

**NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

----- X

In the Matter of Violations of Articles 11, 17 and 71 of the Environmental Conservation Law and Part 700, *et seq.*, of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York, by:

**ORDER ON  
CONSENT**

**Case No.  
R6-20051021-44**

**Marks Dairy Farm,**

Respondent.

----- X

**WHEREAS:**

**Jurisdiction and Parties**

1. The New York State Department of Environmental Conservation (the "Department") is an Executive Agency of the State of New York with jurisdiction over the environmental policy and programs of the State pursuant to the provisions of the Environmental Conservation Law ("ECL") and Title 6 of the Official Compilation of Codes, Rules and Regulations ("6 NYCRR").
2. The Department's jurisdiction includes, *inter alia*, (i) management of the fish and wildlife resources of the State pursuant to the provisions of ECL Article 11; and (ii) regulation of discharges of pollution to the waters of the State pursuant to the provisions of ECL Article 17 and the regulations promulgated thereunder at 6 NYCRR Parts 700, *et seq.*
3. This Order is issued in accordance with the Department's enforcement authority pursuant to ECL Articles 3 and 71.
4. Marks Dairy Farm (the "Respondent") is a partnership authorized to do business in the State of New York, maintaining a place of business on East Martinsburg Road, Lowville, New York, and is a "person" as defined in ECL §§ 1-0303.18, 11-0103.19 and 17-0105.1.

**Facts**

5. On July 1, 1999, pursuant to its authority under Article 17 of the ECL, the Department issued a General Permit (GP-99-01, as modified, effective July 1, 2004, by GP-04-02) (the "General Permit") regulating discharges from Concentrated Animal Feeding Operations (CAFO). Among other things, the General Permit requires permittees to submit a Comprehensive Nutrient Management Plan (CNMP) detailing how they will manage animal wastes at their facilities.
6. Respondent owns and operates a CAFO located in the Town of Martinsburg, Lewis County, New York (the "Facility"). Respondent filed its Notice of Intent to be covered under the

General Permit on December 9, 1999 and Respondent's CNMP certification was completed on March 19, 2002.

7. On or about August 10, 2005, an impoundment lagoon (the "Lagoon") failed at the Facility releasing several million gallons of liquid cow manure into adjacent fields and causing the discharge (the "Discharge") of a large quantity of liquid manure to the Black River.
8. The Lagoon was not listed on the Respondent's CNMP and the Respondent was not authorized to discharge manure from the Lagoon.
9. The Discharge caused a substantial fishkill over approximately 20 miles of the Black River in Lewis and Jefferson Counties. ECL § 11-0503(1), prohibits, *inter alia*, the discharge of "deleterious or poisonous" substances in quantities injurious to fish. Pursuant to ECL § 71-0925(5), the penalty imposed for violation of ECL § 11-0503(1) shall be \$500 to \$1,000 for each offense, "and an additional penalty of ten dollars for each fish killed in violation thereof." Department Staff estimates that the number of fish killed by the Discharge exceeded 375,000.
10. The Discharge caused violations of ECL Article 17 and the regulations promulgated thereunder. Specifically, the following water quality standards were violated:
  - a. Taste/Color/Odor (6 NYCRR 703.2) - the Discharge caused significant changes in the coloration and odor of the Black River.
  - b. Turbidity (6 NYCRR 703.2) - the Discharge caused a significant increase in turbidity in the Black River.
  - c. Suspended/Colloidal/Settleable solids (6 NYCRR 703.2) - the Discharge caused a significant increase in solids in the Black River.
  - d. Floating Substances (6 NYCRR 703.2) - the Discharge caused a significant increase in floating substances on the Black River.
  - e. Dissolved Oxygen (6 NYCRR 703.3) - samples taken from the Black River on August 12 establish the minimum DO standard was violated. The minimum DO readings recorded were 0.2 mg/L and 0.3 mg/L.
  - f. Ammonia (6 NYCRR 703.5) - samples taken from the Black River over a two-day period establish the maximum ammonia standard was violated. The maximum readings recorded on August 11 and 12 were 2100 ug/L and 5300 ug/L, respectively.
  - g. Impairment of Best Usage (6 NYCRR 701.8) - Pursuant to the regulations, the best usage of the impacted section of the Black River is fishable/swimmable. The Black River was closed to swimming, fishing and wading for a 16-day period starting August 10th through the 25th of August when the Lewis County Emergency Management Office lifted the advisory.

