



State of Nevada

Dept. of Conservation & Natural Resources

State Environmental Commission SEC.nv.gov

901 South Stewart Street, Suite 4001, Carson City, Nevada 89701

FORM 3: FORM FOR REQUESTING AN APPEAL HEARING
(Provide attachments as needed)

1. Name, address, telephone number, and signature of appellant:

RECEIVED

Name: Save Our Smith Valley, Inc. (SOS, Inc.)

MAR 19 2015

Physical Address: See Attached.

ENVIRONMENTAL PROTECTION

E-mail Address: See Attached.

Telephone Number: See Attached.

Signature: [Handwritten signature: Carl Mayhew]

Representative capacity (if applicable): Secretary, SOS, Inc.


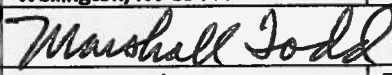
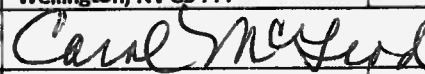
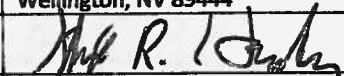
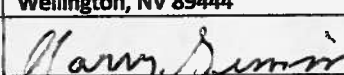
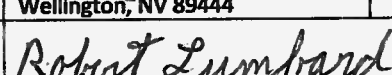

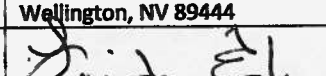
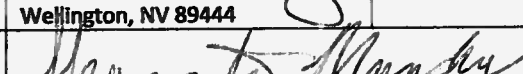
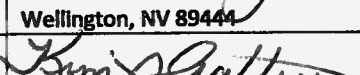
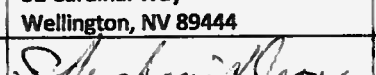
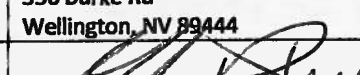
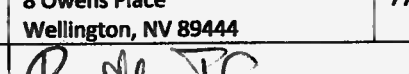
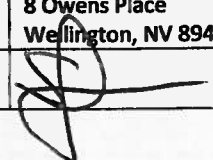
2. Attach copy of Nevada Division of Environmental Protection final decision, such as permit or notice of alleged violation, being appealed. (attached in plastic sleeve.)

3. Specify grounds of appeal: (check all that apply)

- Final decision in violation of constitutional or statutory provision;
Final decision made upon unlawful procedure;
Final decision was affected by other error of law;
Final decision was clearly erroneous in view of the reliable, probative and substantial evidence on the whole record;
Final decision was arbitrary or capricious or characterized by abuse of discretion;

4. For each ground of appeal checked above, please list the constitutional, Nevada Revised Statute (NRS), and/or Nevada Administrative Code (NAC) provision allegedly violated. Also list the statutes and/or or regulations that give the State Environmental Commission jurisdiction to hear the appeal.

- A. Violation of Statutory Provision: NRS § 233B.135(3)(a); see also No. 5 below
B. Unlawful Procedure: NRS § 233B.135(3)(c); see also No. 5 below
C. Error of Law: NRS § 233B.135(3)(d); see also No. 5 below
D. Clearly Erroneous: NRS § 233B.135(3)(e); see also No. 5 below
E. Arbitrary/Capricious/Abuse of Discretion: NRS § 233B.135(3)(f); see also No. 5 below

1. Name, address, telephone number, and signature of appellant:			
Name	Physical Address	Phone	Email
Chris Murphy	25 Dennis Drive Wellington, NV 89444	775-835-3050	straightarrowshoes@yahoo.com
Signature of appellant:			
Marshall Todd	25 Linda Way Wellington, NV 89444	775-686-8501	Mftodd63@yahoo.com
Signature of appellant:			
Carol McLeod	80 Jessen Road Wellington, NV 89444	775-901-2743	csmlcleodphs@yahoo.com
Signature of appellant:			
Steve Hanks	80 Jessen Road Wellington, NV 89444	775-901-2743	csmlcleodphs@yahoo.com
Signature of appellant:			
Bob Lumbard	265 Burke Wellington, NV 89444	775-465-0024	B25jbob@smithvalley.com
Signature of appellant:			
Gary Simmons	90 Jessen Road Wellington, NV 89444	775-465-2098	eagleranch@hdiss.net
Signature of appellant:			
Frank Ely	38 Linda Way Wellington, NV 89444	775-465-9188	Frankcely99@yahoo.com
Signature of appellant:			
Linda Ely	38 Linda Way Wellington, NV 89444	775-465-9188	Frankcely99@yahoo.com
Signature of appellant:			
Shassity Murphy	25 Dennis Drive Wellington, NV 89444	775-343-2132	straightarrowshoes@yahoo.com
Signature of appellant:			
Kim Gattuso	105 Hunewill Lane Wellington, NV 89444	775-465-2182	Kim89444@yahoo.com
Signature of appellant:			
Stephanie Doane	31 Cardinal Way Wellington, NV 89444	775-465-9885	stephaniedoane@earthlink.net
Signature of appellant:			
Glenn Peters	350 Burke Rd Wellington, NV 89444	775-465-2226	darbar30@aol.com
Signature of appellant:			
Ruth Ifversen	8 Owens Place Wellington, NV 89444	775-465-9086	wagonerrd@yahoo.com
Signature of appellant:			
David Ifversen	8 Owens Place Wellington, NV 89444	775-465-9086	davidi@newsguy.com
Signature of appellant:			

The statutes and regulations that give the State Environmental Commission legal authority and jurisdiction to hear this appeal are as follows:

1. NRS §§ 445A.300-445A.730
2. NRS § 445A.305
NRS § 445A.445
3. NRS § 445B.340
4. NRS § 445A.605(a)
5. NRS § 445A.720
6. NRS § 459.9995
7. NRS § 445B.890
8. NRS § 444.980
9. NRS § 519A.415
10. NAC §§ 445A.228-445A.263
11. NAC § 445A.407

5. For each ground of appeal checked above, provide a brief and concise statement of the facts which provide the basis for the appeal.

See Attachment I

Date of Request: March 19, 2015

Send Form to: Executive Secretary, State Environmental Commission, 901 South Stewart Street, Suite 4001, Carson City, NV 89701

Attachment I

5. For each ground of appeal checked above, provide a brief and concise statement of the facts, which provide the basis for the appeal.

The grounds for appeal of the permit issued by the Nevada Division of Environmental Protection (NDEP), Bureau of Water Pollution Control (Bureau) in favor of SMITH VALLEY DAIRY (SVD) Groundwater Pollution Control Permit NS2014502 effective date March 9, 2015 (Smith Valley Permit) are as follows:

1. Final Decision is in violation of statutory provisions:

Pursuant to NRS § 445A.585, "a permit is required for construction of treatment works. A person *shall not* begin the construction of any treatment works without a permit issued by the Department." However, SVD began construction on its treatment works facility as early as March 17, 2014 in clear violation of NRS § 445A.585. Additionally, NAC § 445A.283 requires a permit *before* constructing treatment works.

NDEP allegedly issued a Cease and Desist Order and Notice of Alleged Violation to SVD, however, SVD had already completed construction of its treatment works without a permit as noted by several neighboring residents, as well as civil engineering expert, Kathy J. Martin. NDEP issued the permit with this outstanding violation notice. SVD had no repercussions with regard to commencing construction in violation of Nevada law. In fact, NDEP made clear that the agency would approve the permit from the beginning, without conducting the proper testing and oversight necessary. There is no information available about whether the treatment works were designed according to any standards because they were completed long before the permit was approved.

Additionally, the permit allows pollution discharge through a pipe, across two private residences into a protected wildlife area. This is in clear violation of the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, which provides that "the discharge of any pollutant by any person shall be unlawful." See 33 U.S.C. § 1311(a). Here NDEP is allowing the discharge of pollutants from SVD (a point source) into Artesia Lake, a wildlife management area. Artesia Lake constitutes "navigable water" under the Clean Water Act, which defines the term broadly as "the waters of the United States, including territorial seas." See 33 U.S.C. § 1362(7). Without a National Pollution Discharge Elimination System (NPDES) permit specifying the allowable discharge conditions, SVD cannot discharge pollutants. This discharge is in clear violation of the Clean Water Act's provisions, which apply because the wildlife area receives federal funding. Also, the pipe, which was constructed before approval of the plan and issuance of the Smith Valley Permit, has not undergone any pressure testing to ensure proper functioning or to check for leaks, blockages, or other failures. According to engineering expert, Kathy J. Martin, the plans submitted by SVD were not site specific plans, but were in fact, general engineering plans that are not satisfactory for SVD's location.

Furthermore, the location of SVD is within a groundwater protection area. All of the surrounding residents use wells for drinking water. Groundwater discharge and seepage from SVD will inevitably pollute the aquifer, which provides water to the entire community.

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According to NAC § 445A.8255, a "Groundwater Protection Area" means "a geographic area that is: (1) Near to or surrounding public water wells, including, without limitation, community water systems and nontransient noncommunity water systems that use groundwater as a source of drinking water; and (2) Delineated as a groundwater protection area pursuant to the source water assessment and protection program of this State. Degradation to the community's sole source of drinking water will not only devastate the area, it will be irreversible. Groundwater moves exceedingly slowly underground and while the negative effects from SVD discharge pollution may not be realized immediately, the damage will be unavoidable.

The Smith Valley Permit was issued in violation of NRS § 40.140. SVD constitutes a nuisance under NRS § 40.140(1) & (2) because the activity will have a substantial adverse effect on the public health and safety. Additionally, SVD is coming to an area where homeowners, who are not engaged in agricultural activity, are currently located. SVD will not only interfere with the comfortable enjoyment of life and property of these residents, it will be injurious to health and offensive to the senses. Animal waste from over 7,000 bovines will not only produce hazardous odors, it will inevitably seep into the water supply and degrade the limited supply of underground drinking water in the area. Silage stored on the ground is already leaching into the soil. A concrete slab without a liner is not sufficient to store the amount of silage SVD will need.

NDEP's decision to issue Smith Valley Permit was in violation of the statutory provisions listed above. Therefore, this permit appeal should be granted.

2. Final Decision was made upon unlawful procedure and affected by other error of law:

NRS § 445A.665 states:

1. Any records, reports or information obtained under NRS 445A.300 to 445A.730, inclusive, must be available to the public for inspection and copying unless the Director considers the record, report or information or part thereof as confidential on a satisfactory showing that the information contained therein, other than information describing a discharge into the waters of the State or injection of contaminants through a well, is entitled to protection as a trade secret of the informant.

2. Any record, report or information treated as confidential may be disclosed or transmitted to other officers, employees or authorized representatives of this State or the United States who:

(a) Carry out the provisions of NRS 445A.300 to 445A.730, inclusive;
or

(b) Consider the information relevant in any proceeding under NRS 445A.300 to 445A.730, inclusive, and the information is admissible under the rules of evidence.

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NDEP failed to make information obtained under NRS §§ 445A.300 - 445A.730 available to the public for inspection and copying as provided by NRS § 445A.665. Citizens were told that access to the application would not be granted because "it was not complete." This however is not a lawful denial of public access. NDEP did not express that it considered any of the information requested to be a trade secret of the informant. While citizens were given a twenty-one day extension over the thirty day comment period, this extra time was meaningless because the public never received a complete permit application to comment upon. This failure to comply with the public records law makes the subsequent permit issuance unlawful. Citizens did not have a proper opportunity to notice and comment on the proposed draft and were provided inadequate public participation. These citizens exhausted all avenues to participate in the public permitting process, but were rebuffed. This effectively renders the permit approval invalid. NDEP's decision to issue Smith Valley Permit after this denial was made upon unlawful procedure and affected by an error of law.

3. Final decision was clearly erroneous in view of reliable, probative and substantial evidence on the whole record:

Issuing Smith Valley Permit is clearly erroneous in view of reliable, probative and substantial evidence on the whole record that SVD's groundwater monitoring plan's allowable seepage rates and associated mass loading of pollutants will violate water quality standards in contravention of NRS § 445A.305, which states in relevant part:

2. The Legislature declares that it is the policy of this State and the purpose of NRS 445A.300 to 445A.730, inclusive:

(a) To maintain the quality of the waters of the State consistent with the public health and enjoyment, the propagation and protection of terrestrial and aquatic life, the operation of existing industries, the pursuit of agriculture, and the economic development of the State; and

(b) To encourage and promote the use of methods of waste collection and pollution control for all significant sources of water pollution (including point and diffuse sources).

The issuance of Smith Valley Permit is clearly erroneous in light of the potential substantial degradation of drinking water from the surrounding wells when the total nitrogen concentration is allowed to reach 10.0mg/L before ceasing activities.

Further, the decision to issue the permit was clearly erroneous in view of reliable, probative and substantial evidence on the whole record because the permit is severely deficient in many aspects. Based upon expert civil engineer Kathy J. Martin's review, Smith Valley Permit has the following deficiencies:

(a) The depth to water level requires a "daily maximum," however it should say "daily minimum." A daily maximum would equate to the lowest depth to groundwater, however

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knowledge of the highest water level to compare to the depth of the lagoons is necessary to determine appropriate separation distance. See Smith Valley Permit, at page 3, 4, 5, and 6.

(b) The lagoon flow rate is calculated to average 0.80 million, or 800,000 gallons of water per day. However, this number far exceeds AgPro's estimate of 0.08 million gallons, or 80,000 gallons per day in the Smith Valley Dairy permit Application. Note that the state water permit was based on a total water usage estimate by the dairy as 0.15-0.18 million, or 150,000-180,000 gallons of water per day. The discharge permit allows for 10 times the volume of discharge requested by the applicant and 5 times more water than the applicant actually has a legal right to pump. See Smith Valley Permit, at page 7.

(c) The frequency of measurement for the flow rate by a meter is vague and overbroad. The base is described as a 30 day average, but the measurement is made weekly. It is unclear if the permit is requiring a 30 day rolling average or just weekly values. See Smith Valley Permit, at page 7.

(d) The groundwater monitoring parameters are vague and overbroad. The total dissolved solids, pH, chloride, and total nitrogen are all based on a "daily maximum," however, the sampling frequency is only "once per quarter." See Smith Valley Permit, at page 3, 4, 5, and 6.

(e) The Smith Valley Permit requires reporting of the amount of manure on site and removed in units of wet tons. However, there is no indication that the Smith Valley Dairy will have a weigh scale to produce such a measurement. The permit should require an measurement of amount of manure onsite and removed using cubic feet based on stack dimensions of the manure in the manure storage area. Otherwise, the operator would use book values to estimate wet tons and that would not be a satisfactory predictor of the actual amount of manure at SVD. See Smith Valley Permit, at page 8 and 15.

(f) The Smith Valley Permit's upgradient monitoring well location is located directly downgradient from the manure storage area. This location fails to consider the groundwater contamination from the manure storage that would affect "upgradient" water quality for the wastewater lagoons. See *generally* Smith Valley Permit.

(g) The frequency for total suspended solids and BOD5 are "annual" whereas the remaining parameters are semi-annual. The notation on the bottom of the table on page 10 says "annual measurements shall be conducted in the 4th quarter of each calendar year and submitted with the annual report." However, there is no specific information about when in the 4th quarter the sampling should take place. See Smith Valley Permit, at page 9 and 10.

(h) The monitoring requirements for the dead animal compost do not include information about the most important parameters – maximum temperature and moisture content. Without these numbers the efficiency of the composting cannot be correctly monitored. See Smith Valley Permit, at page 13.

(i) The parameters for baseline ground water sampling should include fecal indicators, such as e coli and/or fecal coliform. See Smith Valley Permit, at page 18.

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- (j) The Smith Valley Permit has nine items that "do not apply" to SVD's facility. See Smith Valley Permit, at page 19.
- (k) The Smith Valley Permit allows manure to be "stockpiled in and around the pens and in places of the facility's production area that drain to the wastewater impoundments." Based on this language, manure can be stored anywhere, which would make it impossible to control contaminated storm water runoff from the production area. In addition, the impoundments are built above-grade, so it is not clear how the contaminated stormwater would "drain" into the impoundments. See Smith Valley Permit, at page 19.
- (l) The Smith Valley Permit states that "any data point from the current year that is greater than the limits identified in the applicable tables and conditions above must be explained in the narrative." However, only the total nitrogen and total flow data have limits in the tables. Thus, only these two data points would be explained. See Smith Valley Permit, at page 21.
- (m) The Smith Valley Permit allows the operator to pick the "analytical technique or methods used." However, the permit should dictate the appropriate laboratory method and detection limit to be used for each parameter to be analyzed to insure that all data is comparable and that the detection limit is sensitive enough to identify pollution trends in the shallow groundwater. See Smith Valley Permit, at page 21 and 22.
- (n) The Smith Valley Permit states that "all laboratory analyses conducted in accordance with this discharge permit must have detection at or below the permit limits." However, only one parameter, total nitrogen, has a detection limit. Traditional discharge permits list the detection limits alongside each parameter and the detection limit should be significantly lower than the permit limit. See Smith Valley Permit, at page 22.
- (o) Smith Valley Permit allows total nitrogen to increase to 7.0mg/L before "an alternative method of process wastewater and/or manure storage must be prepared and submitted to the Division for review and approval." It is unclear what other alternate methods are available, beyond a plastic lined lagoon to fulfill this requirement. Additionally, the source of the nitrogen pollution does not have to be identified and the nearby residents drinking the groundwater do not have to be notified. This only compounds the problem without finding a viable solution. See Smith Valley Permit, at page 25
- (p) The Smith Valley Permit requires manure storage methods that minimize dust during high wind events. However SVD has zero manure storage methods proposed to prevent fecal dust from blowing during high storm events. See Smith Valley Permit, at page 28.
- (q) The Smith Valley Permit animal mortality management plan is deficient because there are no design plans or drawings and "animal carcasses shall not be disposed of in storage or treatment facilities unless the facility is designed specifically to treat the carcasses." See Smith Valley Permit, at page 29.

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(r) The engineering drawings have not been shown to be in compliance with design standards. See Smith Valley Permit, at page 27

(s) The Inspections section of the Permit did not include a specific provision to pressure test the buried pipeline used to pump manure wastewater from the lagoons to the land application areas several miles south of the dairy facility. See Smith Valley Permit, at page 29.

4. Final decision was arbitrary or capricious or characterized by an abuse of discretion:

NRS § 445A.445 states:

The Director shall:

1. Administer and enforce the provisions of NRS 445A.300 to 445A.730, inclusive, all regulations adopted by the Commission, and all orders and permits issued by the Department;

2. Examine and approve or disapprove plans and specifications for the construction and operation of new treatment works and extensions, modifications of or additions to new or existing treatment works;

3. Develop comprehensive plans and programs for preventing, reducing or eliminating pollution and controlling injections through a well to prevent the degradation of existing or potential underground sources of drinking water, with due regard to the improvements which are necessary to conserve waters for the protection and propagation of fish and aquatic life, wildlife, recreational purposes, public water supply, agricultural, industrial and other purposes; and

4. Certify all costs and expenditures for any facility, land, building, machinery, equipment, treatment works or disposal systems which are acquired, constructed or installed in conformity with the purposes of NRS 445A.300 to 445A.730, inclusive.

NDEP's decision to issue the Smith Valley Permit was arbitrary and capricious because it did not adequately protect groundwater quality to prevent the degradation of underground sources of drinking water for the protection of wildlife or public water supply. In fact, The Smith Valley Permit states: "There shall be no discharge of substances that would cause the groundwater quality to degrade below drinking water standards." This blanket statement is not an adequate regulatory control for NDEP to rely on in determining to issue the Smith Valley Permit and was therefore, arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with law.

Furthermore, NAC § 445A.121 states in relevant part:

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1. Waters must be free from substances attributable to domestic or industrial waste or other controllable sources that will settle to form sludge or bottom deposits in amounts sufficient to be unsightly, putrescent or odorous or in amounts sufficient to interfere with any beneficial use of the water.

2. Waters must be free from floating debris, oil, grease, scum and other floating materials attributable to domestic or industrial waste or other controllable sources in amounts sufficient to be unsightly or in amounts sufficient to interfere with any beneficial use of the water.

3. Waters must be free from materials attributable to domestic or industrial waste or other controllable sources in amounts sufficient to produce taste or odor in the water or detectable off-flavor in the flesh of fish or in amounts sufficient to change the existing color, turbidity or other conditions in the receiving stream to such a degree as to create a public nuisance or in amounts sufficient to interfere with any beneficial use of the water.

4. Waters must be free from high temperature, biocides, organisms pathogenic to human beings, toxic, corrosive or other deleterious substances attributable to domestic or industrial waste or other controllable sources at levels or combinations sufficient to be toxic to human, animal, plant or aquatic life or in amounts sufficient to interfere with any beneficial use of the water. Compliance with the provisions of this subsection may be determined in accordance with methods of testing prescribed by the Department. If used as an indicator, survival of test organisms must not be significantly less in test water than in control water.

The Smith Valley Permit language is exceedingly vague with regards to groundwater monitoring and pollution control. NDEP's decision to issue the Smith Valley Permit without specific pollution control standards to ensure that SVD does not create a nuisance or interfere with the beneficial use of water is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law.

Moreover, Permits cannot be issued under NRS § 445A.490, if "any discharge ... would result in the degradation of existing or potential underground sources of drinking water." NAC § 445A.819 defines "degrade" to mean, "to cause or create an increase in the amount or concentration of any substance in an underground source of drinking water to an extent that (1) A regulation prescribing standards for primary drinking water is violated; or (2) The Director finds that the existing or potential municipal, industrial, domestic or agricultural use of that water is impaired."

NDEP's decision to issue the Smith Valley Permit without considering or finding that the existing domestic use of water would be impaired, was clearly erroneous in view of reliable, probative and substantial evidence on the whole record, and was arbitrary, capricious, characterized by an abuse of discretion, and otherwise not in accordance with law.