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**BEFORE THE NEVADA STATE ENVIRONMENTAL COMMISSION**

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In Re: Appeal of NDEP's NPDES )  
Permit NV0023027 (Ponderosa Dairy) )  
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**APPELLANTS' REPLY STATEMENT**

I. Introduction

Amargosa Citizens for the Environment (“ACE”), John F. Bosta, Antonio Guerra Martinez (collectively “Appellants”) submit this brief in reply to the Response Statement of the Nevada Division of Environmental Protection (“NDEP”) and Rockview Farms (Ponderosa Dairy) (“Dairy”) filed on June 26, 2009. Appellants’ Reply Statement demonstrates (1) the failure of NDEP to provide adequate notice, appropriate access to critical documents, and circulation of required the draft permit and Nutrient Management Plan (“NMP”); (2) the fundamental inadequacy of the Ponderosa Comprehensive NMP to address nutrient management, and (3) the failure of NDEP to apply legally required standards regulating the use of treated sewage effluent.

II. Procedural Issues

A. Inadequacy of Public Notice

NDEP argues that it sent notices in two papers and mailed notices to individuals requesting information and therefore as a matter of course satisfied the notice requirements of NAC 445.234. NDEP errs by (1) attempting to rewrite the qualitative standard of NAC 445A.234(1) into a quantitative one, and (2) misconstruing the facts and failing to provide adequate notice to potentially interested parties and those actually expressing a direct interest by requesting a public hearing.

1. Applicable Legal Standard

NDEP argues that all it must do to satisfy NAC 445A.234 is provide the minimum notice set forth in subsection (1) – notice in newspapers and those on its mailing list. See NDEP Response at 1-4. NAC 445A.234, however, requires more. First, NDEP must design a program for public notice “in a manner designed to inform

interested and **potentially** interested persons of the proposed discharge . . . .” NAC 445A.235(1) (emphasis added). Second, NAC 445A.234(1) requires that “[p]rocedures for the circulation of public notice must include at least the following: [newspaper and mailing list notice].” In other words, what NDEP considers the maximum notice in all cases is actually the bare minimum required. Moreover, the fundamental criteria for reviewing NDEP performance is qualitative: did NDEP reach out to “inform interested and potentially interested persons” given the context of the application before it?

## 2. NDEP’s Inadequate Program of Notice

NDEP failed to meet the NAC 445A.234 notice standard. NDEP did not send parties requesting a public hearing personal notice of the June 12, 2007 public hearing despite their concrete expression of interest in the application. NDEP and the Dairy argue that the published legal notice in the newspaper was adequate to meet the 30-day notice requirement for these parties. Appellants submit that this is not notice reasonably calculated to “inform interested and potentially interested parties” of the public hearing, particularly given the minimal cost and effort to provide such personal notice.

NDEP also appears to assert that it in fact provided personal notice to Amargosa Valley residents, including Appellants, by attaching a mailing list (NDEP Exhibit D2). NDEP Response at 4:22-23. As will be further explained at the hearing on this matter, Exhibit D-2 mailing list appears to be a new document and was not in file in 2008. Compare NDEP’s Exhibit D2 to Exhibit F, attached hereto. Nor does the NDEP attach any affirmation of service of an employee that this new list was used rather than the one previously existing in the file.

NDEP and the Dairy also point to the number of people attending the public hearing as a sign of success of NDEP's notice efforts. NDEP Response at 4, Dairy Response at 6. The relatively small turnout of Amargosa Citizens was in fact due to the last minute efforts of ACE. As Mr. Barrackman will testify, he was informed of the public meeting a day or two prior to the June 12, 2007 by a friend. Mr. Barrackman then created a one-page mailer informing recipients of the June 12, 2007 hearing. Mr. Barrackman then purchased a bulk mail permit and necessary postage and mailed the notice to all 600 or so rural residents of Amargosa Valley. ACE's mailers landed in the mailboxes the day of the hearing and motivated individuals to attend. See Notice of Decision at 13 (Comment 21.1). Why did not NDEP (or the applicant) undertake these relatively simple and low cost options to inform the Amargosa community? Since the resident had effectively hours notice of the public hearing rather than the 30 days required by law, the SEC should remand the permit for additional, adequately noticed, public process.

B. Inadequate Availability of Documents

In their Opening Statement, Appellants made a simple argument. When NDEP required interested parties to either travel to Carson or pay for the entire file to be copied and mailed to them, it did not make relevant documents reasonably available for inspection as required by NAC 445A.237(1). In NDEP and the Dairy's Responses, these parties reiterate their constrained view that citizens must either travel to Carson or pay for copying the entire file in order to inspect relevant documents. NDEP simply states that since it made documents "available" for inspection in Carson City and "repeatedly"

informed citizens living hundreds of miles away of this fact, it satisfied all requirements under the NAC.