11. The Respondent did not possess an ECL Article 17, State Pollutant Discharge Elimination System (SPDES) permit for the Discharge. Therefore, the discharge of liquid cow manure to the Black River occurred without a SPDES permit, in violation of ECL §§ 17-0701 and 17-0803.

12. Department Staff inspected the Facility on August 18 and 25, 2005. The inspections were conducted to assess Respondent's compliance with the General Permit including progress towards implementation of the CNMP. Although complete compliance with the CNMP is not required until December 31, 2006, the inspections identified violations of the General Permit, many of which were of long duration. Specifically:

- a. General Permit Condition VI.A provides that there shall be no discharge to the surface waters of the State, except in accordance with General Permit Condition VI.C (i.e., rain events in excess of the 25 year, 24 hour storm event).
- b. General Permit Condition VII.A requires facilities identified in the CNMP to be designed, constructed and operated in accordance with NRCS Conservation Practice Standard No. NY312.
- c. General Permit Condition VII.B provides that the permittee and the Certified Planner shall certify, in accordance with the Comprehensive Nutrient Management Plan Certification Form, Appendix B, that the CNMP was prepared in accordance with "NRCS Conservation Practice Standard No. NY312."
- d. General Permit Condition VII.C provides that the CNMP shall contain a schedule for practices to be fully operational.
- e. General Permit Condition VIII.A requires that all discharges to retention facilities be composed entirely of process waste waters from the proper operation and maintenance of a CAFO and the precipitation run-off from the production area.
- f. General Permit Condition VIII.B requires facilities covered by the General Permit to document the attainment of effluent limitations in Section VI and all applicable Generic Best Management Practices (BMP's) used to comply with the effluent limitations in this permit. Such documentation shall be included in the CNMP.
- g. General Permit Condition VIII.C(vi) provides that new and expanded wastewater retention facilities may not be located in the 100-year flood plain unless the facility is protected from inundation and damage that may occur during that flood event.
- h. General Permit Condition VIII.C(xi) requires that the collection, storage and disposal of liquids and solid waste should be managed in accordance with NRCS standards.
- i. General Permit Condition VII.D requires the permittee to amend the CNMP prior to any change in design, construction, operation or maintenance that has a

significant effect on the potential for the discharge of pollutants to the waters of the State.

- j. General Permit Condition VIII.C(i) requires control facilities to be designed, constructed, and operated to contain all process wastewater.
- k. General Permit Condition VIII.C(ii) prohibits expansion of operations prior to amending or enlarging the waste-handling procedures and structures to accommodate additional wastes unless existing facilities have been designed to accommodate such expansion.
- l. General Permit Condition VIII.C(viii) requires solids, sludges, manure or other pollutants to be disposed of in a manner that prevents such pollutants from being discharged to the waters of the State.
- m. General Permit Condition IX.A requires the permittee to provide advance notice to the Department of any planned changes or activity at the permitted facility that may result in noncompliance with permit requirements.
- n. General Permit Condition IX.N(iii) requires the permittee to install depth markers in all surface and liquid impoundments.
- o. General Permit Condition IX.O(i) & (ii) require water lines, including drinking water or cooling water lines, to be inspected and the inspections to be documented once per day and require weekly records of the depth marker reading for manure and process wastewater in any open liquid storage structure.
- p. General Permit Condition IX.O(iii) requires documentation to be maintained concerning any actions taken to correct deficiencies.
- q. General Permit Condition IX.O(v) requires documentation to be maintained on the design of manure storage structures.
- r. General Permit Condition X.F provides that the permittee shall take all reasonable steps to minimize or prevent any discharge in violation of the General Permit that has a reasonable likelihood of adversely affecting human health or the environment.
- s. General Permit Condition X.G provides that the permittee shall at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the permittee to achieve compliance with the conditions of the permit.

