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**STATE OF NEW MEXICO
BEFORE THE SECRETARY OF ENVIRONMENT**

**IN THE MATTER OF THE APPLICATION OF
VALLEY MEAT COMPANY FOR GROUND WATER
DISCHARGE PERMIT RENEWAL, DP-236**

No. GWB 13-05 (P)

**NEW MEXICO ENVIRONMENT DEPARTMENT, GROUND WATER QUALITY
BUREAU'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Pursuant to Subsection B of 20.1.4.500 NMAC (2013) and Subsection I of 20.6.2.3110 NMAC, the New Mexico Environment Department ("Department"), Ground Water Quality Bureau ("GWQB" or "Bureau") submits the following proposed Findings of Fact and Conclusions of Law in the matter of the ground water discharge permit renewal application DP-236 for Valley Meat Company, LLC ("Applicant" or "VMC").

I. FINDINGS OF FACT

FACILITY INFORMATION & HISTORY

1. VMC, formerly known as Pecos Valley Meat Company, is located in at 3845 Cedarvale Road, approximately six miles east of Roswell, in Section 17, T11S, R25E, Chaves County, state of New Mexico.
2. The facility originally received from the GWQB a ground water discharge permit, numbered DP-236, on November 22, 1982.
3. The facility began discharging on or about March 7, 1983, into one surface impoundment/lagoon with a manure liner. The GWQB issued discharge permit renewals to this company November 23, 1987, March 19, 1993, September 8, 1998, and lastly on May 19, 2004.

During the terms of these permits the facility processed livestock including cattle, sheep, and other domestic animals.

4. The permit issued in 1998 required the manure-lined impoundment be replaced with a synthetically lined impoundment; the new impoundment was completed prior to 2003. A second synthetically lined impoundment was required by the permit issued in 2004 for additional evaporative capacity. The second synthetically lined impoundment's construction was completed in December 2005.

5. The most recent discharge permit expired on May 19, 2009. GWB 13-05 (P) Administrative Record, hereafter "AR 236C-," document number 87. To remain continually covered from May 19, 2009 forward, VMC would have been required, pursuant to 20.6.2.3106.F NMAC to: 1) be in full compliance with all relevant Water Quality Act rules and regulations; and 2) to submit a comprehensive and responsive renewal application no later than one hundred twenty (120) days before the permit expiration date, or before January 19, 2009.¹ VMC did not submit a renewal application before the permit's expiration date.

PERMIT RENEWAL (DP-236)

6. On May 7, 2010, the GWQB sent a Notice of Violation to VMC requiring that the company submit a renewal application. On June 3, 2010, the GWQB received a renewal discharge plan application from VMC. AR 236C-109. The renewal application was signed by Ricardo De Los Santos. AR 236C-110.

7. On June 6, 2010, the GWQB sent to VMC a letter requiring that the facility issue the first of the two (2) required public notices, also known as "PN1." Included with the letter was the

¹ The May 2004 DP-236, page 10, paragraph 38 required that the discharger submit a renewal application "180 days" before expiration, however 20.6.2.2106(F) NMAC and NMSA 1978, §74-6-5 (H) requires that the permit renew 120 days before expiration.

required notice that was, within thirty (30) days, to be placed on-site as well as published in the local newspaper, the Roswell Daily Record. AR 236C-111.

8. On December 8, 2010, some six (6) months later, Kimberly Kirby, a GWQB permit manager, sent an email to VMC consultant Chet Wyant indicating that the GWQB had not received confirmation or proof that PN1 had been published in accordance with 20.6.2.3108.D NMAC. Also contained in this communication was a request by Ms. Kirby that Mr. Wyant also address concerns related to the actual number of monitoring wells and the closure information of two prior monitoring wells. Further, Ms. Kirby asked that Mr. Wyant address where offal was being, or would be, shipped for disposal or whether the facility was composting this material on-site. AR 236C-112.

9. On December 28, 2010, the GWQB received from VMC proof of PN1 publication as well as well information on the monitoring wells and composting operations. AR 236C-113.

10. On May 11, 2011, Ms. Kirby performed an onsite inspection of the facility. AR 236C-114. Following the inspection, on May 12, 2011, Ms. Kirby, noticing that the facility's name had changed to "Valley Meat Company, LLC," asked for additional information on ownership and again on how the offal was being managed. AR 236C-115. Ms. Kirby asked that the information be provided within thirty (30) days from the date of the email.

11. On June 17, 2011, Mr. De Los Santos responded asking that VMC be given "a few more days" to pull the information together due to a computer crash. AR 236C-115. It was not until June 21, 2011 that VMC sent to Ms. Kirby an email indicating that VMC was placing the information requested in the mail. *Id.* On June 22, 2011, the GWQB received from VMC a letter addressing the name change as well as providing that VMC would proceed with onsite composting. *Id.*

12. It was not until May 3, 2013 that the GWQB, due to a news article on May 1, 2013, and increasing public inquiries regarding VMC, again contacted VMC. Then the GWQB wrote a letter to VMC requesting the facility's response to several key permit issues. AR 236C-122. This information was necessary to complete the technical evaluation of the application.

