



**STATE OF NEW MEXICO
WATER QUALITY CONTROL COMMISSION**

**IN THE MATTER OF THE PETITION
FOR ALTERNATIVE ABATEMENT STANDARDS
FORMER PRICE'S VALLEY GOLD NORTH DAIRY,
BERNALILLO, SANDOVAL COUNTY, NEW MEXICO**

WQCC 16-02(A)

D&G Price Limited Partnership,

Petitioner

**DECISION AND ORDER GRANTING
ALTERNATIVE ABATEMENT STANDARDS**

This matter comes before the New Mexico Water Quality Control Commission ("WQCC" or "Commission") upon the Petition for Alternative Abatement Standards Former Price's Valley Gold North Dairy Bernalillo, Sandoval County, New Mexico ("Petition") filed by D&G Price Limited Partnership ("Petitioner") on April 28, 2016. A public hearing in this matter was held before the Commission on September 13, 2016. The Commission heard all evidence, deliberated, and voted to approve the Petition for the reasons set forth below.

FINDINGS OF FACT

I. Procedural Findings

1. Pursuant to the Commission's Regulations at 20.6.2 NMAC, the New Mexico Environment Department ("NMED" or "Department") issued ground water discharge permit DP-437 for Price's Valley Gold North Dairy ("PVGND") in 1987. Dairy operations ceased in 1998 and DP-437 was terminated in 2006. *See* Former Price's Valley Gold Dairy Bernalillo, Sandoval County, New Mexico Dairy's Statement of Intent to Present Technical Testimony ("PVGND Statement of Intent"), at 3; Testimony of Ali Furrall, NMED Exhibit 1, at 3.

2. On April 28, 2016, Petitioner submitted the Petition to the Commission requesting approval of alternative abatement standards for three contaminants within the Valley Fill Aquifer. *See* Petition at 5-6.

3. On May 10, 2016, the Department and Petitioner appeared before the Commission during its regular meeting to request a hearing on the Petition, with the Department indicating its intent to support the Petition. The Commission determined that a public hearing would be held on the Petition, and authorized the Chair to appoint a Hearing Officer to schedule the hearing and serve as Hearing Officer pursuant to 20.1.3.10.B NMAC. The Chair appointed Jeffrey N. Holappa, Administrative Law Judge for the New Mexico Environment Department, to serve as Hearing Officer on May 12, 2016.

4. On June 16, 2016, the Department filed its Response to the Petition, in accordance with 20.1.3.18.A(3) NMAC, recommending that the requested alternative abatement standards be granted.

5. On August 11, 2016, the Hearing Officer issued a Scheduling Order pursuant to 20.1.3.18.C(2) and 20.1.3.16.B(2) NMAC, setting the hearing for the Commission's regular meeting on September 13, 2016.

6. Public notice of the hearing on the Petition, which notice expressly included the proposal for well restrictions to be issued by the State Engineer, was published and provided to interested persons as required by 20.1.3.18.C(2) and 20.1.3.16.C NMAC.

7. The Department and Petitioner filed statements of intent to present technical testimony during the public hearing. No other party filed a statement of intent.

8. A public hearing was held before the Commission on September 13, 2016 in Santa Fe, New Mexico, in accordance with the applicable procedures set forth in 20.1.3

NMAC. At the hearing, all persons were provided a reasonable opportunity to present evidence to the Commission and to conduct cross examination.

II. Substantive Findings

A. Background

1. The former PVGND property is located on the east side of New Mexico Highway 528 in Bernalillo, New Mexico. The northern portion of the original dairy has been closed and is occupied by Walmart and other commercial businesses. *See* Petition, Figure 1. The portion of the property subject to the Petition, depicted as Lot 5-B in the Petition at Figure 2, is comprised of approximately 7.4 acres located north of Venada Arroyo and near the intersection of Spanish Bluff Street and Venada Plaza Drive, as shown on the Venada Plaza Plat, Section 36, Township 13N, Range 3E. *See* NMED Exhibit 1, at 2; Pre-Filed Testimony of Jay Snyder (“Snyder Testimony”), at 3.

2. In connection with the closure of dairy operations on the Property, investigations and studies were performed which indicated that groundwater standards were exceeded and soil was contaminated on portions of the Property at the time of closure. *See* NMED Exhibit 1, at 3.