13. On or about December 18 through December 23, 2005, Respondent applied manure to a field owned by Paul Kelley, but leased by Respondent, near Markowski Road in the Town of Lowville in Lewis County, New York. On December 24, 2005, a well supplying water to a residence across Markowski Road produced brown water with suspended solids and a pronounced smell of manure. The Department investigated the situation on December 26 and 27, 2005, and determined that runoff from the field had contaminated the well. The investigation thus revealed a violation of ECL 17-0501 which prohibits the discharge of

pollutants to the waters of the State in contravention of water quality standards, namely odor and suspended material. This investigation revealed the following violations of the General Permit:

- a. General Permit Section VIII C (vii) which prohibits the water quality impairment of neighboring private drinking water wells.
- b. General Permit Section VIII C (viii) which requires that manure that is disposed will not discharge pollutants to waters of the State.
- c. General Permit Section VIII C (xi) which requires the disposal of manure in accordance with NRCS standards. NRCS Standards NY590 state that nutrients shall not be applied to frozen, snow covered, or saturated soil if the potential for runoff exists.

Respondent, at its own expense and without admission of any kind, installed a deep well at the affected residence and there have been no further complaints.

14. Pursuant to ECL § 71-1929, a civil penalty of up to \$37,500/day per violation may be assessed for any violation of Titles 1 through 11 or 19 of Article 17, or any regulation promulgated or permit issued pursuant thereto.

15. The Commissioner of Environmental Conservation, Denise M. Sheehan, is the trustee and steward of the State's natural resources pursuant to ECL §§ 1-0101 and 3-0301; and has been designated as the trustee of the State's natural resources pursuant to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA); and is the authorized representative of the State under Section 311 of the Federal Water Pollution Prevention and Control Act (FWPCA).

16. Due to the impacts of the Discharge, the State of New York has a natural resource damage claim. The State's natural resource damage claim consists of compensation for (i) lost use of the resource (the "Lost Use") and (ii) costs incurred by the State in its assessment of the damages (the "Assessment Costs"). The lost use calculation seeks to establish appropriate compensation for damages associated with the loss of fishing opportunities along the affected reach of the Black River. The Department estimates that the affected reach will remain essentially unavailable, or severely limited, for fishing for two years, with gradual improvement thereafter. The cost of assessment is intended to reimburse the State for personnel, travel and equipment costs incurred in association with the Department's initial response, data collection and continued monitoring of the injured resource.

17. The Respondent and the Department desire an amicable resolution of the Department's allegations and have agreed to resolve Respondent's alleged liability, as described herein, for the related costs, in accordance with the provisions, terms, and conditions contained herein.

The Respondent neither admits nor denies the allegations set forth herein and the existence of this Order, and Respondent's consent hereto, and compliance herewith, does not constitute, nor shall either be construed or considered as, an admission of any kind. Further, the existence of this Order and Respondent's consent hereto, and compliance herewith, shall not give rise to any presumption of law or finding of fact which shall inure to the benefit of any third party.

18. In any proceeding to enforce this Order, Respondent reserves any rights it may have to contest, defend against, dispute, or disprove any action, proceedings, allegations, assertions, determinations, or orders of the Department, except with respect to the validity of this Order or its terms. Furthermore, in any proceeding to enforce this Order, Respondent reserves its right to be heard, to appeal, and to any other due process in any action or proceedings by the Department, including any action or proceeding pursuant to, or to enforce, this Order.

