

IN THE POLLUTION CONTROL HEARINGS CONTROL BOARD
FOR THE STATE OF WASHINGTON

RECEIVED

FEB - 8 2000

DEPT. OF ECOLOGY
BELLINGHAM FIELD OFFICE

DALE MARR, an individual, and
MARR MINK FARM, a Washington
corporation,

) PCBH No.

) Appellants,

) vs.

) NOTICE OF APPEAL

) STATE OF WASHINGTON,
) DEPARTMENT OF ECOLOGY, a state
) agency,

) Respondent.

COMES NOW, Appellants Dale Marr and Marr Mink Farm (hereinafter collectively
"Marr"), by and through Appellants' counsel of record, Chmelik Sitkin & Davis P.S., and
respectfully submits this Notice of Appeal and the Notice of Disposition Upon Application for
Relief From Penalty No. DE 99WQ-N443, pursuant to RCW 43.21B and WAC 371-08.

1. Appellant's Name:

Dale Marr
Marr Mink Farm
Cornell Creek Road
9741 Mt. Baker Road
Deming, Washington 98224
(360) 599-2881 (Telephone)
(360) 599-3182 (Facsimile)

2. Appellant's Representative's Name:

Jonathan K. Sitkin, WSBA No. 17604
Les E. Reardanz, WSBA No. 27074
Chmelik Sitkin & Davis P.S.
1500 Railroad Avenue
Bellingham, Washington 98225
(360) 671-1796 (Telephone)
(360) 671-3785 (Facsimile)

RECEIVED

FEB 07 2000

DEPT OF ECOLOGY

NOTICE OF APPEAL - 1

COPY

LAW OFFICES OF
CHMELIK SITKIN & DAVIS P.S.
ATTORNEYS
1500 RAILROAD AVENUE
BELLINGHAM, WASHINGTON 98225
(360) 671-1796
FAX: 671-3781

1 3. **Decision Appealed From and Procedural History:**

2 Marr appeals from the Department of Ecology's (hereinafter "Department") denial
3 of Marr's Application for Relief from Penalty dated January 6, 2000. A true and correct copy of
4 the Notice of Disposition upon Application for Relief from Penalty is attached hereto as Exhibit
5 "A" and incorporated herein by this reference. Marr was sent a Notice of Penalty Incurred and
6 Due, No. DE 99WQ-N443, in the amount of \$24,000 dated October 8, 1999, regarding
7 violations of RCW 90.48.080 and 90.48.160 and WAC 173-201A. A true and correct copy of
8 the Notice of Penalty Incurred and Due is attached hereto as Exhibit "B" and incorporated
9 herein by this reference. The penalty was issued for two days of discharge into surface water
10 of the State. On October 27, 1999, Marr timely submitted an Application for Relief from
11 Penalty. A true and correct copy of the Application for Relief from Penalty is attached hereto
12 as Exhibit "C" and incorporated herein by this reference. The Department subsequently denied
13 Marr's application, and that denial, along with the original assessment of penalties, are the
14 decisions Marr appeals herein.

15 4. **Statement of Facts:**

16 Marr owns two geographically separate mink farms in Whatcom County,
17 Washington. One is on Cornell Creek Road and the other is on Mt. Baker Highway. Marr has
18 never received any prior violations or been assessed any penalties by the Department.

19 On April 27, 1999, Marr's Cornell Creek Road farm was inspected by a
20 Department inspector, which began this process. The inspector was concerned with manure
21 under the shed roofs coming out under the drip line and suggested Marr install curbing to retain
22 the contents. Upon Marr's request, the inspector suggested Marr contact the local
23 Conservation District for further advice.
24

1 Each spring, mink give birth to their young. Mink are irritable animals and even
2 minor disturbances can cause them to kill each other and their young. The proper rearing of
3 young mink is obviously essential to a successful mink farm. Therefore, Marr must take
4 special precautions during the spring to ensure that the mink maintain a calm and stable
5 environment. Consequently, Marr could not undertake construction during the spring months
6 following the Department's inspection. Nevertheless, well before any penalties were assessed
7 here, Marr did contact the Conservation District and immediately began remedial construction
8 on the curbing when it was safe for the mink.

9 Marr received a notice of correction, dated May 13, 1999, detailing that Marr
10 should clean up and prevent further manure discharge and that Marr should develop a
11 comprehensive farm plan. In early May 1999, Marr arranged for a Conservation District
12 representative to survey the farm to begin a comprehensive farm plan and to help remedy the
13 manure problem. Unfortunately, at this time, Marr did not understand that the manure
14 discharge was also from the water troughs. Based upon the inspection and the Notice of
15 Correction, Marr had only received indications that the shed roofing had a manure problem and
16 no water samples had yet been taken. Subsequently, Marr discovered the problem with the
17 water troughs and has taken action to install a nipple system to prevent further discharge.