3. In 2006, DP-437 was terminated and investigation and remediation of the site has since proceeded under the WQCC’s abatement regulations, sections 20.6.2.4000 through 20.5.2.4116 NMAC. Environmental site conditions have been fully characterized and the Stage 1 Abatement Plan has been completed. The site is currently in Stage 2 Abatement and is in Long Term Monitoring. *See id.*

4. Two interim abatement actions approved by the Department have been performed at the site: in situ denitrification was performed in 2008, and a groundwater

extraction and discharge system was operated from October 2013 until July 2015. These abatement actions failed to achieve standards, and monitoring wells in the Valley Fill Aquifer continue to show groundwater is impacted by nitrogen, chloride, and total dissolved solids (“TDS”). *See* NMED Exhibit 1, at 3; Synder Testimony at 5-4.

5. The Valley Fill Aquifer is a perched aquifer of limited extent that is hydrologically separate from the Upper Santa Fe Aquifer. While there is some communication between the VFA and the water flowing through the Rio Grande alluvial aquifer, it is not sufficient to move the contamination out of the VFA and into the river. Thus, the contaminated plume is essentially stranded within the VFA. *See* Tr. 58:18 – 63:25; Tr. 81:8.

6. New Mexico’s relevant numerical ground water quality standards set forth in 20.6.2.3103 NMAC are: 10.0 mg/l for nitrate, 250.0 mg/l for chloride, and 1000.0 mg/l for TDS. *See* Snyder Testimony at 6.

7. Petitioner has proposed alternative abatement standards (“AAS”) for the property of 220 mg/L for nitrate, 350 mg/L for chloride, and 3,310 mg/L for TDS. *See* NMED Exhibit 1, at 4, 10.

8. The AAS are requested in perpetuity to facilitate site closure and development, with institutional controls proposed, including a deed restriction and domestic well restrictions issued by the Office of the State Engineer, to ensure that the VFA is not used as a potable water supply in the future. *See* Petition at 7; Tr 48:20 – 51:10; Tr. 78:3 – 82:9, NMED Exhibit 1, at 7-9.

B. Process and Requirements

9. Alternative abatement standards fall within the Commission's authority to grant a variance from any requirement of the water quality regulations, pursuant to Section 74-6-4(H) of the Water Quality Act.

10. Section 20.6.2.4103.F(1) of the Commission's abatement regulations provides that a responsible person may submit a petition for approval of AAS any time after submission of a Stage 2 abatement plan.

11. Petitioner has completed the Stage 2 abatement process. *See Snyder Testimony at 4; NMED Exhibit 1, at 3.*

12. Pursuant to 20.6.2.4103.F(2), a petition for AAS must identify the water contaminants for which alternative standards are proposed.

13. Pursuant to 20.6.2.4103.F(2), a petition for AAS must identify the alternative standards proposed.

14. Pursuant to 20.6.2.4103.F(2), a petition for AAS must identify the three-dimensional body of water pollution for which approval is sought.

15. Pursuant to 20.6.2.4103.F(1)(a) NMAC, a petitioner for AAS must demonstrate that compliance with the abatement standards in 20.6.2.4103.A is not feasible, by the maximum use of technology within the economic capability of the responsible person, or that there is no reasonable relationship between the economic and social costs and benefits (including attainment of the standards set forth in Section 20.6.2.4103 NMAC) to be obtained.

16. Pursuant to 20.6.2.4103.F(1)(b) NMAC, a petitioner for AAS must demonstrate that the proposed alternative standards are technically achievable and cost-benefit justifiable.

17. Pursuant to 20.6.2.4103.F(1)(c) NMAC, a petitioner for AAS must demonstrate that compliance with the proposed alternative standards will not create a present or future hazard to public health or undue damage to property.

18. A “hazard to public health” exists when water which is used or is reasonably expected to be used in the future as a human drinking water supply exceeds at the time and place of such use, one or more of the numerical standards of Subsection A of 20.6.2.3103 NMAC, or the naturally occurring concentrations, whichever is higher, of any toxic pollutant affecting human health is present in the water. *See* 20.6.2.7.AA NMAC.