Forcing Nevada citizens to travel to Carson City or incurring the substantial expense of copying and mailing large files incur substantial expense just to inspect relevant documents should not be set a precedent for how government interacts with its citizens to allow informed participation, particularly when simply and inexpensive solutions could be achieved. NDEP could have provided public online access to the documents as it apparently attempted to do shortly after the public hearing. See Email from NDEP to John Bosta, dated August 3, 2007, attached hereto as Exhibit G. NDEP could have also copied (as required the applicant to copy) the applicable files and locate them in Las Vegas or someplace in Amargosa Valley. NDEP instead effectively transferred this cost to each individual in Amargosa Valley. Since NDEP raised so substantial barriers to the right of citizens to inspect relevant documents, the SEC should remand the permit with directions to provide meaningful public inspection opportunities.

C. Draft NMP Not Circulated

Waterkeeper Alliance v. EPA, 399 F.3d 486, 497-502 (2005) requires that NMPs must be reviewed by the permitting authority and the public before a permit is issued to any CAFO. NDEP and the Dairy respond that they meet this requirement because a NMP had already been approved for the Dairy. NDEP's Response at 5-6; Dairy's Response at 7-8. The permit renewal before the NDEP was for expansion of sewage discharge from 625,000 gallons per day to 1,000,000 gallons per day; a 60 percent increase in sewage discharge. See Ponderosa Dairy Fact Sheet at 1. Thus, no prior approval of the NMP for handling this increase in waste stream existed in prior permits or

NMPs. NDEP was therefore required to produce an updated draft NMP and circulate it for meaningful public review.

### III. Substantive Permit Inadequacies

#### A. Groundwater Water Quality Monitoring

The Dairy's last-minute offer in response to this appeal to amend its permit to include a limited groundwater monitoring is a step in the right direction. However, the program must be made adequate with the following additional elements:

1. **Include wells downgradient from land application fields.** In order to ensure that the land application of tons of sewage to fields is not adverse affecting groundwater, the Dairy should expand the number of monitoring wells to include wells downgradient from a primary threat, the fields used to dispose of the nutrients.

2. **Expand range of sampled pollutants to include pathogens.** Bacteria and viral pathogens pose a significant danger to humans from animal wastes. Monitoring should include the full range of pollutants emitted by the Dairy.

3. **Remand permit for public input into water quality monitoring amendment.** The addition of the monitoring program, i.e., location and number of wells and sampling protocols and constituent analysis should be the subject of a public review process. The SEC should remand the permit to the NDEP.

#### B. Inadequate Nutrient Management

NDEP and the Dairy argue that the SEC should defer to NDEP staff in their determination that the NMP meets all applicable standards. NDEP's Response at 8; Dairy's Response at 11. For example, NDEP asserts that the NMP is in compliance with NRCS Standards 590 and 633 (NDEP's Response at 8) and the Dairy argues that it "is

authorized to discharge only as much nitrogen as will be taken up by the crops annually.” Dairy’s Response at 2:22-23. As demonstrated below, NDEP assertion that the NMP complies with these NRCS’s standards is wrong and the Dairy’s statement substantially misleads the SEC regarding how is discharges the huge amounts of nitrogen generated by its operations.

Nevada NRCS standards are intended to protect air quality by reducing emissions from CAFO operations. NRCS standard 590-NV (attached hereto as Exhibit H) indicates the purpose of nutrient management plans as:

Nutrient management plans are intended to help producers improve or maintain their level of management and expertise related to the application of nutrients on the lands they manage in order to . . .

Budget and supply nutrients for plant production

Properly utilize manure or organic by-products as a plant nutrient source

Minimize agricultural non-point source pollution of surface and ground water resources

Protect air quality by reducing nitrogen emissions (ammonium and NOx compounds) and formation of atmospheric particulates

Maintain or improve the physical, chemical and biological condition of soil

USDA NRCS-NV Conservation Practice Standard for Nutrient Management (590-NV), at 1.

The Dairy’s 8200 dairy cattle generate at least 943 tons of total nitrogen per year based on a book value rate for dairies milking twice a day. (The Dairy’s NMP does not indicate whether milking is twice a day or three times a day. If milking is three times a day, more than 943 tons of total nitrogen are likely to be produced.) Planned agricultural utilization of this nitrogen is only expected to be about 19-20% of the total nitrogen

generated at 182 tons of plant available nutrients per year. The Dairy operates its facility in a manner that takes over 70 percent of the nitrogen generated (based on 2 milkings per day and book value N generation) and discharges about 600 tons/year of such nitrogen uncontrolled to the atmosphere by design and as a purposefully intended operational feature of the facility.

The Dairy's polluting atmospheric transfer of nitrogen is done in order to avoid having to apply such nitrogen to the very limited land base that the facility has for waste application.

No aspect of such an operation with its high magnitude of uncontrolled ammonia emissions can be interpreted as meeting all of the objectives of the 590-NV nutrient management standard. Plans and specifications under this standard . . .

. . . shall describe the requirement for applying the practice to achieve intended purpose(s), using nutrients to achieve production goals **and to prevent or minimize resource impairment.**

USDA NRCS-NV Conservation Practice Standard for Nutrient Management (590-NV), at 8 (emphasis added). NRCS 590-NV also provides:

**Additional Criteria to Protect Air Quality by Reducing Nitrogen and/or Particulate Emissions to the Atmosphere**

In areas with an identified or designated nutrient management related air quality concern, any component(s) of nutrient management (*i.e.*, amount, source, placement, form, timing of application) identified by risk assessment tools as a potential source of atmospheric pollutants shall be adjusted, as necessary, to minimize the loss(es).

When tillage can be performed, surface applications of manure and fertilizer nitrogen formulations that are subject to volatilization on the soil surface (*e.g.*, urea) shall be incorporated into the soil within 24-hours of application.

When manure or organic by-products are applied to hay, pasture, or minimum-till areas, the rate, form and timing of application(s) shall be

managed to minimize volatilization losses.

USDA NRCS-NV Conservation Practice Standard for Waste Utilization (590-NV), at 7.

Deliberate management at the Dairy's facility to dispose the majority of the ammonia generated to the atmosphere instead of land applying it as their wastewater management technique cannot be interpreted as a management method that complies with these requirements of NRCS 590-NV. Uncontrolled ammonia releases are not a best management practice required by Section I.A.26 of the Dairy's permit.

Atmospheric ammonia emissions can be subject to wet or dry deposition to downwind surface water, will cause atmospheric formation of PM 2.5 and will contribute to conditions to cause visibility impairment from haze formation. These are all undeniable resource impairment problems, which should be prevented by Nutrient Management Plans that are also supposed to be conservation plans. Indeed, NAC 445B.22093(1) (Organic solvents and other volatile compounds) mandates that:

Solvents or other volatile compounds such as paints, acids, alkalis, pesticides, fertilizers and manure must be processed, stored, used and transported in such a manner and by such means as to minimize the tendency to evaporate, leak, escape or be otherwise discharged into the ambient air causing or contributing to air pollution. If methods of control are available and feasible effectively to reduce the contribution to air pollution from evaporation, leakage or discharge, as determined by the Director, the installation and use of such methods, devices or equipment for control is mandatory.

However, the Dairy's NMP is a plan for atmospheric ammonia pollution rather than a conservation measure that minimizes or prevents atmospheric resource impairments.

NRCS 590-NV requires consideration of the following when preparing nutrient management plans:

When applying manure with irrigation equipment, modifying the equipment can reduce the potential for volatilization of nitrogen from the

time the manure leaves the application equipment until it reaches the surface of the soil (*e.g.*, reduced pressure, drop down tubes for center pivots). N-volatilization from manure in a surface irrigation system will be reduced when applied under a crop canopy.....

When planning nutrient applications and tillage operations, encourage soil carbon buildup while discouraging greenhouse gas emissions (*e.g.*, nitrous oxide N<sub>2</sub>O, carbon dioxide CO<sub>2</sub>). Consider nitrogen volatilization losses associated with the land application of animal manure. Volatilization losses can become significant if manure is not immediately incorporated into the soil after application.”

USDA NRCS-NV Conservation Practice Standard for Waste Utilization (590-NV), at 8. There is no evidence at all that any such consideration was given or taken while the Dairy NMP was prepared. The NMP does not contain any physical specification for the types of irrigation techniques (*i.e.* reduced pressure and drop down tubes for center pivot irrigators) that is necessary to demonstrate responsiveness to these items for NMP consideration. Failure to incorporate such Best Management Practices violates condition I.A.26 of the permit.