13. On May 10, 2013, the GWQB received, via email, a letter from VMC responding to the questions posed by Jennifer Pruett, GWQB Pollution Prevention Section ("PPS") manager, in the Bureau's May 3, 2013 letter.² AR 236C-125.

14. The GWQB permitting staff, specifically Ms. Kirby after review of VMC's response, proceeded with the development of the initial draft of the renewal permit. The first draft of the renewal permit, DP-236, was mailed to VMC, return receipt requested, on May 24, 2013. AR 236C-130.³

DRAFT PERMIT & PUBLIC NOTICE

15. The first draft permit mirrored prior permit terms and conditions, but also contained several additional permit conditions. GWQB NOI, Exhibit 9. Although the facility still proposed to discharge no more than 8,000 gallons per day ("gpd") of wastewater generated from livestock processing, the GWQB proposed an additional monitoring well be installed hydrologically downgradient of the south wastewater storage impoundment to further monitor potential impacts to ground water quality. This additional condition requires VMC to propose a location for the new monitoring well within sixty (60) days of the effective date of the permit and installation within one hundred twenty (120) days of the effective date of the permit.

² VMC's email to Jennifer Pruett was delivered on May 9, 2013 however Ms. Pruett was unable to open the email attachment until May 10, 2013. The letter was received on May 15, 2013.

³ The U.S. Postal Service return receipt and draft permit was returned to the GWQB on July 24, 2013 unsigned, however the draft renewal permit had been emailed to VMC's attorney, Mr. A. Blair Dunn, who verbally confirmed receipt for VMC.

16. On May 31, 2013, as required by Subsection K of 20.6.2.3108 NMAC, the draft renewal permit was published on the Department's GWQB website and published in the required newspapers, including the Albuquerque Journal and Roswell Daily Record. This notice of availability for comment was also directly sent to the facility specific mailing list, a.k.a. "interested parties list." AR 236C-131. This began the required thirty (30) day comment period as required by 20.6.2.3108.K NMAC. The deadline for submission of public comments was adjusted to July 1, 2013 due to the thirtieth (30th) day falling on a weekend date.

17. During the comment period numerous comments and requests for hearing were received. In total, the GWQB received over four hundred eighty-three (483) timely submitted comments. In review of the comments, GWQB staff found a total of sixty-three (63) duplicate comments. Two (2) of the public comments were submitted as a group comment with one having twenty-four (24) names listed and another having twenty-three (23) names listed. Correcting for duplicates and adding the group comments, the grand total of comments received was four hundred sixty-seven (467).

18. Bureau and Department staff attempted to classify any comment, concern, or issue into the following categories: 1) horse slaughter as generally inhumane (245); 2) VMC's prior history and environmental violations (107); 3) the impact that the facility will have on water quality (257); and 4) VMC's owner's prior criminal felony history (64).

19. In review of the comments specifically related to "water quality" concerns, the majority were of a general nature and provided no specific detail(s) on how the facility or renewing permit would impact local water quality but 25 of the comments did contain, with some specificity, concerns on this facility's potential to impact to the local environment.

20. On June 20, 2013, under signature of Ricardo De Los Santos, VMC filed its own comments to the proposed draft renewal permit. AR 236C-145.

21. VMC, on July 9, 2013, submitted to the Department's GWQB, in addition to making several other statements and requests, a request to temporarily discharge pursuant to 20.6.2.3106 NMAC. AR 236C-148.

22. The GWQB, on July 11, 2013, sent to VMC, though VMC's attorney Mr. A. Blair Dunn, a letter asking for clarification on Mr. De Los Santos's prior criminal background. This inquiry was sponsored by the receipt of numerous public comments regarding his prior criminal history and the possible impact on permit issuance pursuant to NMSA 1978, §74-6-5 (2013). In essence, the GWQB letter outlined VMC's prior verbal response to this issue and requested that VMC confirm GWQB's understanding of their response(s). AR 236C-150.

23. That same day the GWQB also issued a separate letter to VMC regarding its current permit status and its request for temporary permission to discharge. AR 236C-151. The GWQB clarified that the facility did not have continued permit coverage because of VMC's failure to submit an application for renewal of DP-236 in a timely manner. Additionally, the GWQB acknowledged receipt of VMC's request to temporarily discharge. *Id.*

24. On July 17, 2013, the GWQB denied VMC's request to temporarily discharge. AR 236C-15.

25. On July 17, 2013, the GWQB provided to Secretary-Designate Ryan Flynn ("Secretary"), a memorandum requesting a determination of whether substantial public interest existed and if a public hearing was required pursuant to Subsection K of 20.6.2.3108 NMAC. The Secretary, on that same day, found that substantial public interest did exist and ordered that a hearing occur to receive further public comment. AR 236C-157.

26. The Hearing Clerk of the Department, on July 17, 2013, received from the GWQB the Secretary's determination of a public hearing and docketed the matter as case GWB 13-05 (P). The Hearing Clerk, pursuant to 20.6.2.3110 NMAC, assigned Felicia Orth as the Hearing Officer. AR 236C-158.

