation – reduction potential in Site monitoring wells was not evaluated to determine if conditions favor denitrification at the Site. To cure this deficiency, groundwater sampling in a revised S2AP proposal should include collection of field parameters, including temperature, pH, oxidation – reduction potential (ORP), conductivity, and dissolved oxygen.

5. The S2AP proposal states that nitrate concentrations are decreasing across the Site. Linear regressions of nitrate trends were used to estimate what the concentrations will be in 2020. These projections fail to consider the flux of nitrate mass across the Site. For example, the estimate for MW-5 does not account for the higher mass of nitrate likely to advect from upgradient MW-3 to MW-5 over the course of time. To cure this deficiency, a S2AP proposal shall include a different, technically sound and robust estimate of naturally occurring mass reduction.
6. The S2AP proposal states that sulfate concentrations in the Site monitoring wells are due to denitrification. The correlation between nitrate and sulfate in Site monitoring wells may also be due to the two chemicals being co-contaminants from dairy waste. To cure this deficiency, a revised S2AP proposal shall include a different method to estimate naturally occurring mass reduction.

The submittals do not meet the minimum scientific requirements of the New Mexico Ground and Surface Water Protection Regulations (20.6.2 NMAC), and the evaluation of remediation options for the Site are not consistent with well-defined and accepted industry practices. NMED strongly recommends that you hire an environmental professional to assist in meeting these requirements.

Discharge Permit Status

Additionally, the McCatharn Dairy Discharge Permit (DP-585) has not been terminated. A draft permit was proposed by NMED on December 21, 2012, and was made available for public comment at that time. Subsequent negotiations for the amended Supplemental Permitting Requirements for Dairies, 20.6.6 NMAC, interrupted the permitting process and NMED did not issue a final permit. If McCatharn Dairy submits a closure report to NMED after manure solids are removed from the property and surface impoundments are closed in accordance with Subsection A of 20.6.6.30 NMAC, NMED will consider a request to terminate the Discharge Permit, in lieu of a renewal application for closure.

Regulatory Path Forward

Pursuant to 20.6.2.4109.E NMAC, a Supplemental FSIR proposal is required and shall be submitted within thirty (30) days of receipt of this letter. Failure to submit a modified document within the required time, or if the modified document does not make a good faith effort to cure the deficiencies, shall result in a violation of 20.6.2.4000 through 20.6.2.4115 NMAC. NMED will require a S2AP proposal once the Supplemental FSIR has been completed and approved.

As discussed in our June 23, 2017 meeting, NMED strongly encourages you to hire an environmental consultant to assist you in meeting the requirements of 20.6.2.4000 through

Mr. McCatharn
August 10, 2017
Page 4 of 4

20.6.2.4115 NMAC. NMED looks forward to continuing to work with you to resolve this issue and is committed to assist you where possible in meeting these requirements.

If you have any questions, please contact Justin Ball, Team Leader, at (505) 222-9522 or Ali Furmall, Program Manager, at (505) 827-0078.

Sincerely,

A handwritten signature in black ink, appearing to read "Michelle Hunter". The signature is stylized with loops and a long horizontal flourish extending to the right.

Michelle Hunter, Chief
Ground Water Quality Bureau

cc: Pete Domenici, Jr., Domenici Law, PDomenici@domenicilaw.com
Butch Tongate, Cabinet Secretary
Bruce Yurdin, Director, Water Protection Division
Chris Atencio, NMED-OGC
Ali Furmall, Program Manager, ROS
Justin D. Ball, Team Leader, ROS-SCP
ROS Reading File

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Lorraine Hollingsworth
lhollingsworth@domicilaw.com

Jeanne Cameron Washburn
jwashburn@domicilaw.com

June 7, 2017

VIA EMAIL: Christopher.atencio@state.nm.us

Butch Tongate, Cabinet Secretary at NMED

c/o Christopher Atencio

P.O. Box 5469

Santa Fe, NM 87502-5469

E-MAILED

JUN 07 2017

@ 11:33am

RE: Dispute Resolution on the Behalf of McCatharn Dairy

Dear Secretary Tongate,

My client, McCatharn Dairy, hereby initiates a dispute resolution on the basis of 20.6.2.4113 NMAC. As a result of the NMED's inaction on McCatharn's most recent FSIR and Proposed Stage 2 Abatement Plan, McCatharn Dairy is prepared to move forward to Stage 2 of the abatement process. I have described the reasons herein.

In June 2016, Mr. McCatharn submitted an FSIR and Proposed Stage 2 Abatement Plan to the NMED Ground Water Quality Bureau. He addressed and resolved the deficiencies from his prior report on June 5, 2015. Those deficiencies were mentioned in a letter he received from the NMED on January 22, 2016. He has received no official notice on his January 2016 submittal. In January 2017, Mr. McCatharn submitted a Stage 2 Abatement Plan Final Report. He has received nothing in writing identifying deficiencies or suggested modifications. Over 90 days have transpired and he has received no formal reply.

Due to the status of Stage 2 submittals and the lack of a timely response by the NMED, a dispute resolution is necessary to address Stage 2 of the abatement process. Please confirm receipt and contact me to arrange the dispute resolution meeting.

Sincerely,


Pete V. Domenici, Jr., Esq.

PVD/rsg/1250



● Page 2

June 7, 2017

cc: John McCatharn

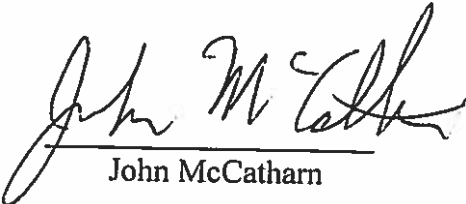
cc: Michelle Hunter via email: michelle.hunter@state.nm.us

9/3/17

DELINEATION OF THE SOUTHERN EDGE OF THE MCCATHARN DAIRY NITRATE PLUME

In our previous meeting in Santa Fe with NMED, concern was expressed about movement of the nitrate plume to the south. This presentation addresses those concerns.

In the State 2 Abatement Report for McCatharn Dairy, calculations were presented that showed water movement due to advection was due east at approximately 8.5 ft/yr. Dispersion was also estimated to be 1.5 ft/yr. Using this information the movement of nitrate in a southerly direction can be calculated. A good point of reference is monitor well #1 (MW1). MW1 is located at the southern edge of Lagoon #1. While the lagoons have been reconfigured over time, MW1 is located approximately at the southeastern edge of the earliest unlined lagoons on the dairy. This offers an excellent location from which to track the southerly movement of the nitrate plume. Since advection is moving the water in an easterly direction, there is no southern component of nitrate travel due to this. Dispersion is the primary source of nitrate movement to the south and was estimated to be 1.5 ft/yr. A simplified worst case estimate of southerly nitrate movement over the 60 year life of the dairy would then begin at MW1 and show a combined movement of 1.5 ft. South and 8.5 ft. east every year for the 60 year life of the dairy. The attached drawing shows this as a movement of only 90 feet south over that time frame.


John McCatharn



9-2-17

Depiction of Estimated Nitrate Plume Migration to the South at McCatharn Dairy