19. The Water Quality Act provides that the Commission may grant a variance from a regulation of the Commission for a period of time specified by the Commission. *See* NMSA 1978, § 74-6-4(H) (as amended through 2009).

20. Pursuant to 20.6.2.4103.F(2), a petitioner for AAS must specify the information required for variance petitions under Subsection 20.6.2.1210.A NMAC, including, among other requirements, the period of time for which the variance is requested.

C. Requirements Met – 20.6.2.4103.F(1)(a)

21. The Petitioner has demonstrated that compliance with the abatement standards in 20.6.2.4103.B is not feasible, pursuant to 20.6.2.4103.F(1)(a) NMAC. Several decades of natural attenuation and two engineered cleanup actions – in situ denitrification and groundwater pumping and discharge – have not reduced contaminant concentrations in groundwater in the VFA to the 20.6.2.3103 NMAC standards. After cessation of groundwater pumping, concentrations have reverted to pre-abatement levels in select wells in areas where the VFA thins and is difficult to hydraulically stress (due to low transmissivity related to minimal aquifer thickness). The VFA is stagnant and perched, and the lack of both

groundwater flow-through with attendant dispersion and intrinsic denitrification renders it very difficult to reduce concentrations. *See* NMED Exhibit 1, at 5-7; Snyder Testimony at 8-9.

22. Petitioner has also demonstrated that there is no reasonable relationship between the costs and benefits of continuing abatement and the social costs and benefits of doing so. Because of the nature of the Valley Fill Aquifer, as discussed previously, it is likely that no abatement effort at any cost will achieve Section 3103 standards. *See* NMED Exhibit 1, at 7; Snyder Testimony, at 10.

23. Petitioner has proposed the following institutional and government controls to prevent future use of the Valley Fill Aquifer as a source of potable water in order to mitigate social costs from the proposed AAS:

- a. Petitioner will record a deed restriction in the Sandoval County real property records prohibiting construction of wells in the Valley Fill Aquifer on that portion subject to the AAS. The deed notice will provide owners, operators, prospective buyers, and others with notice and information regarding the groundwater condition in the Valley Fill Aquifer. The deep regional Upper Santa Fe Group Aquifer can still be used for water supply on the Property. A copy of the deed notice is included as Appendix G to the Petition.
- b. The Department will petition the New Mexico State Engineer under State Engineer regulation 19.27.5.13.A to issue an Order prohibiting construction of a well in the affected water-bearing zone of the Valley Fill Aquifer, Lot 5-B and contiguous portions of Venada Plaza Drive. The State Engineer has the

required information and will issue the Order upon the Department's formal request.

See NMED Exhibit 1, at 7-8; NMED Exhibit 4.

24. Additionally, the following ordinances and rules further ensure that water from the Valley Fill Aquifer will not be used as source of potable water:

- a. The Town of Bernalillo Water Use and Water Rate Ordinance, Ordinance 81, Article 4, Section 11 provides "At such time as a public water main becomes available within two hundred (200) feet of a property line served by a private water well, a direct connection shall be made to the public water system in compliance with this Ordinance, within 90 days." Water and sewer lines have been installed along existing streets in the Venada Plaza Development. *See* Petition, Appendix G. Thus, under the above ordinance, city water supply will be provided to all buildings on the Property.
- b. The New Mexico State Engineer's regulations at 19.27.4 NMAC contain provisions that prevent construction of a water supply well in contaminated groundwater. *See* 19.27.4.29 NMAC (requiring wells to be constructed to prevent contamination, inter-aquifer exchange of water, flood water contamination of aquifer, and infiltration of surface water); 19.27.4.29.D NMAC (requiring that all wells be set back from potential sources of contamination in accordance with NMED regulations and other applicable ordinances and regulations); 19.27.4.30.A NMAC (requiring annular seals when necessary to prevent flow of contaminated or low quality water); 19.27.4.30.A(4) NMAC (requiring annulus sealing and proper screening in

wells which encounter non-potable, contaminated, or polluted water at any depth to prevent commingling of such water with any potable or uncontaminated water).

See NMED Exhibit 1, at 8-9.

