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8 BEFORE THE STATE ENVIRONMENTAL COMMISSION
9 STATE OF NEVADA
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12 *In re:*
Amargosa Citizens for the Environment,
13 *Petition for Declaratory Order or Advisory*
Opinion filed January 8, 2009.

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15 **ROCKVIEW FARMS, INC., OPPOSITION TO PETITION FOR A DECLARATORY**
ORDER OR AN ADVISORY OPINION

16 Comes now, Rockview Farms, Inc., as operator of the Ponderosa Dairy, by and through its
17 attorneys of record, Parsons, Behle & Latimer, and hereby files its opposition to the Petition for a
18 Declaratory Order and an Advisory Opinion filed by the Amargosa Citizens for the Environment
19 (ACE) on January 8, 2009. Rockview Farms' opposition is supported by the following
20 memorandum of points and authorities, all relevant documents on file with the Commission or the
21 Nevada Division of Environmental Protection (NDEP), and any oral argument the Commission
22 may request.
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **Introduction**

3 ACE's Petition should not be considered by the Commission because it is not authorized
4 under NRS 233B.120. Likewise, because ACE failed to timely file an appeal of Rockview's
5 Permit, it has no standing to challenge the terms of the Permit at the Commission. Accordingly,
6 the Commission should dismiss ACE's Petition.
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8 Even if the Commission considers ACE's Petition, it is clear that there is no basis for
9 ACE's request for the Commission to declare that the Director of the Department of Conservation
10 and Natural Resources should require groundwater quality monitoring of all existing wells in
11 close proximity to the Ponderosa Dairy or a groundwater monitoring program at the Ponderosa
12 Dairy. Moreover, the Permit already requires groundwater monitoring and there is no evidence
13 that more extensive monitoring is necessary. Lastly, ACE's request for a declaratory order that
14 sewage, as defined under NAC 445A.107, includes dairy wastewater is based on incorrect
15 conclusions regarding the process wastewater that is stored in dairy lagoons and applied to land as
16 fertilizer. Lastly, ACE's request for an advisory opinion that groundwater monitoring is the only
17 way to adequately protect groundwater is not supported by the law or the facts. ACE's Petition is
18 simply an improper attempt to circumvent the appeal process set forth in NRS 445A.605 and
19 should be dismissed or denied by the Commission.
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22 **Facts**

23 The Nevada Division of Environmental Protection, Bureau of Water Pollution Control
24 renewed Rockview Farms' Permit NV0023027 on October 25, 2007. The Permit became
25 effective November 4, 2007 and expires on November 3, 2012. NDEP issued the Permit pursuant
26 to the Clean Water Act as amended, 33 U.S.C. 1251 *et seq.*, and the Nevada Water Pollution
27 Control Law, NRS 445A.300 – NRS 445A.730. The Permit allows Rockview Farms to discharge
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1 manure solids and process wastewater (green water) from the Ponderosa Dairy and apply it to
2 approximately 865 acres of crop lands. All manure solids generated onsite are removed from the
3 production area and composted and sold under NDEP Compost Plant Permit #SW289REV00.
4 The rate at which nitrogen compounds in the green water are applied to crops is limited to the
5 annual crop nitrogen uptake rate.
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7 The record shows that NDEP's decision to renew Rockview Farms' Permit was the result
8 of a lengthy review within the agency and extensive public comment. During the review process
9 NDEP reviewed and responded to numerous written comments and those made at a public
10 hearing on June 12, 2007. ACE's president, secretary, and treasurer all participated in the public
11 comment process, but did not timely appeal the Permit to the Commission.
12

13 Only two individuals (John Bosta and Antonio Guerra Martinez) appealed NDEP's
14 decision to renew Rockview Farms' Permit, which appeal is currently pending before the
15 Commission. ACE, however, failed to timely file an appeal of the Permit and instead is now
16 attempting to challenge the Permit through an administrative declaratory order or advisory
17 opinion under NRS 233B.120. For the reasons set forth below, however, ACE's Petition is
18 procedurally improper, not supported by the law or the facts, and untimely.
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20 Argument

21 **I. The Commission should dismiss ACE's Petition because it is not authorized by 22 NRS 233B.120 and ACE failed to timely appeal the Permit.**

23 The only basis for ACE's Petition is NRS 233B.120. But Ace's Petition does not seek the
24 Commission's decision regarding the applicability of a statute, or agency regulation or decision.
25 Thus, NRS 233B.120 does not apply and the Commission should not consider the Petition. In
26 addition, ACE lacks standing to challenge the terms of the Permit because it failed to timely file
27 an appeal as allowed under NRS 445A.605. Because ACE failed to timely appeal NDEP's
28 decision, it has waived any objection to the Permit. Accordingly, the Commission should dismiss

1 ACE's Petition.

2 **a) The Petition is not Authorized Under NRS 233B.120 and should be**
3 **dismissed.**

4 Any interested person may petition the Commission for a declaratory order or an advisory
5 opinion as to the applicability of any statutory provision, or Commission regulation or decision.
6 NRS 233B.120; NAC 445B.888. The procedure for obtaining an agency decision regarding the
7 applicability of a statute, or agency regulation or decision is designed to promote the process of
8 obtaining a decision regarding an agency's position on a particular matter rather than challenging
9 a determination already made. *Women Aware v. Reagen*, 331 N.W.2d 88, 92 (Iowa 1983) (citing
10 *Wisconsin Fertilizer Assn. v. Karns*, 158 N.W.2d 294, 300 (Wis. 1968)); see also, *Hill v. State*
11 *Employees Retirement Commn.*, 851 A.2d 320, 325 (Conn. App. 2004). The procedure was not
12 intended to "allow review of concrete agency decisions for which other means of review are
13 available." *Citizens Against Reckless Dev. v. Zoning Bd. of App.*, 159 P.3d 143, 156 (Haw. 2007).

