

Pete V. Domenici, Jr.
pdomenici@domenicilaw.com

Jeanne Cameron Washburn
jwashburn@domenicilaw.com

DOMENICI LAW FIRM, P.C.
ATTORNEYS AT LAW
320 Gold Avenue SW, Suite 1000
Albuquerque, New Mexico 87102-3228

(505) 883-6250 Telephone
(505) 884-3424 Facsimile

Lorraine Hollingsworth
lhollingsworth@domenicilaw.com

Reed Easterwood
reasterwood@domenicilaw.com

April 9, 2018

VIA FED EX

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 2 copies of the "Appeal Petition and Request for a 15-Day Extension of Time to Submit Substantive Information Regarding Objections to the NOD, to be filed on behalf of McCatharn Dairy. Please return an endorsed copy in the enclosed envelope.

Thank you,


Lorraine Hollingsworth

Encls.

cc: Michelle Hunter, GWB Chief, via email
Chris Atencio, NMED Office of General Counsel, via email



WQCC 18-02(A)

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 MARCH 9, 2018

NO.: WQCC 18-02 (A)



JOHN McCATHARN,

Petitioner.

**APPEAL PETITION AND REQUEST FOR A 15-DAY EXTENSION
OF TIME TO SUBMIT SUBSTANTIVE INFORMATION
REGARDING OBJECTIONS TO THE NOD**

THE PETITIONER, John McCatharn, pursuant to 20.1.3.17.A(1)(a) 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 March 9, 2018. A copy of the NOD is attached hereto as Exhibit 1. The Petitioner also requests an additional 15 days, to April 24, 2018, to submit the substantive information required pursuant to 20.1.3.17.A(1)(c) and (e).

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.

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 March 9, 2018 letter, attached hereto as Exhibit 1. The March 9, 2018 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. NMED sent a prior NOD on August 10, 2017 regarding the FSIR, for which the Petitioner filed a Notice of Appeal on September 7, 2017, case number WQCC 17-05(A). On October 5, 2017, NMED filed a Notice of Withdrawal of Notice of Deficiency, attached hereto as Exhibit 2. Case number WQCC 17-05(A) remains open and pending. The Petitioner expects to request that the WQCC consolidate the current appeal of the March 9, 2017 NOD with WQCC 17-05(A).

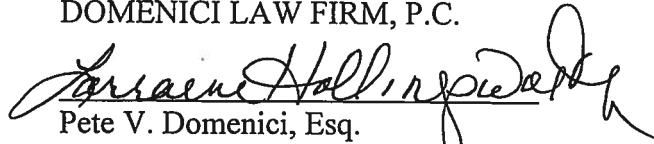
C. Request for additional 15 days, to April 24, 2018, to provide substantive information required by NMAC 20.1.3.17.A(1)(c) and (e).

This Notice of Appeal is being filed within 30 days of the date of the NOD as required by NMAC 20.1.3.17.A(1)(a) in order to ensure the timeliness of the Appeal Petition. Based on communications between the Petitioner and NMED, the parties may reach agreement on a path forward that will resolve the NOD. However, the Petitioner respectfully requests an additional 15 days, to April 24, 2018, to submit the substantive information required by 20.1.3.17.A(1)(c) and (e), if necessary, in which he will identify the portions of the abatement plan action to which he objects, will state the substance of such objections, and will submit supporting documentation. The Groundwater Quality Bureau does not object to the request for an extension.

WHEREFORE, the Petitioner respectfully requests that this Appeal Petition be docketed and that the Petitioner be granted an additional 15 days, to April 24, 2018, to submit the information required by NMAC 20.1.3.17.A(1)(c) and (e) to proceed with this Appeal.

Respectfully submitted,

DOMENICI LAW FIRM, P.C.



Pete V. Domenici, Esq.

Lorraine Hollingsworth, Esq.

320 Gold Ave. SW, Suite 1000

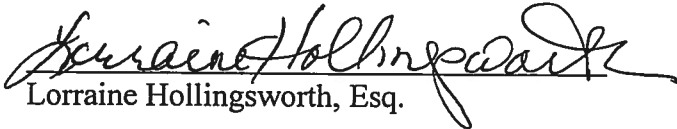
Albuquerque, New Mexico 87102

505-883-6250

pdomenici@domenicilaw.com

lhollingsworth@domenicilaw.com

I hereby certify that a true and correct copy of the foregoing Appeal Petition was served on the New Mexico Environment Department and Chris Atencio, counsel for NMED, on the 9th day of April, 2018.



Lorraine Hollingsworth, Esq.



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

March 9, 2018

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

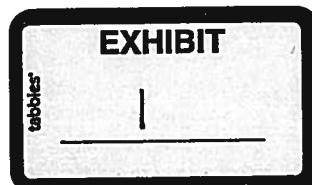
Dear Mr. McCatharn:

On August 10, 2017, the New Mexico Environment Department ("Department") sent a Notice of Deficiency ("NOD") Letter to McCatharn Dairy finding the Final Site Investigation Report ("FSIR") submitted on June 24, 2016, deficient; the Stage 2 Abatement Plan proposal for McCatharn Dairy received on January 25, 2017, to be deficient and premature; and requesting that McCatharn Dairy submit a revised FSIR to address contamination found in soil and groundwater at the former McCatharn Dairy site located at 6363 State Highway 47 SE, Albuquerque, New Mexico.

