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April 24, 2018

VIA FED EX

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

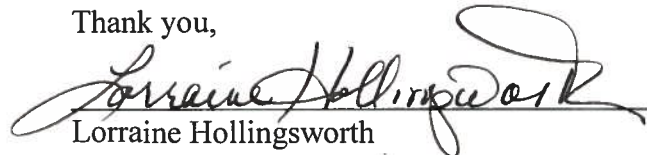


RE: WQCC 18-02(A)

Dear Ms. Castaneda:

Enclosed please find the original and 13 copies of the Petitioner's Objections to March 9, 2018 Notice of Deficiency, to be filed on behalf of McCatharn Dairy in WQCC 18-02(A). Please return an endorsed copy in the enclosed envelope.

Thank you,


Lorraine Hollingsworth

Encls.

cc: Chris Atencio, NMED Office of General Counsel

**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.

PETITIONER'S OBJECTIONS TO MARCH 9, 2018
NOTICE OF DEFICIENCY

THE PETITIONER, John McCatharn, hereby submits his substantive objections to the March 9, 2018 Notice of Deficiency (NOD). The Appeal Petition was filed on April 9, 2018. On April 12, 2018, an Order was entered extending the time to submit the substantive information required pursuant to 20.1.3.17.A(1)(c) and (e) to April 24, 2018. A copy of the March 9, 2018 NOD is attached hereto as Exhibit 1.

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 March 9, 2018 letter, attached hereto as Exhibit 1.

McCatharn Dairy received a Notice of Violation (NOV) from NMED on November 21, 2013. In response to the NOV, McCatharn Dairy submitted a Stage 1 Abatement Plan on January 17, 2014. (Letter dated August 15, 2014, Exhibit 2, attached hereto). As indicated in the August 15, 2014 letter, NMED and McCatharn Dairy reached an agreement regarding the submission of a revised Stage 1 Abatement Plan and a Stage 2 Abatement Plan proposal.

(Exhibit 2). Two additional monitoring wells were to be installed and sampled and the Stage 2 abatement plan was the implementation of an active pump and evaporate system. The two additional monitoring wells, MW-5 and MW-6 have been installed and sampled.

After the August 15, 2014 letter, McCatharn Dairy proposed to move from an active pump and evaporate remedial option to a Monitored Natural Attenuation (MNA) system. On June 24, 2016, McCatharn Dairy submitted an Final Site Investigation Report (FSIR) to NMED. A Stage 2 Abatement plan proposal was submitted to NMED on January 25, 2017. On August 10, 2017, NMED sent McCatharn Dairy an NOD, which the Dairy appealed and which NMED subsequently withdrew. The Dairy submitted supplemental information and comments to NMED on December 19, 2017, and NMED issued the NOD now being appealed on March 9, 2018.

After attempting to meet NMED's requirements for an FSIR and Stage 2 Abatement Plan (S2AP) for an MNA system, McCatharn Dairy is proposing to go back to the plan set forth in the August 15, 2014 letter from NMED. (Exhibit 2). The Dairy intends to submit a revised FSIR and a S2AP that will comply with the agreement set forth in the August 15, 2014 letter.

McCatharn Dairy hereby submits the following objections to the March 9, 2018 NOD.

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 March 9, 2018 NOD was issued more than 18 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. (*Id.*). The NOD was issued eleven 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. 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. 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 was contrary to and misrepresented the agreement reached on June 23, 2017. NMED subsequently withdrew the August 10, 2017 NOD “in acknowledgment of the verbal agreements regarding process made on June 23, 2017.” (Exhibit 1, March 9, 2018 NOD, p. 1). McCatharn Dairy provided additional information to NMED on December 19, 2017 and NMED then issued the March 9, 2018 NOD, which is also contrary to the agreements reached between NMED and the Dairy.

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, prepared the documentation delineating the plume, which was submitted to NMED.

Instead of accepting the information submitted by McCatharn Dairy and moving forward pursuant to the agreed process, NMED is now demanding the installation of additional monitoring wells, the development of a groundwater contaminant distribution model, or some other comparable method to delineate the horizontal and vertical extent of the plume and the revision of the S2AP proposal to include additional, unnecessary sampling and data. (Exhibit 1 at ¶¶2-7).

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

Paragraphs 1 through 7 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, 6 and 7 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 supplemental information and comments provided to NMED on December 19, 2017, the FSIR and the Stage 2 Abatement Plan are complete and no additional information is necessary or required.

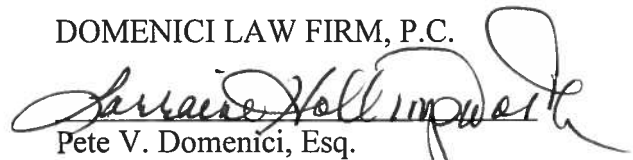
In the NOD, NMED states that Mr. McCatharn should “hire an environmental consultant to assist” in meeting the regulatory requirements (Exhibit 1 at p. 3). Mr. McCatharn is a licensed civil engineer and there are no allegations that he is not qualified to prepare documents

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.



