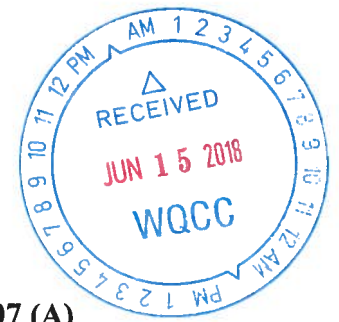


STATE OF NEW MEXICO
WATER QUALITY CONTROL COMMISSION



CREEKSIDE DAIRY
GWQB 17-02 (CO)

WQCC 17-07 (A)

**HEARING OFFICER RECOMMENDATION AND
PROPOSED FORM OF ORDER**

On the 10th of April 2018, the appointed Hearing Officer conducted a public hearing pursuant to 20.1.3.2.A(4) NMSA 1978, Section 74-6-10(G) (1993) and 20.1.3.2.A(4) NMAC which governs the public hearings on compliance orders. The hearing was held before the Water Quality Control Commission, at the State Capitol, Room 307, 490 Old Santa Fe Trail, Santa Fe, New Mexico at 1:36 P.M. New Mexico Environment Department (“Department”) was represented by the Office of General Counsel, Christopher Atencio appearing on behalf of the Ground Water Quality Bureau. Mr. Abel Villalpando d.b.a Creekside Dairy was self-represented and appeared for himself and on behalf of Creekside Dairy LLC (“Creekside”).

Creekside appealed a compliance order and requested a hearing. The hearing officer, in preparation for the hearing officer recommendation, reviewed the record proper, transcript, exhibits, post hearing submissions of findings of fact and conclusions of law and closing arguments. Creekside did not submit written findings of facts and conclusions of law or closing arguments.

The appellant, Creekside, presented testimony by Mr. Villalpando and limited testimony by Carol Irvin, Mr. Villalpando’s daughter, who is currently acting as an office manager for the dairy. Exhibits were reviewed prior to the hearing and NMED’s exhibit 15 was excluded due to the incorrect address. The remaining exhibits were admitted without objection. The Department presented testimony by Ms. Nancy McDuffie, Program Manager for the Agricultural Program of

the Ground Water Quality Bureau. The Bureau requests that the Commission approve their compliance order finding and affirm their civil penalty assessment. Creekside presented its evidence at the hearing, they did not prepare findings of facts or conclusions of law or an Order with a requested outcome.

The public hearing occurred during the regularly scheduled WQCC meeting. 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. The New Mexico Environment Department (“NMED”) is an executive agency within the government of the State of New Mexico and a constituent agency of the New Mexico Water Quality Control Commission (“Commission”). NMSA 1978, §§ 9-7A-4 (1991), 74-6-2(K) (2003).
2. The Ground Water Quality Bureau (“Bureau”) is an organizational unit of NMED within its Water Protection Division created pursuant to the authority granted to the Secretary of the NMED under NMSA 1978, Section 9-7A-6(B)(3) (1991).
3. The Water Quality Act, NMSA 1978, Sections 74-6-1 to -17 (“WQA”) authorizes the Department to issue a compliance order assessing a civil penalty whenever on the basis of any information a person is violating a requirement, regulation, or water quality standard adopted pursuant to the WQA. NMSA 1978, § 74-6-10(A)(1) (1993).
4. The Secretary of NMED has every power expressly enumerated in the laws, whether granted to the Secretary, the department, or any divisions of the department; the Secretary may delegate authority to subordinates as necessary and appropriate, here the authority to issue administrative compliance orders to the Director of the Water Protection Division. NMSA 1978, § 9-7A-6(B) (1991).

5. Dairy wastewater contains total Kjeldahl nitrogen (“TKN”), consisting of ammonia, nitrogen, and organic nitrogen. Ammonia, nitrogen, and organic nitrogen are water contaminants that have the potential to alter the physical, chemical, biological, or radiological qualities of water and to adversely affect human health and the environment. Ammonia nitrogen and organic nitrogen from livestock waste readily transform into nitrate as nitrogen (“NO₃-N”) as they pass through the vadose zone and enter ground water. Resulting nitrate concentrations in ground water can exceed the human health standard set forth in Paragraph (9) of Subsection (A) of 20.6.2.3103 NMAC. NMED Exhibit 2, ¶ 6; TR 51:8-13.

