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BEFORE THE NEVADA STATE ENVIRONMENTAL COMMISSION

In Re: Appeal of NDEP's NPDES)
Permit NV0023027 (Ponderosa Dairy))
)

APPELLANTS' OPENING STATEMENT

I. Introductory Statement

Amargosa Citizens for the Environment (“ACE”), John F. Bosta, Antonio Guerra Martinez (collectively “Appellants”) submit this Opening Statement in support of their appeal of the decision of the Nevada Division of Environmental Protection (“NDEP”) to approve the renewal and major expansion of the National Pollutant Discharge Elimination System (“NPDES”) Permit Number NV0023027 for the Ponderosa Dairy in Amargosa Valley. The Ponderosa Dairy, owned by a California corporation (Rockview Farms, Inc.), is a large confined animal feeding operation (“CAFO”) that generates enormous amounts of animal urine and feces and then discharges this raw waste to

settling ponds and then flooded or sprayed on nearby fields for disposal. Through the renewal and expansion permit, Rockview Farms, Inc. seeks to increase the amount of sewage discharged to 1,000,000 gallons per day – more than four times the amount of wastes generated by all of the residents of Nye County.

Appellants, Nevada citizens residing in Amargosa Valley near the dairy, oppose the permit renewal and expansion as fundamental not protective of the groundwater resources identified as the receiving water for this waste stream. The Appellants depend upon the aquifer underlying Amargosa Valley for their daily domestic and agricultural needs. The operation of the Ponderosa Dairy profoundly affects Appellants’ lives – indeed the dairy has contaminated the groundwater through reckless operation and been the subject of multiple investigations and enforcement efforts. The Appellants are therefore rightfully concerned with not only the problematic terms of NDEP’s permit but also the application process seemingly designed to thwart meaningful participation by local citizens.

II. Statement of Issues

A. Application Process Violations

Under NAC 445A.230 et seq., NDEP must follow certain procedures in order to ensure meaningful participation of all interested parties. NDEP failed to meet these requirements in the follows ways:

1. Inadequate Public Notice

NDEP must provide public notice of applications and hearings “in a manner designed to inform interested and **potentially** interested persons of the proposed discharge” NAC 445A.235(1); see also NAC 445A.239(1). NAC 445A.235(1)

thereafter sets forth minimum procedures that NDEP “must include.” Here, NDEP notice was not designed to ensure meaningful participation of residents of Amargosa Valley. The notices in this case were published one day in only one newspaper circulated in the valley – a small legal notice in the Pahrump Valley Times – and posted in the town office. NDEP could have, but did not, send notices to those citizens attending past public meetings from sign-up sheets. Further, as explained in more detail below, NDEP did not even provide notice of the public hearing in this matter to those individuals who had requested the hearing. In these circumstances, NDEP did not design a public outreach effort that was designed to “inform interested and potentially interested persons.”

2. Inadequate Notice of Public Hearing

The State Environmental Commission directs the NDEP, not once but twice, that it “must” provide “at least 30 days” prior notice of a hearing on applications. See NAC 445A.238(4) (Public notice for the hearing must be made at least 30 days prior to the hearing and in accordance with the requirements stated in subsection 1 of NAC 445A.234.); NAC 445A.239(1)(D) (Public notice of any public hearing held . . . must be . . . [g]iven . . . at least 30 days in advance of the hearing.”). In addition, the NDEP stated it would provide notice to who commented on the Notice of Proposed Action. “It [the notice of hearing] should have been -- gone to people who had commented on the dairy, on this permit renewal.” See NDEP Notice of Decision at 13 (Response to Comment 21.1).

NDEP, however, failed to meet these simple noticing requirements. NDEP’s Notice of Public Hearing (dated May 16, 2007 for the June 12, 2007 hearing) was never

sent to the citizens requesting the hearing. Thus, the citizens received significantly less than the mandatory 30-day advance notice of the public hearing.

3. Critical Documents Not Readily Available

One of the most critical documents in the regulation of CAFOs is the Nutrient Management Plan (“NMP”). See e.g., Waterkeeper Alliance v. EPA, 399 F.3d 486, 497 (2005). NMPs set forth the effluent limitations imposed on the discharger and how it intends to operate to meet those requirements. It therefore provides the public with critical information to gauge whether the permit issued will in fact protect water resources. See 73 Fed. Reg. 70418 (November 20, 2008) (Revised National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines for Concentrated Animal Feeding Operations in Response to the *Waterkeeper* Decision.) (“EPA is also requiring CAFOs seeking permit coverage to submit their nutrient management plans (NMPs) with their applications for individual permits or notices of intent to be authorized under general permits. Permitting authorities are required to review the NMPs and provide the public with an opportunity for meaningful public review and comment. Permitting authorities are also required to incorporate terms of NMPs as NPDES permit conditions.”) Indeed, the NDEP references the NMP for the Ponderosa Dairy in the Fact Sheet for the renewal/expansion application on pages 1, 2, 3, 4, 8 and 9. NDEP, however, refused to locate a copy of the draft permit or existing Ponderosa Dairy NMP in Southern Nevada; instead requiring each member of the public to either travel to Carson City to inspect a copy or arrange for a service to copy the draft permit or NMP, located in Carson City, and deliver it the individual in Amargosa Valley.

The NDEP's refusal to facilitate public review violates the requirements of NAC 445A.237(1) that requires NDEP "shall ensure that any application, reporting or related forms, including the draft permits prepared pursuant to subsection 1 of NAC 445A.233 . . . are available to the public for inspection **and** copying. (Emphasis added.) Forcing citizens to travel to Carson City from Amargosa Valley to satisfy their right to inspect critical public documents stretches the concept of "availability" beyond any rational meaning. Moreover, NDEP could have made the documents available the public online (as apparently the Ponderosa Dairy subsequently did for the staff of NDEP).

4. Draft NMP Not Circulated

In addition to not making the existing NMP available for inspection to Amargosa Valley residents, NDEP improperly deferred the completion of the revised Comprehensive NMP for the renewal and expansion until after permit issuance. NDEP is required to provide the public with the opportunity to review the complete and updated nutrient management plan for Ponderosa Dairy prior to permit issuance. Waterkeeper Alliance v. EPA, 399 F.3d 486, 497-502 (2005) (NMPs must be reviewed by the permitting authority before permit coverage is issued to any CAFO.) The schedule of compliance for the proposed permit only requires Ponderosa Dairy to submit its updated NMP 30 days *after* the permit's effective date. Any procedure that allows post-permit approval review of an NMP not only runs afoul of federal law as reflected in the Waterkeeper decision, but also violates NAC 445A.233(1)(b)(1) and NAC 445A.234(3). The Fact Sheet for this permit itself notes (at page 1) that "CAFOs are regulated based primarily on nutrient application rates, NMP compliance, not the number of animals at

the facility.” In recognition of that fact, the updated NMP should have been made available for public review during the comment period.

B. Substantive Permit Inadequacies

1. Lack of Groundwater Water Quality Monitoring

NAC 445A.250(1) permits NDEP to “reasonably require” that all existing wells in close proximity to Ponderosa Dairy, a confined animal feeding operation (“CAFO”), be monitored for pollutants and degradation of water quality. Despite authorizing discharging millions and millions of gallons of sewage onto lands within Amargosa Valley, a track record of groundwater contamination and a history of enforcement actions against the Ponderosa Dairy, NDEP’s permit allows Rockview Farms to stop groundwater water quality monitoring when it lines the final sewage holding lagoon (which it apparently has done). The public and NDEP is therefore left without any assurance that the measures it believes are necessary to protect the State’s waters from pollution in fact work, even though NDPE admits that the lines will leak and the field irrigation will penetrate to the underlying aquifer. The factual and legal support for groundwater monitoring are set forth in the report prepared by the Western Environmental Law Center (“WELC”) (attached hereto as Exhibit A). The documents referenced in the WELC Report are located on the SEC website at www.sec.nv.gov/cafo/index.htm and are hereby incorporated into this appeal.

NDEP should also have required groundwater monitoring in this case because of Ponderosa Dairy and Rockview Farm’s repeated history of noncompliance with the law and orders from NDEP and other state agencies. As demonstrated in Exhibit B, C, and D

hereto, the operators of Ponderosa Dairy simply cannot be trusted to faithfully adhere to the terms of its permit, particularly if no monitoring is required.¹

2. CNMP Is Inadequate

The Appellants obtained an expert review of the CNMP and his report is attached hereto as Exhibit E. As demonstrated in this report, the CNMP has fundamental problems with numerous sections, including, but not limited to its Emergency Action Plan, failure to address track out of sewage, Plan Facilities Information, Pest Management, Mortality Disposal Plan Nutrient Management and Wastewater Irrigation, water conservation, etc. The Appellants urge the SEC to remand this permit and CNMP to NDEP for further consideration of these items. In addition, the Appellants request that the SEC require the NDEP to include water quality-based effluent limitations and specific pathogen standards. Also, pursuant to 40 C.F.R. 122.23(b)(3), the Ponderosa Dairy should include within its CNMP the disposal of manure at the Beverly Hills Dairy since it is controlled by the same entity (Rockview Farms).

Lastly, it appears that the Ponderosa Dairy CNMP does not address the actual intention of the Rockview Farms regarding its operations at the site. In a September 6, 2007 application to the State Engineer for water rights, the Ponderosa Dairy requests water rights sufficient not only for their milking operation but also for 5,000 calves. NDEP's permit nor the CNMP address the waste generated by these additional animals.

3. NDEP Must Treat Animal Waste From Dairies As Sewage

NAC 445A.107 defines "Sewage" as "the water-carried human or animal waste from residences, buildings, industrial establishments, feedlots or other places, together

¹ NDEP even admits that "[t]he facility has an extensive history of compliance issues due primarily to elevated nitrate concentrations" Ponderosa Fact Sheet at 5.

with such groundwater infiltration and surface water as may be present.” There can be no doubt that the water-carried animal waste from the Ponderosa Dairy’s buildings, industrial establishments and feedlots meets exactly terms of this regulatory definition. Since the discharge from the Ponderosa Dairy is sewage, NDEP must apply the regulatory restrictions applicable to this waste stream.

For example, NAC 455A.275 prohibits the use of treated effluent for agricultural irrigation unless it has been treated to secondary standards: “A person shall not use treated effluent unless: . . . [t]he treated effluent has received at least secondary treatment.” *Id.* In turn, “treated effluent” is defined as “sewage that has been treated by a physical, biological or chemical process. The term does not include graywater.” NAC 445A.2748. Since the wastewater from the Ponderosa Dairy is sewage, the Dairy may not use this waste stream for any purposes unless NDEP finds that it meets secondary standards. In addition, NDEP must also require signage and buffer zones and insure that no runoff from fields will occur. NAC 445A.2752-2756.

However, NDEP repeatedly refused to apply these reasonable human health protective standards to CAFOs. See e.g., Ponderosa Dairy Notice of Determination Comment 1.5 (“ ‘What range of distances are considered unhealthful from the fields receiving manure and/or waste water?’ Response: There are no statutes or regulations limiting the distance between a concentrated animal feeding operation (CAFO) land application field and a residence.”); Comment 47.2 (“Comment: ‘What range of distance are considered unhealthful from the fields receiving manure and/or waste water?’ Response: ‘We have no required buffer zone for CAFOs.’”); Comment 17.2: “What is it difference of the design [between the Ponderosa ponds and a sewer pond]?”) Response:

“A modern sewer pond is most likely designed with a double liner. There are places where facilities do not have double-lined ponds, but that's -- that's our typical standard of performance.” [¶] WTS-5 Guidance Document for Design of Wastewater Treatment Ponds requires a liner with a leak detection plan for all wastewater treatment ponds. ‘Acceptable leak detection plans include double liners with leak collection or downgradient monitoring wells. Other innovative plans for leak detection will be reviewed by NDEP prior to acceptance.’ ”); Comment 22.8 (“Then why is there no liner barrier with monitoring underneath the sealed ponds, such that if there's a leak in the pond, we will know it?” Response: “Because we [the bureau] did not feel that that [it] was necessary [to regulate CAFOs the same as wastewater treatment plants] for a dairy facility.”)

To the citizens of Amargosa Valley, sewage is sewage. NDEP is required under law to insure that the storage and use of it comply with basic protective standards.

III. Witness List

1. Bill Barrackman
2. John Bosta
3. Alex Sagady

IV. Anticipated Length of Appellants' Case-in-Chief

The Appellants anticipate presenting their case-in-chief in approximately four hours.

V. Conclusion

Based upon the foregoing, Appellants respectfully request that the SEC consider whether, (1) the application process utilized by the NDEP complied with the letter and

spirit of applicable law in order to provide the citizens of rural Amargosa Valley with the meaningful opportunity and means to become aware, inform themselves and participate, and (2) whether the resultant permit adequately protects the State's precious and limited water resources.

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/s/
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