27. On July 30, 2013, due to comments from VMC and their attorney, Mr. A. Blair Dunn, that VMC planned to 'pump and haul' waste water from the facility. The GWQB immediately replied by sending a letter to VMC requesting further clarification and information on that proposed activity. AR 236C-164. To date, VMC has not responded to this letter.

28. On August 15, 2013 a conference was held by the Hearing Officer and between the parties, including the GWQB, VMC, and Front Range Equine Rescue ("FRER") represented then by Mr. Bruce Wagman of Schiff Hardin LLP. The primary issue discussed, and later set, was the hearing schedule. It was then decided that, following calendar reviews between the parties that the hearing would occur on October 21st and October 22nd, 2013. AR 236C-170.

29. On September 13, 2013, the GWQB issued the required minimum thirty (30) day public notice of the date, time, and location of the public hearing. The notice was published in the local newspaper and newspaper of general circulation, on the Department's website, and via U.S. mail or email to all parties that had submitted comments.

PRE-HEARING SCHEDULE

30. The Procedural Order issued by the Hearing Officer set forth the deadlines for: 1) submittal of the Administrative Record (due September 11, 2013); 2) submittal of the Notice of Intent to Present Technical Testimony including written direct technical testimony (due October 9, 2013); and 3) a pre-hearing conference call (on October 18, 2013). The parties were to submit any pre-trial motions on or before the October 18, 2013 conference call.

31. On September 11, 2013, the GWQB submitted the Administrative Record to the Hearing Clerk and notified all parties of the filing. On September 12, 2013, the Hearing Clerk filed a revised Service List for GWB 13-05 (P).

32. On October 9, 2013, the Department, FRER, VMC, and Mr. John Holland, President of Equine Welfare Alliance, Inc., filed Notices of Intent to Present Technical Testimony, a.k.a. "NOI" with written technical direct testimony.

33. The applicant, VMC, provided the written testimony of Mr. Ricardo De Los Santos, general manager and principal owner of VMC, Mr. Chet Wyant, consultant for VMC, Mr. Lonnie Ashcraft, a consultant that had previously worked for VMC, and Mr. Leonard Blach, Doctor of Veterinary Medicine. In addition to the testimony of these four(4) parties, VMC provided as an exhibit the draft discharge permit, DP-236 and its comments on the draft permit, hereafter "VMC's NOI."

34. The GWQB submitted along with its NOI approximately fourteen (14) exhibits including the written testimony Mr. Jerry Schoeppner, GWQB Bureau Chief, and Ms. Kimberly Kirby of the GWQB, hereafter "GWQB's NOI." As part of GWQB's NOI, Ms. Kirby provided a revised draft discharge permit. The revised draft permit included conditions added pursuant to comments received through the public comment phase.

35. FRER, through their attorney Bruce Wagman, and the New Mexico Attorney General's Office ("AG's Office"), through their attorney Ari Biernoff, jointly filed a NOI on behalf of the "...State of New Mexico, the New Mexico Attorney General's Office, Front Range Equine Rescue and six residents of Roswell, New Mexico," hereafter "FRER's NOI." As part of this joint NOI, FRER provided written testimony of Mr. William C. Olson.

36. The last, and only other party providing written testimony in a NOI, was that of Mr. John Holland, President of Equine Welfare Alliance. Mr. Holland provided several exhibits primarily related to compliance issues and concerns at other horse slaughter facilities outside the State of New Mexico.

PRE-TRIAL MOTIONS

37. Prior to the hearing, at the October 18, 2013 telephone conference, the GWQB filed three (3) pre-trial motions. The first motion was to determine the various interests of the parties in FRER's NOI. The second motion filed by the GWQB was to strike the entry of the New Mexico Attorney General's Office into the proceedings. The last motion was to exclude and/or to limit the testimony of Mr. William C. Olson, witness for all of the FRER parties. FRER and the Attorney General's office stated verbally that Bruce Wagman represented only FRER and the six (6) residents of Roswell, New Mexico. The Assistant Attorney General, Ari Biernoff, stated that he represented the interest of the State of New Mexico. Both Mr. Wagman and Mr. Biernoff stated they had jointly hired William Olson and that his testimony was for both parties.

38. The Hearing Officer, on the GWQB's first motion to determine the interests of the various FRER parties, found that the verbal response of FRER and the AG's office was sufficient and dismissed the GWQB's first motion. The GWQB's last two motions, supported by VMC, but objected to by Mr. Bruce Wagman and Mr. Biernoff, were similarly denied by the Hearing Officer.

PUBLIC HEARING

39. The public hearing for the VMC discharge permit renewal was held, beginning at 9:00 a.m., on October 21st and October 22nd, 2013, at the Chaves County Courthouse located at 400 N. Virginia Avenue in the City of Roswell, Chaves County, New Mexico. Based on the number of

public comments received during the PN2, the parties expected in excess of over one hundred (100) attendees at the hearing. Additionally, due to safety concerns of the parties, it was agreed that this facility would provide the most secure location for the parties and the public to safely present their testimony.

40. Present during the term of the hearing were four (4) to five (5) officers from the district's New Mexico State Police office. Everyone attending the hearing was pre-screened for weapons and other electronic or disruptive devices before entering the Chaves County Courthouse.⁴ The public hearing was commenced by the Hearing Officer, Felicia Orth, on the day and time stated.