6. Nitrate is a water contaminant that has the potential to alter the physical, chemical, biological, or radiological qualities of water and to adversely affect human health and the environment. The human health standard for nitrate in ground water is 10.0 mg/l. 20.6.2.3103 NMAC. NMED Exhibit 2, ¶ 7; Answer and Request for Hearing (“Answer”), p.1, ¶ 7.

7. Mr. Abel Villalpando is the owner of Creekside Dairy. Answer, p. 1, ¶ 11; NMED Exhibit 3; TR 33:11-12, 34:3-9.

8. Creekside Dairy discharges up to 56,000 gallons per day of wastewater as defined by 20.6.6.7 NMAC from the production area of Creekside Dairy. NMED Exhibit 4, p. 3; TR 32:25-33:7.

9. Creekside Dairy is located approximately seven miles north of Artesia, New Mexico within Section 1, T16S, R25E, Eddy County. NMED Exhibit 4, p. 3; TR 33:8-14.

10. Ground Water Discharge Permit Number 913 (“DP-913”) was issued to Mr. Villalpando for Creekside Dairy on June 16, 2004. NMED Exhibit 4, p. 1; TR 35:23-25.

11. DP-913 expired on June 16, 2009. *Id.*

12. The Bureau sent an application reminder letter on July 2, 2009, to Mr. Villalpando at the address listed on DP-913. NMED Exhibit 2, ¶ 18; NMED Exhibit 5; TR 36:14-17.
13. The Bureau received an application for renewal of DP-913 from Mr. Villalpando on July 9, 2009. NMED Exhibit 6; TR 36:25-37:7.
14. The Bureau deemed the renewal application received on July 9, 2009, administratively incomplete because it was missing: a physical address as well as Sections B and C of the permit application. NMED Exhibit 7; TR 36:25-37:7.
15. The Bureau sent a notice of administrative incompleteness to Mr. Villalpando on July 24, 2009. NMED Exhibit 7; TR 37:21-38:5.
16. There is no indication of a response to the Bureau's July 24, 2009 notice of administrative incompleteness in the record. TR 38:6-9.
17. The Dairy Rule, 20.6.6 NMAC, became effective on January 31, 2012, providing dairy specific permitting requirements in addition to the ground water permitting requirements of 20.6.2 NMAC. 20.6.6.5 NMAC; TR 40:20-41:11.
18. The Bureau mailed a certified letter/return receipt requested on December 30, 2011, to notify Creekside Dairy that an application for discharge permit renewal, renewal and modification, or renewal for closure was due no later than March 30, 2012. NMED Exhibit 8; TR 38:12-21.
19. The Bureau received a Ground Water Discharge Permit Renewal application for the facility from Mr. Villalpando on March 28, 2012. NMED Exhibit 9; TR 38:22-39:7.
20. Bureau staff determined that the March 28, 2012, application was administratively incomplete and sent a notice of administrative incompleteness on April 4, 2012. NMED Exhibit 10; TR 39:8-10.

21. The Bureau sent a second notice of administrative incompleteness on July 6, 2012. NMED Exhibit 11; TR 39:11-20.
22. The record does not indicate that Mr. Villalpando responded to either notices of administrative incompleteness. TR 39:21-40:15.
23. The Water Quality Control Commission amended 20.6.6 NMAC in June 2015 which revised permitting conditions and requirements for dairy facilities. TR 41:7-11.
24. On August 1, 2015, the Bureau sent notices to all dairy facilities via first class mail regarding the amendments to 20.6.6 NMAC as well as the timeline requirements for applications pursuant to 20.6.6.35 NMAC. NMED Exhibit 13; TR 41:12-23.
25. Nancy McDuffie, the Bureau's Agricultural Program Manager, visited Creekside Dairy on April 27, 2016, where Ms. McDuffie and Mr. Villalpando discussed the need for Creekside Dairy to submit a permit application. TR 42:11-43:10; 112:1-9.
26. At that time, Ms. McDuffie believed she had secured a verbal agreement from Mr. Villalpando to submit a new permit application within 90 days of the inspection, i.e. by July 25, 2016. NMED Exhibit 14; TR 42:11-43:10.
27. The Bureau sent an application reminder letter to Creekside Dairy on June 7, 2016, to memorialize the verbal agreement requirements and to remind Mr. Villalpando that failure to correct the violation would result in formal enforcement action. NMED Exhibit 14; TR 43:11-14.
28. Creekside Dairy did not submit an application for discharge permit renewal before July 25, 2016. TR 43:15-17; 112:10-113:4.
29. Creekside Dairy does not have a system in place to receive and process mail, including certified letters, that are sent to Creekside Dairy. TR 27:9-28:14.