18 Based upon the violations cited in the Notice of Penalty Incurred and Due, the
19 water samples that violated RCW 90.48.080 and 90.48.160 revolve around the water trough
20 and the septic tank. To alleviate this problem, Marr has begun installing a nipple system on the
21 water troughs. The installation will be complete in the breeder pens before the breeding
22 season begins in March, 2000. Subsequently, the nipple system installation will be expanded
23 to include the pelter pens before the kits are moved there in early summer, 2000. Further,
24 Marr has ceased using the septic system altogether. Accordingly, Marr has directly addressed
25

1 and remediated the water troughs and septic systems, which were the two major causes for
2 the violations.

3 Moreover, the following is a list of additional remedial items Marr has completed to
4 specifically address the water pollution problems and to ensure they are not repeated:

5 a. Reduce the heard: Marr has reduced its breeder females, which is the
6 measuring stick for a heard, from 5,000 breeder females to 3,000, which is approximately a
7 40% reduction.

8 b. Stopped preparing food: Marr has stopped preparing its own mink
9 food on-site and, instead, is purchasing and transporting prepared mink food to the farms. This
10 has greatly reduced the potential contamination. Previously, Marr made its own food by
11 grinding and mixing fish and animal by-product, which required washing down the equipment
12 each day upon completion. While Marr still has equipment and barrels to wash down, Marr has
13 reduced the quantity of water used from approximately 250 gallons per day to approximately
14 71.5 gallons per day (500 gallons per week). This constitutes a reduction of approximately
15 178.5 gallons per day. Furthermore, Marr is collecting the wash down water and distributing it
16 on the fields, pursuant to the Conservation District's suggestion.

17 c. Manure storage: Marr has begun storing its mink manure in a
18 covered, concrete floored storage building. With the reduction of the herd by 2,000 mink, Marr
19 now has less manure and will use the extra building space for additional manure storage.

20 d. Farm plan: Marr has met, repeatedly, with the Conservation District to
21 develop a farm plan. This process continues and is expected to be completed no later than
22 this summer.

23 e. Curbing and gutters: Marr has installed curbing and gutters to reduce the
24 contamination, pursuant to the Department's suggestion. Marr will be installing additional
25

1 curbing and gutters after the breeding season in April, 2000 and again after the birthing season
2 in May, 2000, when it is safe for the mink.

3 By the time Marr has completed all of the remedial measures listed herein, Marr
4 estimates it will have spent approximately \$25,000 to \$30,000.

5 Appellant submitted a statement of facts with its Application for Relief from
6 Penalty that further details the factual circumstances of this matter. A true and correct copy of
7 the statement is attached hereto with Marr's Application for Relief from Penalty as Exhibit C.
8 Importantly, the sworn statement Marr submitted with its Application for Relief shows the many
9 items Marr began before the Department assessed penalties, thereby showing Marr's good
10 faith effort to comply with the regulations, remedy any violations, and prevent any future
11 violations.

12 5. **Short and Plain Statement that Denial is Unjust or Unlawful:**

13 The Department is authorized to assess civil penalties for violations of RCW
14 90.48.080 and 90.48.160, pursuant to the terms of RCW 90.48.144. Amberson Egg Farm v.
15 DOE, PCHB No. 99-029, 1999 WL 825747 (1999). However, the appropriate amount of the
16 penalty, if any, is reviewed *de novo* by the Pollution Control Hearings Board (hereinafter the
17 "Board"). Henry Bosma Dairy v. DOE, PCHB No. 94-121, 1995 WL 879291 (1995). A penalty
18 is set based on the consideration of the violator's previous history, the severity of the violation's
19 impact on public health and/or the environment and other relevant factors. RCW 90.48.144(3).
20 In assessing the appropriateness of the penalty, the Board should also consider the violation in
21 light of all the circumstances. Cascade Pole Co. v. DOE, PCHB 90-7 (1992). The Department
22 bears the burden of proof as to the existence of a violation and the reasonableness of the
23 penalty. Amberson Egg Farm v. DOE, PCHB 99-029.
24

1 Initially, Marr does not challenge the violation's existence. However, Marr does
2 request that the Board mitigate the penalties.