41. Technical testimony was presented first on October 21, 2013, with public comments starting at 5:00 p.m. that same day. Additional technical and public comments were allowed to continue on the following day, October 22, 2013, if necessary. Tr. P. 11, L. 1. Members of the public that proposed to speak and provide comment on the proposed permit were requested to sign a roster to determine the order for public comment. Tr. P. 12, L. 12.

PRE-HEARING MOTION REVIEW

42. The Hearing Officer, at the beginning of the trial again asked the parties if they had additional comments on the pre-trial motions discussed on October 18, 2013. Tr. P. 17, L. 2. The Hearing Officer reiterated her prior and initial rulings on the parties' various motions, specifically those propounded by the GWQB. Tr. P. 17, L. 5 – 25. Mr. Dunn, attorney for VMC, again renewed his objections as did Mr. Powers, attorney for the GWQB. Tr. P. 18-19. Mr. Wagman and Mr. Biernoff renewed their opposition to the GWQB's motions.

VMC TESTIMONY

⁴ It is standard policy of the Fifth Judicial District Court, Roswell, that all persons entering the Courthouse are screened prior to entry.

43. VMC, through their attorney, Mr. Dunn, initiated the proceeding with panel testimony from Ricardo De Los Santos, Chet Wyant, Lonnie Ashcraft, and Dr. Leonard Blach, DVM.

44. Mr. De Los Santos testified that the facility was built, he believed, sometime in 1982. Tr. P. 62, L. 14. He initially leased the business, but later purchased the operations. *Id.* The facility previously processed livestock animals, primarily cattle. Tr. P. 64, L. 16. The facility has employed, at times, fifty (50) to fifty-five (55) employees. Tr. P. 64, L. 15. Prior cattle processing operations ceased in April 2012 to switch from cattle processing to equine processing. Tr. P. 95, L. 18.

45. The facility's collection and storage system includes gravity feed lines from the processing floor of the interior and the holding pens to two (2) underground concrete solids settling tanks to the first of two (2) synthetically lined surface impoundments. Tr. P. 67, L. 5. There is no discharge from the wastewater impoundments; instead wastewater in the impoundments is disposed of by evaporation.

46. The discharge from the facility is measured by a flow meter. Tr. P. 75, L. 1. The maximum allowed daily discharge volume is 8,000 gpd. Tr. P. 134, L. 7. In response to questions, VMC agreed that the impoundments are not always at the maximum volume due to on-going evaporation. Tr. P. 91, L. 8. VMC indicated that it has contracted with a company to take all offal. Tr. P. 72, L. 13. The company agreed that it will not compost any offal onsite. Tr. P. 72, L. 10.

47. Mr. De Los Santos provided that over the last ten (10) years he has not had any criminal convictions and the only instance of a felony conviction was in 1978 in which he received only probation. Tr. P. 28-29.

48. Mr. Lonnie Ashcraft then testified regarding the installation of impoundment liners at the two (2) wastewater impoundments. Mr. Ashcraft believed that the liners had been properly installed and that the facility had four (4) monitoring wells. Mr. Ashcraft indicated based on his experience, that the facility was operating as designed and believed that the facility was protective of ground water.

49. Mr. Chet Wyant testified that he became involved with VMC in May 2010. He was contacted by VMC to assist in preparation of the permit renewal of DP-236. He indicated that after submission of the renewal application he was unaware of any public opposition to the permit. Mr. Wyant testified that the permit was initially issued for, and continues to govern up to 8,000 gpd of livestock processing wastewater discharge. Mr. Wyant explained that the wastewater exits the facility via a gravity line and then collects in two (2) underground concrete holding tanks used for solids settling. Tr. P. 36, L. 5. Although Mr. Wyant was more familiar with dairy and livestock feeding yards, he believed that the facility was typical of other low-flow, small slaughter facilities he had encountered. Tr. P. 36-27.

50. Mr. Wyant and Mr. Ashcraft both agreed that whether or not the facility was processing horses verses cattle it should not affect the overall operations of the facility or type of contaminants from the operations. In questions poised to Dr. Blach and Mr. Wyant, both stated that to their knowledge the various drugs administered to cattle and equines is not currently regulated or monitored by the Department's GWQB pursuant to the WQA and ensuing WQCC regulations.

51. Dr. Blach testified that the blood volume between horses and cows are very similar. Tr. P. 41, L 6. Dr. Blach also testified that the difference in weight of offal between cows and horses is much greater for cows. Tr. P. 42-44. He also testified that, based on his experience,

due to the general cleanliness of the animal, process water use was significantly greater on cattle than would be on horses. Tr. P 44, L. 11.

52. Dr. Blach indicated that the common veterinary drugs used for and between cattle and horses is not that different. These included antibiotics, prostaglandins, Meclizines, Butazolidins, antihistamines, steroids, etc. Tr. P. 46, L. 46. Based on his experience these drugs metabolize out of the animal over short periods of time, but is dependent on the specific medications, dosages, and durations of treatment. Tr. P. 46-47.

