

1 BEFORE THE STATE OF NEVADA, STATE ENVIRONMENTAL COMMISSION

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-- Public Petition --  
Amargosa Citizens for the Environment  
Submitted Under NRS 233B.120

**DECISION**

On February 11, 2009, the State Environmental Commission (“Commission”) considered a petition submitted by the Amargosa Citizens for the Environment (“ACE”) pursuant to NRS 233B.120 and NAC 445B.888. Prior to hearing ACE’s petition, the Commission considered a motion to vacate and reset the hearing on ACE’s petition, which was filed by Rockview Farms, Inc., owner and operator of Ponderosa Dairy. Rockview Farms asked that the hearing be reset because its representative, Assemblyman Ed Goedhart, was unable to attend the hearing due to legislative responsibilities. After hearing from counsel for Rockview Farms about Ed Goedhart’s role, the Commission denied the motion. The Commission then proceeded to consider ACE’s petition. Representatives from ACE, Rockview Farms and the Nevada Division of Environmental Protection (“NDEP”) participated. Public comment was also received.

The petition requested the Commission to issue a declaratory order on three issues:

- A. The Director of the Department of Conservation and Natural Resources should use the powers allocated to the Director in NAC 445A.250(1) to “reasonably require” that all existing wells in close proximity to Ponderosa Dairy, a confined animal feeding operation, be monitored for pollutants and degradation of water quality;
- B. The Director of the Department of Conservation and Natural Resources should use the powers allocated to the Director in NAC 445A.250(1) to “reasonably require” that a groundwater monitoring program should be

1 instituted at Ponderosa Dairy in a manner so as to detect the movement of  
2 contaminants from the operation of the dairy; and

3 C. Sewage as defined in NAC 445A.107 includes dairy feedlots.

4 The petition also requested the Commission to issue an advisory opinion, Issue D, to confirm  
5 that in accordance with the duties described in the Nevada Water Pollution Control Act,  
6 comprehensive groundwater monitoring is the only way to adequately protect groundwater  
7 because it would allow regulators the ability to track pollution from an entire facility and  
8 assures that “best management practices” are working.

9 The Commission requested legal advice from its counsel. Counsel advised the  
10 Commission that issuing a declaratory order with respect to Issues A and B was beyond the  
11 scope of what the Commission can do under NRS 233B.120 and NAC 445B.888. Counsel  
12 indicated that NRS 233B.120 is meant to provide a means of seeking a determination of  
13 whether and in what way some statute, regulation or agency decision applies to the factual  
14 situation raised by an interested person that has not yet been determined. NDEP already  
15 spoke as to the applicability of monitoring required by NAC 445A.250(1) to the Ponderosa  
16 Dairy when it issued the permit in 2007. Thus, there is no longer a question of how the  
17 relevant statutes or regulations apply and there is no basis for a declaratory order. In addition,  
18 issuing a declaratory order would circumvent the contested case process. An appeal, filed by  
19 John Bosta, is currently pending before the Commission concerning Ponderosa Dairy’s  
20 permit. Counsel indicated that the Commission could issue a declaratory order regarding  
21 Issue C, inclusion of dairy feedlots in the definition of sewage found in NAC 445A.107.

22 With respect to the advisory opinion, Issue D, counsel for the Commission advised that  
23 such an opinion is beyond the scope of NRS 233B.120 because it seeks a policy statement  
24 and not a determination of whether and in what way a statute applies to a factual situation.  
25 Counsel also advised that if the Commission issued such an opinion, it could be engaging in  
26 ad hoc rulemaking because the rulemaking procedures contained in NRS chapter 233B were  
27 not followed. See *K-Mart Corp. v. S/IS*, 101 Nev. 12, 693 P.2d 562 (1985); *Labor*

1 *Commissioner v. Littlefield*, 123 Nev. 35, 153 P.3d 26 (2007). Counsel for NDEP and  
2 Rockview Farms agreed with the legal analysis provided by counsel for the Commission.

3 The Commission heard more testimony regarding Issue C. Sewage is defined in NAC  
4 445A.107(1) as “the water-carried human or animal waste from residences, buildings,  
5 industrial establishments, feedlots or other places, together with such groundwater infiltration  
6 and surface water as may be present.” Dairy feedlots are not mentioned in the definition.  
7 ACE explained that its purpose in clarifying that feedlots in the “sewage” definition included  
8 dairy feedlots is so that the animal waste would be considered sewage and another set of  
9 regulations would apply. It offered an estimate that one cow produces as much waste as 20  
10 or 30 humans and that Ponderosa Dairy has 8,500 cows. By that calculation, ACE figured the  
11 dairy operation produces as much as four times the waste pollution as Nye County. It noted  
12 that untreated dairy manure contains some of the same pathogens as human manure. NDEP  
13 offered that feedlots historically has been where beef cattle is fattened before slaughter and  
14 that at the end of the day, it was not sure the permit writing process would be affected if  
15 feedlot in the definition of “sewage” included dairy feedlots.

16 After hearing testimony and questioning witnesses, the Commission determined that it  
17 would deny the petition regarding Issues A, B and D and that it would continue Issue C  
18 regarding the definition of “sewage” to the next Commission meeting in order to hear from  
19 NDEP staff.

20 Based on the foregoing, the petition filed by Amargosa Citizens for the Environment is  
21 DENIED, except that the Commission shall consider the request for a declaratory order  
22 regarding the definition of sewage under NAC 445A.107 and dairy feedlots at its next  
23 Commission meeting.

24 Dated this \_\_\_\_ day of March, 2009.

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28 Lew Dodgion, Chairman  
State Environmental Commission