3 Until this matter, Marr had no history of previous violations or penalties. This is
4 Marr's first experience with the Department. It is important to remember that the prime
5 purpose of civil penalties is remedial rather than retributive. Port Townsend Paper Corp. v.
6 DOE, PCHB 86-136, 1988 WL 158978 (1988). Accordingly, penalties are designed to correct
7 problems by promoting compliance, to influence behavior, and to deter future violations of both
8 the violator and the public. Id.; Henry Bosma Dairy v. DOE, PCHB No. 94-121. As Marr
9 worked diligently before the penalties were assessed to remediate the farms' problems in order
10 to comply with the Department's regulations and to ensure that the violations do not recur, the
11 imposition of these penalties are not required to promote Marr's compliance, to deter future
12 violations, or influence Marr's behavior.

13 Marr has cooperated in good faith to remedy the problems. Specifically, and
14 importantly, Marr is addressing the water trough problem, which was the foundation for the
15 majority of the violating water samples, by installing a nipple system. Further, Marr has
16 completely ceased using the septic system, which was the Department's other big complaint.

17 Marr has also removed the mink manure pile and is storing it in a covered building
18 with concrete flooring. Marr has installed curbing and is hand watering the mink and catching
19 and appropriately disposing of the excess off site. They have met with the Conservation
20 District repeatedly to develop a farm plan and have implemented the Conservation District's
21 instructions. For example, they are collecting the feed room wash down waters and spreading
22 it on the field.

23 Moreover, Marr has reduced its herd by 2,000 breeder females, which is
24 approximately a 40% reduction of its herd. Marr has stopped producing its own mink food,
25

1 thereby reducing the wash down water by 178.5 gallons per day. That is approximately a 70%
2 reduction. As demonstrated in Marr's Application for Relief from Penalty, Marr either
3 completed or began these remedial measures before the penalties were issued.

4 In short, Marr is correcting the problems without the penalties forcing its
5 compliance. Due to Marr's inexperience in the regulatory arena, Marr did not understand the
6 process or the requirements initially. For example, the May 13, 1999 Notice of Correction
7 required that Marr clean up the manure discharges. The Department inspector had indicated
8 to Marr, during his April 27, 1999 inspection, that he was concerned about the manure under
9 the shed roofs and suggested that Marr install curbing, which Marr did install after the mink
10 birthing season concluded in 1999. Marr did not understand that the manure problem also
11 included the mink's water troughs until a subsequent Department inspection and water sample
12 test. This is supported by the Department's notation in the Notice of Penalty Incurred and Due,
13 paragraph 4, which provided that Marr took partial compliance action but that mink manure
14 discharge was still detected. This is when Marr realized the manure discharge was also from
15 the water troughs and began developing a plan to remedy this problem.

16 Regardless, Marr undertook significant and substantial efforts to solve the
17 problems and develop a comprehensive plan to prevent recurrence even before the penalties
18 were assessed. Marr's action during the time frame between the incident and the date the
19 penalties were assessed is particularly important when the Board determines whether to
20 mitigate the penalty. R.G. Leary Construction Co. v. DOE, PCHB No. 90-1, 1990 WL 150969
21 (1990). As Marr worked diligently to correct the violations and prevent any further violations,
22 the penalties should be mitigated.

23 The purpose of penalties, i.e., to promote remedial action to correct the problem
24 and to deter future violations, has been accomplished in this matter even before the penalties
25

1 were assessed. The Department does not need penalties here to ensure compliance or to
2 deter future violations. Marr began its significant remedial efforts prior to the assessment of
3 penalties and has continued to work in good faith to comply and prevent recurrence. Thus, the
4 imposition of a \$24,000 penalty is unnecessary and merely serves to reduce the amount of
5 money available for Marr to continue its efforts to correct the problems. Accordingly, Marr
6 respectfully requests that the penalty be mitigated and suspended as further detailed in
7 paragraph 6 below.

8 Additionally, Marr appeals on the basis that a unspecified portion of the penalties
9 was based upon water samples taken from the Mt. Baker Highway farm. The Department's
10 inspection in April, 1999 and Notice of Correction in May, 1999 were solely regarding the
11 Cornell Creek Road farm. The Department did not inspect the Mt. Baker Highway farm until
12 August, 1999 and never issued a notice of correction. Therefore, the penalties were assessed
13 before Marr had notice of the Mt. Baker Highway farm problems and before Marr had any
14 opportunity to comply. Essentially, Marr discovered the results of the Mt. Baker Highway farm
15 water samples at the same time Marr was informed of the penalties. Consequently, Marr
16 respectfully requests the penalties be reduced accordingly.