25. With the above institutional and government controls and requirements in place to prevent ingestion of groundwater in the Valley Fill Aquifer, the proposed AAS will allow the Department to close out abatement so that the Property can be fully redeveloped. Without the AAS, the Property will remain idle. Therefore, the economic and social benefits of the proposed AAS (which include the above-described institutional and government controls), outweigh the benefits of continuing abatement which is unlikely to achieve 3103 standards. *See* Snyder Testimony, at 9-10.

D. Requirements Met – 20.6.2.4103.F(1)(b)

26. Petitioner has demonstrated that the proposed AAS have been achieved, and their approval will allow immediate submission of an Abatement Completion Report and termination of abatement. *See* NMED Exhibit 1, at 9.

27. The cost of submission of the Abatement Completion Report is negligible relative to what has been spent on abatement activities up to this point. *See id.*

28. Approval of the AAS will allow development to be completed on the Property, which presently lies in a partial state of development, thereby benefitting the Town of Bernalillo. *See id.*

29. Petitioner has therefore demonstrated that the proposed AAS are technically achievable and cost-benefit justifiable.

E. Requirements Met – 20.6.2.4103.F(1)(c)

30. The institutional and government controls outlined above will prevent human exposure to or ingestion of the nitrate impacted groundwater of the Valley Fill Aquifer, rendering the AAS protective of public health. *See* NMED Exhibit 1, at 9-10.

31. Chloride and TDS are not Section 3103.A contaminants and do not present a human health concern. *See* NMED Exhibit 1, at 10.

32. The proposed AAS will free the Property for completion of development, and thus will not cause undue harm thereto. *See id.*

33. Petitioner has therefore demonstrated that the proposed AAS will not create a hazard to public health or undue damage to property.

F. Requirements Met - Other

34. Perpetuity is a reasonable period of time for the variance in this case due to the technical infeasibility of conducting further abatement, the controls that will be in place to prevent hazards to public health, and the need to close out abatement so that the property can be economically developed. *See* Tr. 81:24 – 82:9; NMED Exhibit 1, at 7-9; Snyder Testimony, at 9-10.

35. Petitioner has met the requirements of 20.6.2.4103.F(2) by: identifying the information required by Subsection 20.6.2.1210.A; identifying the contaminants for which alternative standards are proposed; identifying the three-dimensional body of water pollution for which the alternative abatement standards are sought; and identifying the extent to which the standards of 20.6.2.4103 are now, and will be in the future, violated. *See* NMED Exhibit 1, at 10; Snyder Testimony, at 6-7.

Conclusions of Law

1. The Commission has jurisdiction to hear and decide this matter pursuant to NMSA 1978, § 74-6-4 (2009), 20.1.3 NMAC, and 20.6.2.4103 NMAC.
2. The Commission has jurisdiction over Petitioner and the former PVGND site pursuant to the Water Quality Act, NMSA 1978, §§ 74-6-1 through -17, 20.1.3 NMAC, and 20.6.2 NMAC.
3. The Commission may take action to accept, modify, or deny Petitioner's petition for alternative abatement standards.
4. Petitioner has met all applicable requirements for the granting of alternative abatement standards in 20.1.3, 20.6.2.1210.A, and 20.6.2.4103.F NMAC.
5. The numerical values proposed in the Petition for the proposed alternative abatement standards are supported by substantial evidence in the record.
6. Approval of the proposed alternative abatement standards in perpetuity is supported by substantial evidence in the record.

ORDER

Based upon these Findings of Fact and Conclusions of Law, a quorum of the Commission renders the following decision and order:

IT IS THEREFORE ORDERED that:

1. The Commission approves alternative abatement standards for the Valley Fill Aquifer as identified in NMED Exhibit 3.

2. The alternative abatement standards are as follows:

Contaminant	Standard
Nitrate	220 mg/l
Chloride	350 mg/l
TDS	3,310 mg/l

3. The alternative abatement standards are granted in perpetuity.

4. As soon as practicable upon issuance of this Order, Petitioner and the Department shall take the necessary steps to implement the institutional controls proposed in the Petition, namely, the deed restriction and the State Engineer well restriction order.

10-14-16

Date



Larry Dominguez, Chair

Water Quality Control Commission

CERTIFICATE OF SERVICE

I hereby certify that a copy of the **Decision and Order Granting Alternative Abatement Standards** was sent via the stated methods below to the following parties on October 14, 2016:

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