53. Dr. Blach also stated the most commonly cited drug used in horses was “Bute.” Tr. P. 51, L. 22. “Bute” or Butazolidin is an anti-inflammatory drug. As with cattle use of “Bute” and other veterinary medications, the withdrawal times are well known for cattle. Tr. P. 52, L. 18. In most cases these drugs are metabolized within thirty (30) days from administration. Tr. P. 55, L. 9.

54. Dr. Blach was unaware of any commonly administered veterinary medication that persisted or remained permanent in the meat or milk of cattle or other livestock animal.⁵ Tr. P. 50, L. 20; Tr. P. 51, L. 12. Dr. Blach, on cross examination, did indicate that there are some veterinary drugs that are banned when used on animals going to slaughter. Tr. P. 144, L. 12; *but see* Tr. P. 169, L. 17. Dr. Blach indicated he was unaware of any substance potentially in horse blood that would be caustic enough to damage plastic liners such as at the wastewater impoundment liners. Tr. P. 62, L. 22.

55. VMC agreed that if the discharge permit is issued that it would comply with the requirement to calibrate any discharge meter per the conditions of section 22 and 23 of the draft

⁵ There were many questions throughout the hearing posed by FRER dealing with the toxicology, persistence, human health risk, and potential environmental risk of equine administered veterinary drugs, however based on information received during the hearing it appears that such risk, persistence and potential harm(s) has not been adequately studied and is currently not regulated.

revised renewal permit. Tr. P. 77, L. 10. VMC, through Mr. De Los Santos, also agreed under oath that it would conduct a ground water directional flow study as required by the revised draft renewal permit condition, number 21. TR. P. 77, L. 25 to P. 78, L. 8. VMC, also again under oath and through Mr. De Los Santos, agreed that it would install the additional monitoring well required by the GWQB and as included in the revised draft renewal permit as condition number 15. Tr. P. 82, L. 19.

56. On cross examination by Mr. Powers, Mr. De Los Santos and other VMC witnesses were unable to verify whether or not the system also received waste from bathrooms, kitchens, and other domestic uses and went to the surface impoundments. Tr. P. 74, L. 12. After some discussion, Mr. De Los Santos agreed that prior to facility operation and permit issuance that the facility would determine whether such domestic wastewater was part of the facility's overall waste stream, and if so, VMC would eliminate the co-mingling of wastewaters. Tr. P. 80, L. 10; Tr. P. 168, L. 3.

GWQB TESTIMONY

57. The GWQB presented Kimberly Kirby and Jerry Schoeppner as their witnesses. Mr. Schoeppner, through his pre-filed testimony, stated that he has been the GWQB Bureau Chief since June 2011. GWQB NOI, Exhibit 3, P. 1, L. 2. In this position, Mr. Schoeppner testified that he oversees the Pollution Prevention Program. *Id.* Mr. Schoeppner testified that in addition to the analysis performed by GWQB staff for this permit renewal, he was also responsible for investigating permitting questions related to NMSA 1978, §74-6-5 (E). After reviewing information received from VMC and the Pollution Prevention Program staff Kimberly Kirby, Mr. Schoeppner determined there were no sufficient causes to deny the permit renewal. GWQB NOI, Exhibit 3, P. 11-13.

58. Although some comments received during the public comment phase had alleged that VMC had “willfully” violated its prior permit terms and conditions, Mr. Schoepner found that many of VMC’s violations were common to similarly situated facilities and did not rise to “willful” within the context of NMSA 1978, §74-6-5 (E). GWQB NOI, Exhibit 3, P. 14, L. 2. Additionally, Mr. Schoepner found that most, but not all, compliance issues were addressed by VMC once identified by GWQB staff. GWQB NOI, Exhibit 3, P. 14, L. 3.

59. Mr. Schoepner believed that the revised proposed permit, which included the additional conditions added by Ms. Kirby to the first draft renewal permit, met the requirements of the WQA and the WQCC regulations and therefore, in conclusion, recommended renewal of the draft discharge permit. GWQB NOI, Exhibit 3, P. 14, L. 20.

60. Kimberly Kirby testified that she had been with the GWQB for approximately twelve and a half (12 ½) years. GWQB NOI, Exhibit 8, P. 1, L. 12. As part of her current duties, Ms. Kirby testified that she is responsible for receiving, reviewing, drafting, issuing, and inspecting ground water discharge permit applications, including the permit renewal application for VMC.

61. Ms. Kirby, through her pre-filed testimony, testified that the facility was first permitted in November of 1982, with its most recent ground water permit expiring in May 2009. GWQB NOI, Exhibit 8, P. 2. Ms. Kirby testified that the primary wastes regulated by the ground water discharge permit are those found in 20.6.2 NMAC. GWQB NOI, Exhibit 8, P. 10-11. The wash water from a slaughterhouse, per Ms. Kirby, typically contains various amounts of water, organic matter (including fats/grease), suspended solids, phosphorus and nitrogen, but may also contain disinfecting and cleaning chemicals such as chlorine. *Id.*

62. Pursuant to comments received during the PN2, Ms. Kirby examined the various concerns raised and found that no sufficient basis existed to deny the permit. Ms. Kirby

proposed an additional permit condition based on testimony filed by FRER witness William Olson. The additional condition was for a leak detection program of the two (2) solids settling tanks and related piping. Tr. P. 174, L. 21.