The Department withdrew the August 10, 2017 NOD in acknowledgement of the verbal agreements regarding process made on June 23, 2017. Subsequently, NMED received supplemental comments ("Comments") from you on December 19, 2017, to address deficiencies noted in the August 10, 2017 NOD.

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 since NMED cannot yet approve the FSIR. 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 NOD 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 and Comments did not sufficiently address the following issues raised in the January 22, 2016 Notice of Deficiency:
 - a. Location and quality of soil data;
 - b. Assessment of the vertical distribution of chemicals of concern in groundwater;
 - c. Presentation of a hydrogeology cross section;
 - d. Presentation of aquifer testing upon monitoring wells;
 - e. Presentation of a Monitoring Program, Quality Assurance Plan, or Site Health and Safety Plan;
 - f. Presentation of downgradient groundwater wells.
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, documents the agreement 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 that will adequately support the MNA remedial option chosen, though they may have been sufficient specifically for the previously 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 to the east for purposes of MNA. Further, the Comments identify a downgradient groundwater receptor (Coptart) in the immediate vicinity of the groundwater plume; recent laboratory analytical results demonstrate nitrate concentrations above standards in this offsite well. 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 horizontal and vertical extent of the plume. NMED is amenable to a well-structured and supported proposal of a methodology that does not include the installation of additional monitoring wells.
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 with the information submitted.

4. The S2AP proposal states that denitrification is occurring at the Site. The FSIR, S2AP proposal, and Comments do not contain sufficient evidence to support this claim. Geochemical data was not presented; 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, as acknowledged in the Comments.
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 into 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. However, 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.
7. The Comments identify a downgradient groundwater receptor (Copart) in the immediate vicinity of the groundwater plume. Impacts, if any, to this receptor have not been assessed, though recent sampling indicate nitrate levels above standards. To cure this deficiency, a revised Monitoring Program shall include quarterly monitoring of the Copart supply well for chemicals of concern.

Your submittals do not meet the minimum scientific requirements of 20.6.2 NMAC based on the information included in the submissions, and the evaluation of remediation options for the Site are not consistent with well-defined and accepted industry practices. NMED strongly recommends that you retain 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 a closure report is submitted 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, a request to terminate the Discharge Permit will be considered, in lieu of a renewal application for closure.

Mr. McCatharn
March 9, 2018
Page 4 of 4

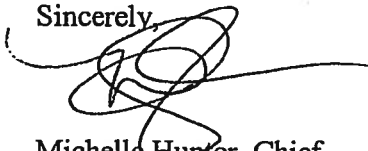
Regulatory Path Forward

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. After submission and approval of the S2AP, you will then be required to issue public notice of the S2AP to all residents and businesses within a mile radius of the locations where groundwater standards are exceeded. Because of the location of the impact, it is imperative for you to understand that notices will need to be provided in both English and Spanish, with the translation provided by a certified Spanish translator.

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

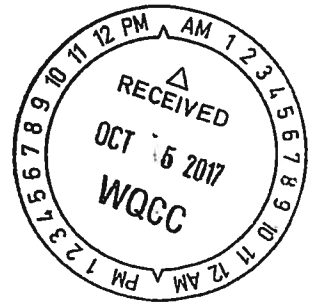


Michelle Hunter, Chief
Ground Water Quality Bureau

cc: Pete Domenici, Jr., Domenici Law, PDomenici@domenicilaw.com
Chris Atencio, NMED-OGC
Ali Furmall, Program Manager, ROS
Justin D. Ball, Team Leader, ROS-SCP
ROS Reading File



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

WQCC 17-05(A)

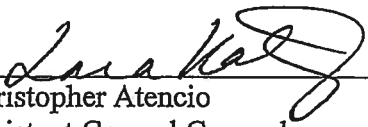
JOHN McCATHARN,

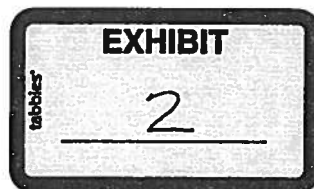
Petitioner.

NOTICE OF WITHDRAWAL OF NOTICE OF DEFICIENCY

Pursuant to 20.1.3.22.C NMAC, the New Mexico Environment Department, Water Protection Division ("Department") hereby withdraws the Notice of Deficiency issued to McCatharn Dairy on August 10, 2017.

Respectfully submitted
New Mexico Environment Department

For 
Christopher Atencio
Assistant General Counsel
New Mexico Environment Department,
Water Protection Division
121 Tijeras Avenue NE, Suite 1000
Albuquerque, New Mexico 87102-3400
Phone: (505) 222-9554
Fax: (505) 383-2064
christopher.atencio@state.nm.us



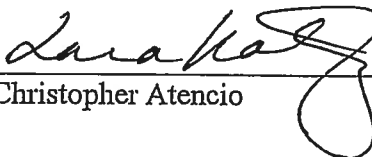
CERTIFICATE OF SERVICE

I hereby certify that this Notice of Withdrawal of Notice of Deficiency was sent via email and via First Class U.S. Mail on October 5, 2017, to the following:

Via email and First Class U.S. Mail

Pete V. Domenici, Jr., Esq.
Lorraine Hollingsworth, Esq.
Domenici Law Firm, PC
320 Gold Avenue SW
Suite 1000
Albuquerque, New Mexico 87102
pdomenici@domenicilaw.com
Counsel for Petitioner

John Grubescic
New Mexico Attorney General's Office
P.O. Drawer 1508
Santa Fe, New Mexico 87504
jgrubescic@nmag.gov
Counsel for the Water Quality Control Commission

for 
Christopher Atencio