

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



**NEW MEXICO ENVIRONMENT DEPARTMENT,
GROUND WATER QUALITY BUREAU,**

Complainant

WQCC 17-07(A)

v.

**ABEL VILLALPANDO D.B.A. CREEKSIDE DAIRY,
CREEKSIDE DAIRY, L.L.C.**

Respondent.

**NEW MEXICO ENVIRONMENT DEPARTMENT'S
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

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 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, and has 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 has been 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 refuses 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 it is discharged 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, set for January 9, 2018, was properly scheduled to begin no later than 90 days after the request for compliance order hearing, and was stayed by agreement of the parties. 20.1.3.19.B NMAC; Public Notice; Order Granting Stay of Hearing.
52. The January 9, 2018 hearing in this matter was properly noticed on December 8, 2017, 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 has been in violation of 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.

Respectfully submitted,

GROUND WATER QUALITY BUREAU
NEW MEXICO ENVIRONMENT DEPARTMENT

/s/ Christopher N. Atencio
Christopher N. Atencio
Assistant General Counsel
Office of General Counsel
New Mexico Environment Department
121 Tijeras Avenue NE, Suite 1000
Albuquerque, New Mexico 87102-3400
Telephone: (505) 222-9554
christopher.atencio@state.nm.us

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing New Mexico Environment Department's Proposed Findings of Fact and Conclusions of Law was delivered as described below to all parties on May10, 2018.

Via First-Class U.S. Mail and electronic mail:

Abel Villalpando,
304 East Ojibwa Road
Dexter, NM 88230
starrynightdairy1@yahoo.com
Respondent for Creekside Dairy

Via First-Class U.S. Mail and electronic mail:

Stephen Vigil
New Mexico Attorney General's Office
P.O. Drawer 1508
Santa Fe, NM 87504
svigil@nmag.gov
Counsel for Water Quality Control Commission

Via Hand-Delivery:

Pam Castañeda,
Commission Administrator
P.O. Box 5469
Santa Fe, NM 87502

/s/ Christopher N. Atencio
Christopher N. Atencio