63. Mr. Dunn for VMC, Mr. Holland of Equine Welfare Alliance, and Mr. Biernoff of the AG's Office did not cross-examine the GWQB witnesses, Mr. Schoeppner or Ms. Kirby. Tr. P. 178-180. Mr. Wagman did conduct a short cross-examination of Mr. Schoeppner and Ms. Kirby. Tr. P. 180-184.

EQUINE WELFARE ALLIANCE TESTIMONY

64. Mr. John Holland, President of Equine Welfare Alliance, Inc. provided a brief summary related to the history of horse slaughter and the compliance history of other horse slaughter operations outside the State of New Mexico.

FRER/AG TESTIMONY

65. FRER and the AG's Office presented Mr. William Olson as their only witness. The primary scope of Mr. Olson's testimony was that: 1) the facility, VMC, was not compliant with prior permit terms; 2) that the volume was likely to exceed the eight thousand (8,000) gpd discharge limit; 3) that the facility should conduct a leak detection program; 4) that the facility should install double liners; and 5) that the veterinary drugs used in horses were toxic. Mr. Olson recommended that the Department not renew the discharge permit.

PUBLIC COMMENTS-HEARING

66. The public was provided the opportunity to participate in the permit hearing. A total of fifteen (15) people provided oral public comment at the hearing. Of those providing comment, approximately seven (7) opposed the permit renewal while eight (8) supported the permit renewal. One (1) public comment received on October 22, 2013 appeared unrelated to the

purpose of the permit renewal hearing.⁶ Of those supporting the permit renewal, three (3) of the supporting comments were received from Chaves County Commissioners.⁷ Additionally, of the remaining supporters, one (1) was a State Representative of the area, another represented the New Mexico Cattle Growers Association, and another represented the New Mexico Farm and Livestock Bureau.

II. CONCLUSIONS OF LAW

WQA LAWS & REGULATIONS

67. The Water Quality Control Commission (“WQCC”) is charged by the New Mexico Legislature, through the Water Quality Control Act (“WQA”), NMSA 1978, 74-6-1 (2013), *et. seq.*, to be the agency to prevent or abate water pollution in the state. NMSA 1978, §74-6-4 (D). As part of this duty, the WQCC is responsible for developing and enacting water quality standards for both surface and ground waters of the state. NMSA 1978, §74-6-4 (C); *see also Phelps Dodge Tyrone, Inc. v. New Mexico Water Quality Control Comm'n* (“*Phelps Dodge*”), 2006-NMCA-115, ¶ 16. The water quality standards are intended to protect, at minimum, the public’s health and welfare, enhance the quality of the water and achieve the purposes of the WQA. NMSA 1978, §74-6-4 (C).

68. The WQCC and WQA require every person that conducts or proposes an activity that could lead to a discharge to the surface or ground water of the state, and is not specifically exempted, obtain a discharge permit from the Department. NMSA 1978, §74-6-5 (A); 20.6.2.1201.A NMAC (2013); *see also Phelps Dodge*, 2006-NMCA-115, ¶ 16. Discharge without a permit or discharge contrary to the WQA could subject the person or applicant to

⁶ The comment by L.H. Kennedy, Tr. P. 422-424 appeared to be a comment on the land title of the facility and her claim to title. Additional comments were made by Ms. Kennedy regarding her suits, and possibly her daughters’, against the city, county and state for title to unknown and unspecified lands.

⁷ Commissioner James W. Duffy, testified as a Chaves County Commissioner as well as a resident that lives within a half (1/2) mile from the VMC facility on Cedarville Road, Chaves County.

administrative enforcement actions or civil and criminal penalties in state district courts. NMSA 1978, §74-6-10, -10.1 and -10.2; 20.6.2.1220 NMAC.

69. The GWQB, upon submission of a notice of intent to discharge, will notify the applicant whether a permit is or is not required. 20.6.2.1201.D NMAC. Where the Department determines that a permit is required, the Department may require “submission of plans, specifications and [any] other relevant information that it deems necessary.” NMSA 1978, §74-6-5 (C).

70. A “discharge permit” is a discharge plan that has been approved by the Department. 20.6.2.7.R NMAC. The discharge permit application, also known as a “discharge plan,”⁸ must outline, in general, the location of the facility, type of operation(s), quality and quantity of the wastewater, prior or existing ground water quality, plans, specifications, maps, and depth to ground water among other things. 20.6.2.3106.C NMAC; 20.6.2.3107 NMAC; 20.6.2.3109 NMAC. The applicant must also pay any authorized permitting fee(s) to the Department. 20.6.2.3106.D NMAC.

71. No discharge permit may be issued for more than five (5) years. NMSA 1978, § 74-6-5 (H). If the applicant is renewing an existing permit, the applicant must first be in compliance with the WQA and submit an application for discharge permit renewal at least one hundred twenty (120) days before the permit expiration date. 20.6.2.3106.F NMAC.