17
18 6. Relief Requested:

19 Based upon the foregoing, Marr respectfully prays for the following relief:

- 20 a. That the penalties be waived;
- 21 b. Alternatively, that the penalties be mitigated as the Board finds equitable;
- 22 c. That the mitigated penalties, or a portion thereof, be suspended for a
23 certain period of time, as determined by the Board, conditioned upon Marr not incurring any
24 additional water pollution violations;

1 c. Alternatively, Marr will agree to contribute the final amount of its penalties
2 to a nonprofit clean water charity or Marr will contribute the final amount of penalties to
3 sponsoring environmental training for other mink farmers to ensure their compliance; and

4 d. Such other equitable relief as the Board deems just and appropriate.

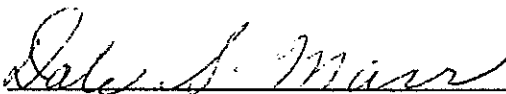
5 7. **Verification of Notice:**

6 I, Dale Marr, the appellant herein, have read this Notice of Appeal and believe the
7 contents herein to be true and correct.

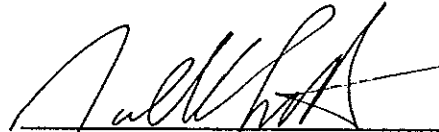
8
9 RESPECTFULLY SUBMITTED this 4 day of February, 2000.

10
11 Appellant:

Chmelik Sitkin & Davis P.S.

12
13 

14 Dale Marr
15 President, Marr Mink Farm

16
17 

Jonathan K. Sitkin, WSBA No. 17604
Les E. Reardanz, WSBA No. 27074
Attorneys for Appellant Dale Marr and
Marr Mink Farm

18 CLIENTS MARK NOTICE OF APPEAL(RSV)

DEPARTMENT OF ECOLOGY

IN THE MATTER OF THE ASSESSMENT)	NOTICE OF DISPOSITION
OF PENALTY AGAINST)	UPON APPLICATION FOR
Mr. Dale Marr)	RELIEF FROM PENALTY
Marr Mink Farm)	No. DE 99WQ-N443

To: Mr. Dale Marr
Marr Mink Farm
Cornell Creek Road
9741 Mt. Baker Road
Deming, WA 98244

NOTICE OF PENALTY INCURRED AND DUE, No. DE 99WQ-N443 in the amount of \$24,000 was sent to Mr. Dale Marr on 8 October 1999 to address violations of Chapter 90.48.180 RCW, 90.48.160 and WAC 173.201A.

The penalty assessment was based on the following violations: DE 99WQ-N443 was issued for two days of discharge to waters of the State of Washington in violation of 90.48.080 RCW, 90.48.160, and WAC 173.201A. Refer to DE 99WQ-N443 for details.

On 27 October 1999, Mr. Dale Marr filed an "APPLICATION FOR RELIEF FROM PENALTY" No. DE 99WQ-N443.

The Department of Ecology (the Department) has reviewed the "APPLICATION FOR RELIEF FROM PENALTY" and has determined that no extraordinary circumstances exist, such as the presence of information or facts not considered in setting the penalty originally, to justify canceling or mitigating the penalty.

For this reason, IT IS ORDERED that penalty assessment No. DE 99WQ-N443 be AFFIRMED.

The penalty is due and payable thirty (30) days from your receipt of this Notice of Disposition. Please send the penalty payment to: Cashiering Section, Department of Ecology, PO Box 5128, Lacey, Washington 98509-5128.

If you wish to contest this penalty, you must file an appeal within thirty (30) days of your receipt of this Notice of Disposition, to the Pollution Control Hearings Board, PO Box 40903, Olympia, Washington 98504-0903. At the same time, copies of your appeal must be sent to: Department of Ecology c/o Enforcement Officer, PO Box 47600, Olympia, Washington 98504-7600; and to the Enforcement Coordinator, Northwest Regional Office, 3190 - 160th Avenue SE, Bellevue, Washington 98008-5452. These procedures are consistent with Chapter 43.21B RCW and its implementing regulations.

DATED JAN 06 2000, at Bellevue, Washington.

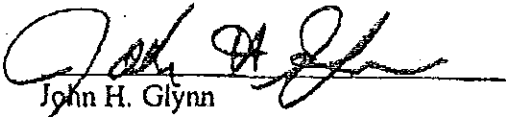

John H. Glynn
Water Quality Manager
Northwest Regional Office



EXHIBIT A