Pete V. Domenici, Esq.

Lorraine Hollingsworth, Esq.

320 Gold Ave. SW, Suite 1000

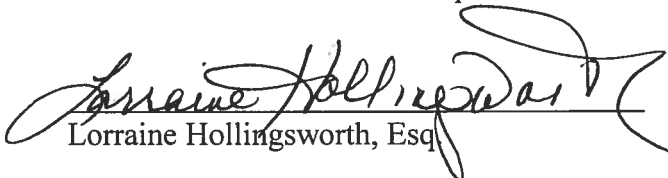
Albuquerque, New Mexico 87102

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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 24th day of April, 2018.



Lorraine Hollingsworth, Esq.



SUSANA MARTINEZ
Governor

JOHN A. SANCHEZ
Lieutenant Governor

NEW MEXICO
ENVIRONMENT DEPARTMENT

Ground Water Quality Bureau

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P.O. Box 5469, Santa Fe, New Mexico 87502-5469
Phone (505) 827-2900 Fax (505) 827-2965
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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 (Copt) 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.

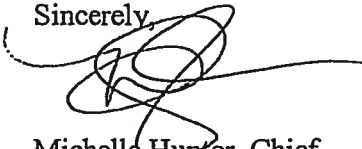
Regulatory Path Forward

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



SUSANA MARTINEZ
Governor
JOHN A. SANCHEZ
Lieutenant Governor

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RYAN FLYNN
Cabinet Secretary
BUTCH TONGATE
Deputy Secretary

August 15, 2014

Mr. John McCatharn
McCatharn Dairy
P.O. Box 19306
Albuquerque, NM 87119-0306

RE: Letter of Agreement, Stage 1 Abatement Plan, McCatharn Dairy, Albuquerque, New Mexico

Dear Mr. McCatharn:

On February 6, 2014, New Mexico Environment Department (NMED) representatives met with you and your counsel, Pete Domenici Jr., to discuss the revised Stage 1 Abatement Plan proposal submitted on January 17, 2014. You submitted this proposal in response to a Notice of Violation for the McCatharn Dairy dated November 21, 2013. At this meeting and in subsequent correspondence, all parties agreed that:

1. McCatharn Dairy will submit a revised Stage 1 Abatement Plan proposal that includes: a) the installation of two new monitoring wells constructed in accordance with the Ground Water Quality Bureau's Monitoring Well Construction and Abandonment Guidelines and the previously approved Quality Assurance Project Plan in order to better define the magnitude and extent of the contaminant plume, b) a monitoring program modification, and c) a schedule of implementation.
2. Upon NMED approval of the revised proposal, McCatharn Dairy will install the two new monitoring wells, and, after sampling for two quarters, submit a Final Site Investigation Report. NMED will approve the report without requiring additional investigation, though NMED may require additional wells to define the extent and magnitude of contamination under Stage 2, if needed.
3. NMED will approve a Stage 2 Abatement Plan proposal that includes the pumping of MW-3 as the abatement option, assuming public comments and a request for hearing are not received which may alter the final Stage 2 Abatement Plan. The proposal shall provide for the evaluation of site data after two years and annually thereafter to determine whether the abatement option is effective. If it is not effective, McCatharn Dairy shall submit a modified proposal identifying an alternate abatement option. The evaluations to determine



Mr. John McCatharn
August 15, 2014
Page 2

effectiveness will be conducted for the first five years after the installation and first sampling of the new monitoring wells. During the first five years, and afterwards, modifications may be required pursuant to 20.6.2.4111 NMAC.

The abatement option will be considered ineffective if the data evaluation indicates any of the following:

- a. Contaminant concentrations near the pumping center and along the center line of the plume do not show a decreasing trend.
- b. MW-3 is not capturing the contaminant plume. The plume capture analysis must include:
 - i. development and interpretation of water levels showing the capture zone of pumping from MW-3 through water level measurements, pumping rates, evaluation of flow directions, and potentiometric maps;
 - ii. ground water analytical data indicating the contaminant plume movement is toward MW-3;
 - iii. estimated flow rate calculations to show pumping rates required to capture the contaminant plume; and
 - iv. estimated capture zone width for the measured pumping rate.

Based on the results of the evaluation of effectiveness, McCatharn Dairy may be required to modify the Stage 2 Abatement Plan in order to meet Water Quality Control Commission standards.

McCatharn Dairy is encouraged to confer with NMED during the preparation of the revised Stage 1 Abatement Plan proposal. If you have any questions please contact Bart Faris, Project Manager, at (505) 222-9521, or Pamela Homer, Program Manager of the Remediation Oversight Section, at (505) 827-2754.

Thank you for your cooperation in this matter.

Sincerely,

 for :

Jerry Schoeppner, Chief
Ground Water Quality Bureau

cc: Pete Domenici Jr., Esq., PDomenici@domenicilaw.com
Bill Mansker, INEX, wlmminex@msn.com
Chris Atencio, OGC, NMED
Bart Faris, GWQB, NMED Dist. 1
ROS Reading File