72. By regulation, the WQCC has authorized the Secretary of the Department to determine whether or not to issue, issue with condition, or deny permits for ground water discharge based upon information submitted in a permit application and information received, if applicable,

⁸ “Discharge Plan means a description of any operational, monitoring, contingency, and closure requirements and conditions for any discharge of effluent or leachate which may move directly or indirectly into ground water.” 20.6.2.7.R NMAC.

during a public hearing. NMSA 1978, §74-6-5; 20.6.2.3109 NMAC; *Phelps Dodge*, 2006-NMCA-115, ¶ 16.

73. Once the Department has deemed the application administratively complete the applicant is required within 30 days to provide public notice (PN-1) in accordance with 20.6.2.3108 NMAC. In addition to PN1, a second public notice is required. 20.6.2.3108 NMAC.

74. The Department must allow for public comment on any draft permit for no less than thirty (30) days. 20.6.2.3108.K NMAC. Where the Secretary determines there exists “substantial public interest,” a public hearing will be held. *Id.* The Secretary must then notify, in writing, all parties of the time, date, and location of the public hearing. *Id.* In no event shall the hearing occur earlier than thirty (30) days from the written hearing determination notice. 20.6.2.3108.L NMAC.

75. If substantial public interest exists and a public hearing is to occur, the Secretary may appoint an impartial hearing officer to preside over the hearing. 20.6.2.3110 NMAC. If appointed, the hearing officer will conduct the hearing in accordance with 20.6.2.3110 NMAC and 20.1.4 NMAC. A final report from the hearing officer is later presented to the Secretary for final action on the permit in accordance with 20.6.2.3110 NMAC. *Id.*

76. In making his or her decision, the Secretary must deny an application for a permit where:

“(1) the effluent would not meet applicable state or federal effluent regulations, standards of performance or limitations; (2) any provision of the WQA would be violated; (3) the discharge would cause or contribute to water contaminant levels in excess of any state or federal standard. Determination of the discharge's effect on ground water shall be measured at any place of withdrawal of water for present or reasonably foreseeable future use. Determination of the discharge's effect on surface waters shall be measured at the point of discharge; or (4) the applicant has, within the ten years immediately preceding the date of submission of the permit application: (a) knowingly misrepresented a material fact in an application for a permit; (b) refused or failed to disclose any information required under the Water Quality Act; (c) *been convicted of a felony or other crime involving moral turpitude*; (d) been convicted of a

felony in any court for any crime defined by state or federal law as being a restraint of trade, price-fixing, bribery or fraud; (e) *exhibited a history of willful disregard for environmental laws of any state or the United States*; or (f) had an environmental permit revoked or permanently suspended for cause under any environmental laws of any state or the United States.”

NMSA 1978, §74-6-5 (E) (emphasis added).

77. Prior to the Secretary’s action on the permit application, renewal, or modification, and considering those factors in NMSA 1978, §74-6-5 (E), the Secretary, “shall approve the proposed discharge plan, modification, or renewal” if it is demonstrated that there will be no hazard to public health or undue risk to property. 20.6.2.3109.C NMAC (emphasis added).

78. Additionally, the Secretary must also ensure that the discharge: 1) will not impair ground water with less than 10,000 milligrams per liter (“mg/l”) of Total Dissolved Solids (“TDS”) at any point of withdrawal or place of potential future use; 2) will not exceed concentrations of standards found in 20.6.2.3103 NMAC or discharge toxic pollutants; and/or 3) meets the conditions of Subparagraphs (a) or (b) and Subparagraph (c) of Paragraph (3) of Subsection C of 20.6.2.3109. 20.6.2.3109.C NMAC.

79. The Secretary must deny a proposed discharge plan, renewal, or modification if the discharge plan does not specify any means to measure and sample effluent, will cause any surface water standard to be exceeded, may result in a hazard to the public or public health, and the permit exceeds a five (5) year term. 20.6.2.3109.H NMAC.

CONCLUSIONS OF LAW

80. VMC is a “person” as defined by the WQA. NMSA 1978, §74-6-2 (H). The facility’s proposed activities, livestock processing, generate a discharge which could potentially move directly or indirectly to ground water and thus requires a permit. NMSA 1978, §74-6-5; 20.6.2.3106.B NMAC. VMC has proposed renewal of its ground water discharge permit, DP-

236, pursuant to NMSA 1978, §74-6-5 and 20.6.2 NMAC. The facility's last ground water discharge permit, issued on May 19, 2004, expired on May 19, 2009 because an application for renewal was not submitted in a timely manner, pursuant to Subsection F of 20.6.2.3106 NMAC.

81. VMC filed a discharge plan renewal application on June 3, 2010, as required by NMSA 1978, §74-6-5, 20.6.2.3106 NMAC, 20.6.2.3107 NMAC, and 20.6.2.3109 NMAC, but the discharge plan renewal application was incomplete. The GWQB requested on several occasions additional information from the applicant, VMC, to complete its technical review of the discharge plan.

82. On May 10, 2013, VMC provided the last requested information to the GWQB. Finding that the application was then "technically complete," the GWQB, on May 31, 2013, proposed approval of a draft discharge permit for VMC in accordance with Subsection H of 20.6.2.3108 NMAC.

83. Notice of the availability of the proposed draft discharge permit for public comment was then published in accordance with the requirements of 20.6.2.3108 NMAC. Following the end of the required public comment period, the Secretary, pursuant to Subsection K of 20.6.2.3108 NMAC, determined that substantial public interest existed and ordered that a public hearing be held in accordance with 20.6.2.3110 NMAC and 20.1.4 NMAC.

84. On July 18, 2013, and in accord with 20.6.2.3110 NMAC, the Secretary appointed a hearing officer to conduct the public hearing. The hearing officer, pursuant to 20.6.2.3110 NMAC and 20.1.4 NMAC, ordered a public hearing to occur and a notice of the public hearing was delivered to all parties and published on September 13, 2013, within the thirty (30) day provisions of 20.6.2.3108.L NMAC.

85. The GWQB timely filed the administrative record with the hearing officer as required by 20.1.4.200.A (2) NMAC. On October 9, 2013, the GWQB, VMC, FRER/AG, and Mr. John Holland each filed a notice of intent to present technical testimony in conformity with 20.1.4.300 NMAC.

86. The hearing officer, on October 21, 2013, and October 22, 2013, held a public hearing in the City of Roswell, Chaves County, State of New Mexico as required by Subsection B of 20.6.2.3110 NMAC and 20.1.4 NMAC. All parties providing technical testimony at the hearing were taken under affirmation, oath, and under penalty of perjury.

87. The applicant, at hearing, sufficiently met his burden of proof, by a preponderance of the evidence, to show that renewal of the discharge permit would be protective of ground water pursuant to Paragraph (1) of Subsection A of 20.1.4.400 NMAC. Although raised by the public via public comment, and as addressed by VMC through direct testimony, Mr. De Los Santos's prior criminal convictions were outside the limits of NMSA 1978, §74-6-5 (E).

88. FRER and the AG's Office did show, through testimony, that VMC's sampling and monitoring program and results were not compliant with prior permit conditions.

89. The GWQB, through their testimony and by the agreement and consent of VMC, has met their burden of persuasion for the additional conditions and terms included in the revised draft discharge permit renewal in accordance with Paragraph (1) of Subsection A of 20.1.4.400. NMAC. The discharge permit should be issued as proposed in GWQB Exhibit 9 with an additional condition for the testing of the solids settling tanks for leakage.

90. The facility, as agreed to at the hearing by VMC president and general manager Mr. De Los Santos, will determine the destination of all internal domestic wastewater and make appropriate structural changes to eliminate domestic wastewater flows into the system used for

the disposal of livestock processing wastewater as required by Condition 5 of the revised draft discharge permit provided as Bureau Exhibit 9. GWQB NOI, Exhibit 9. The conditions imposed by GWQB are reasonable and are necessary to protect ground water quality.

91. FRER and the AG's Office failed to sufficiently disprove VMC's contention, as required by Paragraph (1) of Subsection A of 20.1.4.400 NMAC, that the proposed discharge permit was protective of ground water and those segments of surface water which are gaining because of ground water inflow as required by the WQA, NMSA 1978, §74-6-1, *et. seq.*, and 20.6.2 NMAC. FRER and the AG's Office also failed to demonstrate any reason under NMSA 1978, §74-6-5 or other provision where the Secretary "must" or "shall" deny the discharge permit.

92. The hearing officer, during the two (2) days of hearing, also took public comment from approximately fifteen (15) people in accordance with 20.6.2.3110 NMAC and 20.1.4.400 NMAC.

93. Based on technical testimony from VMC, FRER/AG, and the GWQB, as well as comments received during public comment, the applicant has demonstrated that, pursuant to NMSA 1978, §74-6-5 and 20.6.2.3110 NMAC, the proposed draft renewal permit, with conditions, should be issued. There is no substantial evidence to indicate that discharge in accordance with the proposed revised discharge permit will result in exceedance of the standards of 20.6.2.3103 NMAC or the presence of any toxic pollutants as defined in Subsection WW of 20.3.2.7 NMAC, nor that either a hazard to public health or undue risk to property will result from the issuance of the proposed renewal of the Discharge Permit. 20.6.2.3109.C NMAC.

III. CONCLUSION

94. Based on the information contained in the renewal application, the evidence presented at the public hearing, and the applicable law, the Ground Water Quality Bureau respectfully

requests that the Hearing Officer adopt and incorporate the Proposed Findings of Fact and Conclusions of Law in the Hearing Officer's Report to the Secretary.

Respectfully submitted,

GROUND WATER QUALITY BUREAU
NEW MEXICO ENVIRONMENT DEPARTMENT



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Ground Water Quality Bureau's Proposed Findings of Fact and Conclusions of Law was hand delivered or mailed to the following persons of record on December 5, 2013:

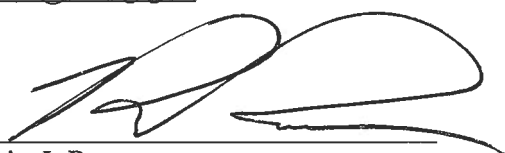
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Re: *GWB 13-05 (P)*