15 Here, ACE is not seeking the Commission's input regarding the applicability of any
16 statute, or Commission regulation or decision, but is attempting to appeal NDEP's decision to
17 renew Rockview Farms' Permit by asking the Commission to add a new provision to the Permit.

19 The first two issues in ACE's Petition that concern NAC 445A.250(1) do not request the
20 Commission to decide the applicability of any statute, or Commission regulation or decision.
21 NAC 445A.250(1) states that any discharge authorized by the Nevada Water Pollution Control
22 Law may be subject to such monitoring requirements as may be reasonably required by the
23 Director of the Department of Conservation and Natural Resources. There is no question that the
24 monitoring requirements authorized under NAC 445A.250(1) were applicable, and in fact were
25 applied, to Rockview Farms' Permit. Section I.A.2(a) of the Permit mandates that groundwater
26 samples shall be collected from a monitoring well (MW-1) to confirm the effective protection of
27 groundwater. Therefore, clearly ACE is challenging the groundwater quality monitoring program
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1 that NDEP designed and imposed in the Permit terms, not the applicability of the regulation. If
2 ACE believed NDEP should have required monitoring of all existing groundwater wells in
3 proximity to the Ponderosa Dairy or instituted a groundwater monitoring program, then it could
4 have appealed the Permit to the Commission under NRS 445A.605.

5
6 Throughout the Petition, ACE repeatedly raises policy issues and concerns regarding the
7 “shortcomings” of the current regulatory system for reviewing and issuing water pollution control
8 discharge permits. But none of the policy issues raised by ACE may be considered under NRS
9 233B.120 because they do not relate to the applicability of a statute, or agency regulation or
10 decision. Accordingly, the Petition is not proper and should be dismissed by the Commission.

11 **b) ACE failed to appeal NDEP’s decision to renew Rockview’s Permit**
12 **and should be barred from challenging the decision under NRS**
13 **233B.120.**

14 As stated above, NDEP issued the Permit in October 2007 and ACE did not file an appeal
15 with the Commission. Thus, ACE should not be allowed to challenge the terms of the Permit
16 under NRS 233B.120 because it failed to appeal the Permit under NRS 445A.605 and its
17 challenge is untimely. Allowing a party to circumvent the administrative appeal process over a
18 year after a Permit is issued would render the time limits for an appeal meaningless and would
19 subject NDEP to endless review of its permits. Therefore, the Commission should dismiss ACE’s
20 Petition as an improper and untimely appeal of an agency decision.

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22 **II. The Commission should not issue any declaratory order or advisory opinion**
23 **based on ACE’s Petition because Nevada law does not require all existing wells**
24 **to be monitored or a groundwater monitoring program.**

25 The Nevada Water Pollution Control Law does not mandate groundwater monitoring.
26 Concentrated Animal Feeding Operations (CAFOs) are regulated based primarily on nutrient
27 application rates, which are a function of nutrient concentration and crop uptake rates. The
28 nutrient application rates are set forth in an approved nutrient management plan (NMP) and based

1 on best management practices as described by the U.S. Department of Agriculture, Natural
2 Resources Conservation Service. Contrary to ACE's assertion, groundwater monitoring is not
3 required by NDEP if a CAFO has synthetically-lined process wastewater storage facilities that are
4 designed, constructed, and operated to achieve current State of Nevada standards and green water
5 is land applied in accordance with an approved NMP.
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7 Moreover, ACE fails to recognize that Rockview Farms' Permit requires groundwater
8 monitoring. ACE is not seeking to determine whether NAC 445A.250(1) applies to discharge
9 permits, or even if the Ponderosa Dairy should be subject to any monitoring requirements. ACE
10 instead is seeking to impose more stringent groundwater monitoring policies on the Ponderosa
11 Dairy based on its unsubstantiated¹ allegations regarding groundwater pollution. ACE also fails
12 to recognize that Rockview Farms, at significant expense, constructed synthetically-lined lagoons
13 in reliance on NDEP's policy not to require monitoring wells if the CAFO has a synthetically-
14 lined lagoon. Rockview Farms could have expended substantially less money to construct clay-
15 lined lagoons and installed monitoring wells, but chose to be proactive and install synthetically-
16 lined lagoons and installed monitoring wells, but chose to be proactive and install synthetically-
17 lined lagoons that are more protective of groundwater quality.

18 In addition, ACE simply fails to understand or ignores the fact that compliance with an
19 approved NMP adequately protects groundwater quality and satisfies the requirements of the
20 Nevada Water Pollution Control Law. ACE's mistrust of NDEP's ability to effectively monitor
21 and enforce compliance with Rockview Farms' Permit and its skepticism regarding the current
22 permitting process is not a proper subject for a Petition under NRS 233B.120. Accordingly, the
23 Commission should deny ACE's Petition.
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27 ¹ ACE consistently mischaracterizes the Permit and the operating record of the Ponderosa Dairy. The Petition shows
28 why the Commission should not allow a party to indirectly appeal a Permit decision through a petition under NRS
233B.120—because the entire permitting record, specific permit terms, and operating record of the permittee should
be before the Commission if it is reviewing an NDEP permit.

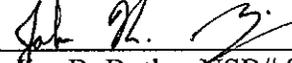
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AFFIRMATION

Pursuant to NRS 239B.030, the undersigned hereby affirms that the preceding document does not contain the Social Security number of any person.

PARSONS BEHLE & LATIMER

DATED this 5th day of February, 2009

By: 
John R. Zimmerman, NSB# 9729