19. Marks Dairy Farm, the Respondent herein, waives its right to a hearing and to contest the Department's jurisdiction to issue this Order, and after due consideration having been had thereon, it appearing that issuance of this Order will be advantageous to the State:

**NOW, WHEREFORE, it is hereby ORDERED, that:**

**ARTICLE I: PENALTY**

A. Respondent is hereby assessed a civil penalty in the amount of three hundred nine thousand and thirty-seven dollars (\$309,037.00). Payment shall be made by installments according to the following schedule:

1. On or before the fourth anniversary of the Effective Date of this Order, Respondent shall pay one hundred nine thousand thirty seven dollars (\$109,037.00);
2. On or before the fifth anniversary of the Effective Date of this Order, Respondent shall pay one hundred thousand dollars (\$100,000.00); and
3. On or before the sixth anniversary of the Effective Date of this Order, Respondent shall pay one hundred thousand dollars (\$100,000.00).

B. Respondent shall pay each installment by certified check or money order, payable to the "Department of Environmental Conservation" and deliver same to the attention of Ms. Elissa Armater, at:

NYS Department of Environmental Conservation  
Division of Environmental Enforcement  
625 Broadway, 14<sup>th</sup> Floor  
Albany, New York 12233-5500

- C. 1. Respondent agrees that all funds recoverable from Respondent's insurance carriers for the Discharge will be paid to the Department as a penalty, in addition to the amounts in Article I.A. above, Article II below, and Article III below, excepting the amount in Article III.D below. Respondent shall make all good faith efforts to recover any and all applicable funds from Respondent's insurance carrier(s). Respondent's good faith efforts may include commencement of litigation against Respondent's insurance carrier(s) if there is a reasonable legal basis to challenge the carriers' denial of coverage related to the Discharge.
2. The first one hundred thousand dollars (\$100,000) of any funds recovered by Respondent pursuant to paragraph I.C.1 above, shall be paid to the Tug Hill Commission in accordance with paragraph III.D of this Order. The next four Hundred Thousand Dollars (\$400,000) of any such funds recovered shall be paid to the Department as a penalty. All payments required herein shall be made within twenty (20) days of Respondent's receipt of said funds. Any amounts recovered by Respondent in excess of five hundred thousand dollars (\$500,000) shall be shared evenly between the Department and Respondent. Such excess funds shall be paid within twenty (20) days of receipt of such funds. Any funds paid pursuant to this paragraph shall be in addition to all expenditures made by Respondent pursuant to paragraphs I.A, II, and III of this Order. Any such payment by Respondent shall be made payable to the "Department of Environmental Conservation," and sent to the address set forth in paragraph I.B. above.
3. For two years from the effective date of this Order, Respondent shall submit a semi-annual written report to the Department, setting forth all measures taken by Respondent during the past six months to recover funds from its insurance carrier(s). Such reporting may be suspended or extended by the Department upon written notification to Respondent.

**ARTICLE II: NATURAL RESOURCE DAMAGES**

A. Respondent shall pay to the Commissioner of Environmental Conservation, as the State's natural resource trustee, the amount of three hundred ninety thousand nine hundred sixty-three dollars (\$390,963.00) for the natural resource damages caused by the Discharge. Payment shall be made by installments according to the following schedule:

1. Within sixty (60) days of the Effective Date of this Order Respondent shall pay one hundred thousand dollars (\$100,000.00), as follows: (i) one payment shall be in the amount of eighty thousand dollars (\$80,000.00); and (ii) one payment shall be in the amount of twenty thousand dollars (\$20,000.00) as compensation to the Department the for the Assessment Costs;
2. On or before the first anniversary of the Effective Date of this Order, Respondent

- shall pay one hundred thousand dollars (\$100,000.00);
3. On or before the second anniversary of the Effective Date of this Order, Respondent shall pay one hundred thousand dollars (\$100,000.00); and
  4. On or before the third anniversary of the Effective Date of this Order, Respondent shall pay ninety thousand nine hundred and sixty-three dollars (\$90,963.00).

B. Respondent shall pay each installment by certified check or money order, payable to the "Department of Environmental Conservation, NRD Unit" and deliver same to the attention of David H. Keehn, Esq., at:

NYS Department of Environmental Conservation  
Division of Environmental Enforcement  
625 Broadway, 14<sup>th</sup> Floor  
Albany, New York 12233-5500

**ARTICLE III: ENVIRONMENTAL BENEFIT PROJECTS**

Respondent agrees to fund Environmental Benefit Projects (EBPs) in the amount of One Million Five Hundred Thousand Dollars (\$1,500,000), as outlined in Paragraphs A, B and C below.

Within Thirty days of the effective date of this Order or, where the value of an EPB described herein requires an appraisal, within thirty days of the approval of such appraisal as provided herein, Respondent shall sign and deliver to the Department, and with respect to Article III.B to the Tug Hill Tomorrow Land Trust, agreements that provide for Respondent conveying the following interests in real property:

\*Maps of Respondent's property are hereby attached as Appendix A to this Order. Appendix A, Maps 2, 3, 4 and 5 set forth the approximate locations of the Easements set forth in Paragraph A below.

A. To the Department as Grantee:

Public fishing rights for the bed and banks of the Black River, and further from the bank of the Black River upland for a distance of Thirty-three feet a for those lands owned by Respondent that border or lie under the Black River.

An easement from the end of the Williams Road to the aforesaid fishing rights easement and the parking lot mentioned in the immediately following sentence. An easement for land to be used as a car-top boat launching site, including a parking lot with the dimension of at least One Hundred feet by Two Hundred feet. Respondent will construct said launching site, road and parking lot to the specifications provided by the Department for such purposes.

Public fishing rights extending Thirty-Three feet on each side from banks of Whetstone Creek as it flows through Respondent's lands.

An easement for land to be used as a parking lot with the dimension of at least One Hundred feet by One Hundred feet contiguous with Blue Street with a Ten foot wide footpath to the public fishing access along Whetstone Creek. Respondent will construct said parking lot to the specifications used by the Department for such purposes.

B. To the Tug Hill Tomorrow Land Trust (the "Trustee"):

Development Rights to sufficient acreage to effect the provisions of Paragraph III.C.2 below. These Development Rights shall include a sixty-seven (67) foot buffer (the "Buffer") running contiguously along the landward side of the public fishing rights easements described in Section III.A above. The Buffer shall be subject to the same restrictions as the other lands subject to the Development Rights easement herein and shall have the additional limitation that no manure shall be spread within the Buffer. Upon execution of the agreement with the Trustee, as described herein, Respondent will pay the trustee the sum of Seventy-Five Thousand Dollars (\$75,000.00) for an endowment for the management of the deeded Development Rights.

\*Maps of Respondent's property are hereby attached as Appendix A to this Order. Appendix A, Map 1 sets forth the approximate location of the Development Rights set forth in Paragraph B above.

- C. 1. The parties agree that the value of the deeded rights to the public fishing rights pursuant to "A" above for the Black River shall be computed at the rate of Eleven Thousand Two Hundred Fifty Dollars (\$11,250.00) per river mile, for a value of Forty-Nine Thousand One Hundred Sixty-One Dollars (\$49,161.00). The value of the public fishing rights pursuant to "A" above for Whetstone Creek shall be computed at the rate of Twenty-Two Thousand Five Hundred Dollars (\$22,500.00) per river mile, for a value of Nineteen Thousand Nine Hundred Twenty-Two Dollars (\$19,922.00). The value of the two parking lots required by "A" above shall be computed at the rate of Two Thousand Nine Hundred Twenty-Five Dollars (\$2,925.00) per Ten Thousand square feet, for a total value of Eight Thousand Seven Hundred Seventy-Five Dollars (\$8,775.00). The value of the footpath to the public fishing access on Whetstone Creek will be valued at Nine Hundred Seventy-Six Dollars (\$976.00). The easement from the end of Williams Road to the public fishing access and parking lot along the Black River will be valued at Three Hundred Ninety Dollars (\$390.00)

The Respondent will construct the following infrastructure with the following allowed costs as part of the EBP. The value of the construction of the parking area near the Black River will be Eight Thousand Eight Hundred Sixty-Two Dollars (\$8,862.00). The value of the construction of the parking area near Whetstone Creek will be Four Thousand Four Hundred Twenty-Two Dollars (\$4,422.00). The value of the construction of the easement from the end of Williams Road to the Black River parking lot will be Twenty-Two Thousand Two Hundred Ninety-Eight Dollars (\$22,298.00). The value of the construction of the boat launching site will be Fifty-Five Thousand Nine Hundred Eighty-Three Dollars (\$55,983.00).

2. The parties agree that the total acres subject to the restriction in Development Rights pursuant to Section III.B above shall be sufficient to cause the aggregate value of all EBPs set forth herein to equal no less than One Million Five Hundred Thousand Dollars (\$1,500,000.00). The value of the Development Rights restriction shall be determined pursuant to the following procedure:
  - a. The Department shall provide Respondent with a list (the "List") of New York State Certified General Appraisers who have conducted conservation easement appraisals on agricultural lands for the Farmland Protection Implementation Program administered by the New York State Department of Agriculture and Markets ("Agriculture & Markets").
  - b. Respondent shall, at its own expense, engage the services of one the appraisers from the List to appraise the value of the Development Rights described in Section III.B above.
  - c. Respondent shall instruct the selected appraiser to provide one original and two complete copies of the appraiser's formal written appraisal report to the Department.
  - d. Provided the Department, after consultation with Agriculture & Markets, but at its sole discretion, finds the appraisal to be a reasonable assessment of the value of the Development Rights described herein, such appraised value shall become binding upon the parties to this Order. In the event that the Department, after consultation with Agriculture & Markets, finds the appraisal materially deficient, it shall provide the appraiser with written notice setting forth the basis for such finding and the appraiser shall have 30 days from the receipt of such notice to correct the deficiency. In the event that the appraiser fails to correct any material defect to the satisfaction of the Department within 30 days, the Respondent shall be required to select a new appraiser from the List to

undertake a new appraisal in accordance with the procedures of this Section.

3. In the event that the total value of the EBPs set forth herein is determined to be substantially less than One Million Five Hundred Thousand Dollars (\$1,500,000.00), Respondent shall pay the difference (the "Shortfall") to the Department as a penalty or enter an agreement with the Department committing Respondent to supplemental EBPs in an amount equal to or in excess of the Shortfall.
    - a. Payments required pursuant to this paragraph, if any, shall be made by annual installments in the amount of One Hundred Thousand Dollars (\$100,000.00) or the remaining amount of the Shortfall, whichever is less. The first installment shall be due and payable on the seventh anniversary of the effective date of this order, and such installments shall continue until such time as the total value of EBPs and the penalty payments made pursuant to this paragraph equals One Million Five Hundred Thousand Dollars (\$1,500,000.00).
    - b. Supplemental EBPs required pursuant to this paragraph, if any, shall be subject to Department approval in accordance with the Department's EBP Policy, shall be in writing and shall be incorporated into and enforceable under this Order.
  4. In the event that the total value of the EBPs set forth herein exceeds One Million Five Hundred Thousand Dollars (\$1,500,000.00), Respondent shall retain the development rights upon sufficient acres, of Respondent's choosing, to reduce the total value of EBPs to approximately One Million Five Hundred Thousand Dollars (\$1,500,000.00).
- D. In the event of a payment by Respondent's insurance carrier, as set forth in Article I.C.2, the sum of One Hundred Thousand Dollars (\$100,000) shall be paid to the Tug Hill Commission to provide funding for a Black River Watershed Plan.

#### **ARTICLE IV: CORRECTIVE ACTION**

Respondent shall implement all actions set forth in the Corrective Actions Schedule, attached as "Schedule A," by the dates indicated therein. Schedule A is hereby incorporated into and made an enforceable part of this Order. Should representatives of the Department and Respondent have good faith differences of opinion as to the interpretation or sufficiency of submissions

pursuant to Schedule A, Respondent and the Department shall use best efforts to resolve any differences cooperatively.

**ARTICLE V: STIPULATED PENALTIES**

In the event Respondent fails to complete to the satisfaction of the Department any required action herein, including without limitation, any corrective action set forth in Schedule A, by the dates established herein, Respondent shall pay an additional penalty for each day the required action remains incomplete, as follows:

1. For days 1 to 14, the penalty shall be \$250.00/day;
2. For days 15 to 30, the penalty shall be \$500.00/day; and
3. For days 31 to the date the corrective action has been completed, the penalty shall be \$2,000.00/day.

Any stipulated penalties required pursuant to this Article shall be due and payable upon thirty (30) days written notice from the Department to the Respondent.

**ARTICLE VI: INTEREST ON LATE PAYMENTS**

Interest shall accrue on any payment required under this Order that is not paid when due. The Respondent shall pay interest at the maximum judgment rate, currently nine percent per annum, as established pursuant to New York State General Municipal Finances Law Section 3-a(1), or any law that may supercede it, from the date said payment is due.

**ARTICLE VII: RELEASE**

Upon completion of all obligations identified in this Order, this Order settles the Department's claims against Respondent and Respondent's employees, agents, officers, directors, successors (including successors in title) and assigns, individually and in their respective capacities, for: (i) natural resource damages caused by the Discharge and (ii) civil and administrative penalties concerning the violations expressly identified herein against Respondent.

**ARTICLE VIII: RESERVATION OF RIGHTS**

Except as provided in Article VII above, nothing contained in this Order shall be construed as barring, diminishing, adjudicating, or in any way affecting any of the civil, administrative, or criminal rights of the Department or of the Commissioner or the Commissioner's designee (including, but not limited to, nor exemplified by, the right to exercise any summary abatement powers) or authorities with respect to any party, including Respondent and Respondent's successors (including successors in title) and assigns.

**ARTICLE IX:        ACCESS**

The Department or an authorized representative shall be allowed upon reasonable notice and presentation of appropriate credentials to: (1) enter the Facility at all reasonable times, including during normal business hours and at any time activities related to this Order are taking place; (2) have access to and copy, at reasonable times, any records which are required to be maintained at the Facility or which relate to compliance with environmental requirements; (3) inspect, at reasonable times, any equipment, practices, and operations regulated or required under any Department permit or order; and (4) sample or monitor, at reasonable times, substances or parameters for the purpose of assuring compliance with any Department permit, order or applicable requirements.

**ARTICLE X:        COMMUNICATIONS**

All communications between the Department and Respondent related to this Order shall be made in writing and transmitted to the addresses identified below by the United States Postal Service, Federal Express, Airborne Express or a comparable courier service, or hand delivered.

- A.     Unless expressly directed otherwise pursuant to another Article of this Order, Communications from Respondent to the Department related to this Order shall be made as follows:
  - 1.     Send one copy to James King, Esq., Regional Attorney, New York State Department of Environmental Conservation, Region 6, 317 Washington Street, Watertown, New York 13601.
  - 2.     Send one copy to Mr. Steven Botsford, P.E., Regional Water Engineer, New York State Department of Environmental Conservation, Region 6, 317 Washington Street, Watertown, New York 13601.
  - 3.     Send one copy to Mr. Joseph DiMura, P.E., