

1 BEFORE THE STATE OF NEVADA, STATE ENVIRONMENTAL COMMISSION

2 In Re:

3 )  
4 Appeal of NPDES Permit NV0023027 )  
5 Rockview Farms, Inc. )  
6 (Ponderosa Dairy) )

FINDINGS OF FACT, CONCLUSIONS OF  
LAW AND ORDER

7 This matter came before a panel of the State Environmental Commission  
8 (“Commission”) on January 19 and 20, 2010. Appellants John Bosta (“Bosta”), Antonio  
9 Guerra Martinez (“Martinez”), and Amargosa Citizens for the Environment (“ACE”) appeared  
10 and were represented by their counsel, John Marshall, Esq. Respondent Nevada Division of  
11 Environmental Protection (“NDEP”) appeared and was represented by its counsel, Carolyn  
12 Tanner, Esq. Intervener Rockview Farms, Inc. appeared and was represented by its counsel,  
13 Jim Butler, Esq. and John Zimmerman, Esq.

14 Appellants appealed NDEP’s renewal, with modifications, of National Pollutant  
15 Discharge Elimination System Permit NV0023027 (“the Permit”) issued to Rockview Farms for  
16 its facility, Ponderosa Dairy (“the Dairy”). Appellants presented six issues. First, NDEP gave  
17 inadequate public notice of the public hearing by publishing the notice only once in the  
18 Pahrump Valley Times and by not sending notices to the citizens who requested the hearing.  
19 Second, NDEP refused to facilitate public review by refusing to locate a copy of the Dairy’s  
20 draft permit or existing nutrient management plan in southern Nevada, which required the  
21 citizens to travel from Amargosa Valley to Carson City or arrange for a service to copy the  
22 documents to satisfy their right to inspect public documents. Third, NDEP improperly deferred  
23 the completion of the revised comprehensive nutrient management plan for the renewal and  
24 expansion until permit issuance. Fourth, the Permit is inadequate because there is a lack of  
25 groundwater quality monitoring. Fifth, the comprehensive nutrient management plan is  
26 inadequate in its emergency action plan, failure to address track out of sewage, plan facilities  
27 information, pest management, mortality disposal plan nutrient management and wastewater  
28 irrigation. Sixth, NDEP must apply the regulatory restrictions applicable to sewage, defined in

1 NAC 445A.107, to water-carried animal waste from the Dairy.

2 Intervener filed a motion to dismiss on June 29, 2009, arguing that appellants were not  
3 an aggrieved party under NRS 445A.605 and did not have standing because neither Bosta  
4 nor Martinez had shown a personal or property right adversely affected by the Permit renewal.  
5 Appellants filed their opposition to the motion on January 14, 2010, arguing that they were an  
6 aggrieved party because they lived in proximity to Ponderosa Dairy and were concerned  
7 about the Dairy's impact on water quality and their health. NDEP did not join in the motion to  
8 dismiss, arguing that it viewed its obligation to protect the waters of the state and the United  
9 States regardless of whether the appellants lived upgradient or downgradient from the Dairy.  
10 After considering the written motion to dismiss and opposition and hearing arguments of  
11 counsel, the Commission denied Intervener's motion to dismiss.

12 After review of the admitted documentary evidence, after hearing the testimony of John  
13 Bosta, Antonio Guerra Martinez, William Barrackman, Alan Tinney, Bruce Holmgren and Jay  
14 Lazarus, and after hearing arguments of counsel, the Commission finds and decides as  
15 follows:

16 FINDINGS OF FACT

17 1. For National Pollutant Discharge Elimination System permits, the federal Clean  
18 Water Act and Nevada law require a Nutrient Management Plan (NMP), a plan in which the  
19 soil-applied nutrients from process wastewater and manure are balanced with the agronomic  
20 rates of the crop being grown. The federal Environmental Protection Agency, Region IX,  
21 reviewed the Permit in draft form before it went to public notice, and asked that more terms of  
22 the NMP be incorporated into the Permit. NDEP complied with EPA's directive and  
23 incorporated the critical terms of the NMP into the draft Permit and the fact sheet. At the time  
24 of public comment for the Permit, the NMP was basically complete except for minor revisions,  
25 such as correcting typographical errors, incorporating a copy of the renewed permit, and  
26 adjusting process wastewater sampling locations.

27 2. Neither federal nor Nevada law require a comprehensive nutrient management  
28 plan, which is a document prepared according to the standards of the Natural Resources

1 Conservation Service (“NRCS”). A comprehensive nutrient management plan (“CNMP”) 2 addresses more issues than a NMP, such as protecting air quality, providing feed stock for 3 livestock and odor control. Rockview Farms prepared a CNMP and submitted it to NDEP. 4 Although the CNMP was prepared in accordance with NRCS standards, NDEP’s Bureau of 5 Water Pollution Control, which issued the Permit, was concerned with only those provisions of 6 the CNMP regarding water quality. The CNMP meets the federal NMP requirements, except 7 that the CNMP does not address chemical handling. Chemical handling is addressed in the 8 NMP. The CNMP and NMP are two separate documents. NDEP approved the NMP portions 9 of the CNMP.

10 3. On February 9, 2007, a Notice of Proposed Action, stating that NDEP proposed to 11 issue the Permit to Rockview Farms, was published in the bi-weekly Pahrump Valley Times 12 and in the daily Las Vegas Review-Journal. NDEP also posted the Notice of Proposed Action 13 and the Fact Sheet on the Internet and placed a copy of the Notice of Proposed Action in the 14 local town hall. NDEP also mailed notices to those persons on its mailing list and to persons 15 who specifically requested notice. Persons were invited to submit comments to NDEP or 16 request a hearing within thirty days of the date of newspaper publication.

17 4. After the Notice of Proposed Action was published, NDEP received five requests 18 for a public hearing and it determined to hold a public hearing. Notice of the June 12, 2007 19 public hearing was published in the bi-weekly Pahrump Valley Times and in the daily Las 20 Vegas Review-Journal on May 11, 2007. NDEP used the same mailing list it had used for the 21 Notice of Proposed Action to mail its Notice of Public Hearing. It also mailed notices to the 22 five people who had requested a hearing. The Notice of Public Hearing was posted in the 23 local town office and on the Internet and was circulated at least 30 days prior to the hearing.

24 5. William Barrackman (“Barrackman”) did not receive individual notice of the Notice 25 of Public Hearing from NDEP. NDEP did not receive comments from Barrackman in response 26 to the Notice of Proposed Action, but from Barrackman’s attorney, William Eddie. Eddie was 27 on NDEP’s mailing list for the Notice of Public Hearing.

28 6. NDEP held a public hearing regarding the Permit in Amargosa Valley on June 12,

1 2007. Barrackman heard about the hearing from somebody at the Senior Center two or three  
2 days before the hearing and ACE then mailed a letter about the hearing to members of the  
3 community, which was delivered on the day of the hearing. Bosta, Martinez and Barrackman  
4 were present and spoke at the hearing. Bosta requested to be placed on NDEP's official  
5 mailing list at the hearing.

6 7. Applications and related forms, including the draft Permit and nutrient  
7 management plan, were made available to the public for inspection and copying at NDEP's  
8 offices in Carson City, Nevada. The fact sheet was available on NDEP's website, but not the  
9 draft Permit. NDEP either copied the entire file, copied specific documents when requested,  
10 or asked individuals to come to Carson City to review the file and select what documents they  
11 wanted copied. When requested to copy those documents NDEP felt was relevant, NDEP did  
12 not copy such documents because NDEP could not know what documents would be important  
13 to the individual requestor.

14 8. Ponderosa Dairy is a concentrated animal feeding operation (CAFO) and consists  
15 of three adjacent facilities: Dairy 1, Dairy 2 and Dairy 3. These dairies are surrounded by  
16 corral systems from which the cows walk into milking barns. After the milking cycles, cows  
17 are washed for herd health and milk quality and the milking barns are themselves washed out.  
18 Water generated in these individual milking barns becomes the process wastewater and flows  
19 to sumps behind each barn and then is pumped through separators to ponds and lagoons.  
20 Behind Dairy 1 are clay lined settling basins/ponds which separate the solids before the  
21 process wastewater goes to land application on the Dairy's crop fields.

22 9. The eight storage ponds for process wastewater at Dairy 1 do not have a  
23 synthetic liner, and there is a downgradient monitoring well known as MW-1 in place.  
24 Previously, Dairy 2 had three unlined ponds and a monitoring well (MW-2), but the Dairy  
25 abandoned the unlined ponds and their associated monitoring well when it created a  
26 synthetically lined pond system in 2005. Dairy 3 has multiple lined ponds and because the  
27 lined ponds were constructed to current synthetic liner requirements, there is no monitoring  
28 well at Dairy 3. The west lagoon and south lagoon are not lined but are not in active use and

1 are there for emergency storm water containment. If these two lagoons are used a second  
2 time, the Permit requires them to be lined.

3 10. The Permit states that additional monitoring wells may be added to the Permit as  
4 a minor modification.

5 11. The Permit states that Rockview Farms may stop monitoring MW-1 upon lining  
6 the Dairy 1 pond system, providing documentation to NDEP that MW-1 has been properly  
7 abandoned as required by the Permit, and the groundwater total nitrogen concentration at  
8 MW-1 does not exceed the background total nitrogen level.

9 12. The Permit requires Rockview Farms to monitor all wells for depth to groundwater,  
10 groundwater elevation, pH, chlorides, nitrate, total nitrogen, and total dissolved solids. Test  
11 results are to be reported to NDEP quarterly.

12 13. Although the Dairy 1 pond system is clay lined, NDEP has not approved that  
13 material as a liner and a monitoring well is required under the Permit.

14 14. In 2002 when Rockview Farms wrote to NDEP about the design and construction  
15 of the synthetically lined ponds at Dairy 3, it stated that the liner leakage shall be equivalent to  
16 12 inches of material with a permeability coefficient of  $1 \times 10^7$  cm/s.

17 15. If there is seepage of process wastewater to groundwater, the storage ponds and  
18 lagoons are looked at as possible contaminant source locations because pressure and a  
19 constant supply of water drive the water down.

20 16. At the time NDEP issued the Permit in 2007, the Dairy had drawn monitoring well  
21 samples in the last quarter of 2006 and the second and third quarters of 2007, but MW-1 was  
22 dry in the first quarter of 2007 and no sample was taken.

23 17. MW-1 needs to be replaced because the groundwater in that area has been  
24 drawn down below the bottom of the well. The Permit was issued just before the well went  
25 permanently dry. No groundwater monitoring reports have been provided since NDEP issued  
26 the Permit in October 2007.

27 18. On June 19, 2009, Rockview Farms submitted a proposed voluntary groundwater  
28 monitoring plan to NDEP that included four new monitoring wells, three of which were

1 downgradient and one of which was upgradient of the facility. MW-1A would replace MW-1  
2 and would monitor potential seepage from the Dairy 1 lagoons and storage ponds. MW-2A  
3 would monitor potential seepage from the Dairy 2 lagoon. MW-3 would monitor potential  
4 seepage from the Dairy 3 lagoon. MW-4 would be located upgradient of the facility. The  
5 monitoring wells are based on the location of the lagoons, not the fields. Rockview Farms  
6 worked with NDEP on the location and construction standards for the proposed wells. The  
7 proposed wells will serve as an early warning of potential seepage through the lagoon liners.

8 19. The Permit requires soil testing from each land application area that has had  
9 manure and/or process wastewater applied. Annually cropped land application areas are  
10 required to have soil analyses every three years or when a major change in crop rotation  
11 occurs and perennially cropped fields are required to have soil analyses every five years.  
12 The Permit specifies soil analyses for total nitrogen, total Kjeldahl nitrogen, nitrate, ammonia,  
13 and total phosphorus. Generally, 15 soil samples per each foot to a depth of three feet, which  
14 is the bottom of the root zone, are taken.

15 20. Soil sampling and testing is a top down approach and could catch a problem  
16 sooner than groundwater monitoring because there is no waiting for any potential  
17 contamination to get to the well depth, for example, of one hundred feet.

18 21. In soil samples with the annual report to be submitted to NDEP in January 2010,  
19 Rockview Farms found soils from Field 4, Flood Field 1 and the Gilligan North Pivot that have  
20 higher nitrogen concentrations so it is increasing the amount of fresh water going to those  
21 fields and reducing the amount of process wastewater until the nitrogen level decreases.

22 22. Rockview Farms has increased the frequency of its soil tests to annual testing to  
23 better manage the nutrient application to its fields.

#### 24 CONCLUSIONS OF LAW

25 1. The Commission has jurisdiction to hear this appeal pursuant to NRS 445A.605.

26 2. NDEP complied with NRS 445A.590 and NAC 445A.234 when it published and  
27 circulated the Notice of Proposed Action in February 2007.

28 3. NDEP complied with NRS 445A.595, NAC 445A.234, NAC 445A.238 and NAC

1 445A.239 when it published and circulated the Notice of Public Hearing in May 2007. NDEP  
2 gave adequate notice for the June 12, 2007 public hearing.

3 4. NDEP complied with NAC 445A.237 when it made the relevant documents,  
4 including the draft Permit and Nutrient Management Plan, reasonably available for public  
5 inspection.

6 5. NDEP complied with NAC 445A.233(1)(b)(1) and NAC 445A.234(3) and did not  
7 improperly defer completion of the revised Nutrient Management Plan until after it issued the  
8 Permit.

9 6. Whether NDEP failed to apply the regulatory restrictions in NAC 445A.274  
10 through NAC 445A.280 and treat Ponderosa Dairy's wastewater as sewage does not fall  
11 within the scope of this appeal.

12 7. Whether wet manure is being tracked out of Ponderosa Dairy does not fall within  
13 the scope of this appeal.

14 8. The Permit as issued in October 2007 did not adequately provide for monitoring of  
15 groundwater quality.

16 ORDER

17 Pursuant to NRS 445A.605(2) and based on the foregoing findings of fact and  
18 conclusions of law, NDEP is directed to modify Permit NV0023027 to include five groundwater  
19 monitoring wells, four located in accordance with the voluntary plan submitted by the Dairy to  
20 NDEP and the fifth well to be located downgradient from the field application areas, with the  
21 location of the fifth well to be approved by NDEP. Further, NDEP is directed to modify the  
22 Nutrient Management Plan and Permit NV0023027 to have the soil from the land application  
23 areas tested on an annual basis instead of every three or five years.

24 Dated this \_\_\_\_ day of February, 2010.

26 \_\_\_\_\_  
27 Lew Dodgion, Panel Chair  
28 State Environmental Commission

1 CERTIFICATE OF SERVICE

2 The undersigned, an employee of the State of Nevada, State Environmental Commission,  
3 does hereby certify that on the date shown below, a true and correct copy of the foregoing  
4 FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER was duly mailed, postage  
5 prepaid, to the following:  
6

7 John Bosta  
8 P.O. Box 42  
9 Amargosa Valley, NV 89020  
10 Appellant  
11 CERTIFIED MAIL 7007 0220 0003 5226 0187

12 Antonio Guerra Martinez  
13 HCR 70 Box 570  
14 Amargosa Valley, NV 89020  
15 Appellant  
16 CERTIFIED MAIL 7007 0220 0003 5226 0194

17 Bill Barrackman  
18 P.O. Box 235  
19 Amargosa Valley, NV 89020  
20 President of ACE  
21 CERTIFIED MAIL 7007 0220 0003 5226 0200

22 John L. Marshall, Esq.  
23 570 Marsh Avenue  
24 Reno, NV 89609  
25 Attorney for Intervener Amargosa Citizens for the Environment  
26 CERTIFIED MAIL 7007 0220 0003 5226 0217

27 Jim Butler, Esq.  
28 John Zimmerman  
Parsons Behle & Latimer  
50 West Liberty Street, Suite 750  
Reno, NV 89501  
Attorneys for Intervener Rockview Farms  
CERTIFIED MAIL 7007 0220 0003 5226 0224

Carolyn Tanner, Esq.  
Office of the Attorney General  
100 North Carson Street  
Carson City, NV 89701  
Attorneys for NDEP

27 \_\_\_\_\_  
Kathy Rebert, Recording Secretary, SEC

28 DATED: February 19<sup>th</sup>, 2010



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28