NRCS 633-NV (attached as Exhibit I) provides: All materials shall be handled in a manner to minimize the generation of particulate matter, odors and greenhouse gases.” USDA NRCS-NV Conservation Practice Standard for Waste Utilization (633-NV), at 2. Use of evaporation techniques to dispose of ammonia waste to the air is not a method which minimizes generation of particulate matter, odors & greenhouse gases. Operation of this facility as an uncontrolled source of ammonia emissions source by design cannot be viewed in any manner to feature minimization of emissions that lead to generation of particulate matter, odors and greenhouse gases.

At an agricultural facility, the purpose of such a facility is to use nutrients to produce a crop through utilization of such nutrients in the crop soil root zone. Operating

the facility in a manner so that about 80% of the total nitrogen generated is NOT utilized by crops means that the operator is engaging in ammonia waste disposal practices rather than trying to ensure appropriate agricultural utilization of generated nitrogen nutrients. Failure to ensure appropriate agricultural utilization of generated wastes violates nutrient management planning requirements.

NRCS 633-NV also provides:

Plans and specifications for Waste Utilization shall be in keeping with this standard and shall describe the requirements for applying the practice to achieve its intended purpose. **The waste management plan is to account for the utilization or other disposal of all animal wastes produced**, and all waste application areas shall be clearly indicated on a plan map.

USDA NRCS-NV Conservation Practice Standard for Waste Utilization (633-NV), at 3 (emphasis added). The Dairy's Nutrient Management Plan did not account for all wastes produced at the facility, since it never accounted for total waste excretion and the amount of nitrogen generated. It only accounted for post-evaporation process waste volumes and nutrients. Under NRCS 590-NV, the Dairy was required to comply with a budgeting requirement for nutrients:

General Criteria Applicable to All Purposes

**A nutrient budget for nitrogen, phosphorous, and potassium shall be developed that considers all potential sources of nutrients** including, but not limited to, animal manure and organic by-products, waste water, commercial fertilizer, crop residues, legume credits, and irrigation water.

USDA NRCS-NV Conservation Practice Standard for Waste Utilization (590-NV), at 1 (emphasis added). Plans and specifications under NRCS 590-NV are required to have: "the following components shall be included in the nutrient management plan . . . Listing and quantification of all nutrient sources." *Id.* By ignoring the fact that its facility

discharges on the order of 600 tons of ammonia per year, the Dairy's nutrient budget never considered the lost ammonia nutrients as being part of "all potential sources of nutrients" at the site.

The Dairy's failure to follow the conservation practice requirements to account for all of its waste in plans and specifications and its deliberate atmospheric discharge of most of the nitrogen generated at the site means that the Dairy has defeated the air quality objectives of both NRCS 590-NV and 633-NV, as well as the Best Management Practice requirements of the Nevada DEP permit. These are palpable violations of permit conditions I.A.3 planning requirements, I.A.3.a.vii & I.A.26.

C. NDEP Must Treat Animal Waste From Dairies As Sewage

On June 28, 2009, the SEC held "[t]he definition of sewage in NAC 445A.107 includes water-carried animal wastes from all feedlots." In Re: Public Petition, Amargosa Citizens for the Environment, Submitted Under NRS 233B.120, Decision, at 2. Since the discharge from the Ponderosa Dairy fits within this definition of "sewage," NDEP must apply the regulatory restrictions applicable to this waste stream as described in Appellants' Opening Statement.

In their Responses, NDEP and the Dairy do not contest that the water-carried wastes at issue in the Ponderosa permit are in fact sewage under NAC 445A.107. Nor do NDEP and the Dairy contest that the discharges of water-carried wastes meet the definition of "treated effluent" under NAC 445A.2748. See NDEP Response at 9; Dairy Response at 13-14. Instead, NDEP and the Dairy side-step these directly applicable regulations and argue that "state CAFO regulations" apply to the sewage discharged by the Dairy. NDEP Response at 2.

Appellants do not dispute that “state CAFO regulations” apply to the Dairy and must be met by NDEP. What NDEP fails to address, however, is that in addition, the State of Nevada has created a directly applicable set of regulations governing the use of “treated effluent,” which the Dairy must also meet. These rules, set forth at NAC 445A.274 through 445A.280, provide specific standards for the use of treated effluent. Since these regulations apply to the Dairy’s use of treated effluent, NDEP cannot simply ignore them. The SEC should remand the permit to NDEP for consideration of whether the Dairy’s proposed use of treated effluent meets the requirements of NAC 445A.275 et seq.

IV. Conclusion

The NDEP failed to insure the adequate public participation and ultimately produced a flawed permit and NMP. The SEC should remand NPDES Permit NV0023027 back to the agency to produce a document that adequately discloses and manages nutrients, complies with state law regarding sewage, invites public disclosure and participation, and for a meaningful hearing.

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/s/  
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