30. The Department issued administrative compliance order GWQB 17-02 (CO) to Creekside Dairy LLC and Abel Villalpando dba Creekside Dairy on September 22, 2017. NMED Exhibit 2; TR 44:13-18.
31. Administrative Compliance Order GWQB 17-02 (CO) required Mr. Villalpando and Creekside Dairy to submit a complete discharge permit renewal application in accordance with 20.6.6.12 NMAC no later than 30 days from the date that the Order becomes final, and that the application be accompanied by the appropriate fees as found in 20.6.2.3114 NMAC. NMED Exhibit 2, ¶ 36; TR 48:23-49:5.
32. Mr. Villalpando and Creekside Dairy received the Administrative Compliance Order GWQB 17-02 (CO) via certified mail return receipt requested on September 26, 2017, and via FedEx on September 27, 2017. NMED Exhibit 16; TR 48:9-21.
33. Mr. Villalpando and Creekside Dairy were in violation of 20.6.2.3104 NMAC by discharging from Creekside Dairy so that it would move directly or indirectly into groundwater without a discharge permit since June 16, 2009, when DP-913 expired. NMED Exhibit 2, ¶ 35; NMED Exhibit 4; TR 45:1-17.
34. Mr. Villalpando and Creekside Dairy were in violation of 20.6.6.8 and 20.6.6.10 NMAC since January 31, 2012, which was the effective date of 20.6.6 NMAC, by discharging from a dairy facility without a discharge permit. NMED Exhibit 2, ¶ 35; TR 45:1-17.
35. Mr. Villalpando and Creekside Dairy refused to comply with the Water Quality Act and the WQCC regulations, 20.6.2 and 20.6.6 NMAC. NMED Exhibit 2, ¶¶ 31-34; TR 45:1-17.
36. Mr. Villalpando and Creekside Dairy had complete control over the events constituting the violation and chose to disregard several requests to come into compliance. *Id.*; NMED Exhibit 3; NMED Exhibit 18; TR 52:14-16.

37. The Bureau established a civil penalty policy in 2001 that explains the Bureau's use of discretion in assessing and calculating civil penalties. NMED Exhibit 17; TR 49:10-50:1.
38. The Bureau properly explained its use of discretion in deciding to assess and in calculating the civil penalty. NMED Ex 18; TR 49:6-55:19.
39. The assessed civil penalty is below the statutory maximum established in NMSA 1978, Section 74-6-10(C)(1). NMED Exhibit 18.
40. Mr. Villalpando did not provide evidence or testimony at the hearing in this matter to refute the violations alleged in the Compliance Order. *See* TR 89:10-128:1.
41. Mr. Villalpando did not provide evidence or testimony at the hearing in this matter that served as a defense to the alleged violations. *See* TR 89:10-128:1.
42. Mr. Villalpando did not provide evidence or testimony at the hearing in this matter that demonstrates that NMED acted outside its discretion in assessing a civil penalty of \$226,000. *See* TR 89:10-128:1.

CONCLUSIONS OF LAW

43. Paragraphs 1 through 42 are incorporated herein.
44. The Water Quality Control Commission has jurisdiction over the subject matter of the Administrative Compliance Order and the parties to this proceeding and is authorized by the WQA to make a final decision regarding the compliance order based upon the findings of the hearing officer and the evidence presented at the public hearing. NMSA 1978, § 74-6-10(G), (H), and (I).
45. Mr. Villalpando and Creekside Dairy, LLC ("Creekside Dairy") are persons as defined in NMSA 1978, Section 74-6-2(I) and 20.6.2.7 JJ NMAC. Answer, p. 1, ref. ¶ 13.

46. No person shall cause or allow effluent 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 of NMED. 20.6.2.3104 NMAC; Answer, p. 1, ref. ¶ 8.
47. No person shall discharge from a dairy facility without a discharge permit. A person intending to discharge from a dairy facility shall submit an application for a discharge permit. 20.6.6.8 NMAC; Answer, p. 1, ¶ 9.
48. Creekside Dairy is a facility that meets the definition of a dairy facility as described in 20.6.6.7 NMAC. NMED Exhibit 2; Answer, p. 1 ref. ¶ 12.
49. The discharge of effluent, in the form of dairy wastewater, from Creekside Dairy is subject to the requirements of the Water Quality Act and the Water Quality Control Commission's regulations. NMED Exhibit 2; Answer, p. 1, ref. ¶ 15.
50. Mr. Villalpando and Creekside Dairy properly petitioned the WQCC for a public hearing regarding the ACO by filing a request for hearing within 30 days of service of the ACO. 20.1.3.19.A; Answer.
51. The hearing in this matter was properly scheduled to begin no later than 90 days after the request for compliance order hearing, January 9, 2018, but was stayed by agreement of the parties. 20.1.3.19.B NMAC; Public Notice; Order Granting Stay of Hearing.
52. The hearing in this matter was properly noticed on December 8, 2017, for the hearing to begin on January 9, 2018, and was properly re-noticed on March 10, 2018, because of the stay of the hearing. Affidavits of Publication.
53. The hearing in this matter was properly held in Santa Fe, New Mexico in Room 307 of the State Capitol Building on Tuesday, April 10, 2018.

54. Ground water beneath the facility is a place of withdrawal for present or reasonably foreseeable future use. *See* NMSA 1978, § 74-6-5(E)(3).

55. The Bureau heard testimony from the Bureau's Agricultural Compliance Section Manager, Nancy McDuffie; Mr. Villalpando, and Carol Irvin. *See* TR.

56. Administrative Compliance Order 17-02 (CO) was properly issued by NMED. NMED Exhibit 2.

57. Based on the totality of the evidence in the record, Mr. Villalpando and Creekside Dairy violated the WQA and the Water Quality Control Commission regulations, specifically 20.6.2.3104 NMAC since June 16, 2009, and 20.6.6.8 and 20.6.6.10 NMAC since January 31, 2012, by discharging from a dairy facility without a properly issued ground water discharge permit.

58. The civil penalties assessed in the Compliance Order were properly calculated within NMED authority and discretion.

RECOMMENDATION AND NEXT STEPS

The hearing officer recommends that the compliance order issued by the Bureau and the assessed penalty be upheld. The agency acted within its discretion in assessing the proposed civil penalty of \$226,800. A violation did occur by Creekside continuously operating and discharging dairy wastewater without a permit. Discharge Permit 913 expired on June 16, 2009.

During the hearing, it became apparent that the record keeping of Creekside was not performed with regularity or precision. Creekside had actual knowledge of the requirement to obtain a valid permit but failed to do so, despite multiple notices, and a face to face meeting with the agricultural compliance manager that took place on April 27, 2016 and is referenced in the administrative record as NMED's Exhibit 17.

Creekside discussed some of the regulatory confusion that occurred during the period the Dairy rule was being proposed, until the final amendments were enacted on August 1, 2015. NMED contacted Creekside via correspondence which explained the regulatory landscape and advised them how to contact the agricultural compliance manager if questions arose. See NMED's Exhibit 13.

It was evident during the hearing that Creekside felt unfairly maligned and put under a compliance microscope, as its other permits were in good order, and that the proposed penalty was disproportionate to alleged paper work omissions. If the hearing officer intends to propose a civil penalty assessment that differs from the bureau she must set out the legal and factual basis for disputing the penalty assessment. The hearing officer is recommending that the penalty assessment as calculated by the Ground Water Quality Bureau be upheld. A review of the policy does not indicate that it was administered in a way that would be arbitrary or capricious. Each element of the formula was reviewed with fact specific elements that were born out by both the administrative record and during the hearing itself. The bureau did not veer from the policy, and showed considerable latitude in assessing a sixty-day violation, which is but a fraction, of the overall time the permit had lapsed.

The decision of whether to follow the recommendation of the hearing officer, or to propose a civil penalty assessment at all, is subject to the discretion of the Commission. The hearing officer is happy to offer suggestions, if asked, but given the experience of the Commission and its firsthand knowledge of the Dairy rule, the Commission may want to debate the factual circumstances surrounding this case and tailor its outcome accordingly. The hearing officer would note that Creekside has made a good faith effort post penalty assessment to hire both an office manager and environmental consultant to corral paperwork and get its permit application in order. These

rehabilitative efforts demonstrate a willingness to alter past practices but will likely require oversight to ensure compliance given nine years of non-compliance. For use in deliberations the WQCC may wish to consult their black exhibit binder and Exhibits 13, 14 17, and 18 which reference in detail the Dairy Rule change as communicated to the dairies, the face to face meeting with the agricultural compliance manager, the civil penalty policy, and the narrative for the penalty assessment. A draft Order consistent with this recommendation will issue. The WQCC may issue its own final order after its deliberations. For ease of use, the rule itself, is included.

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.

(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 17-07 (A)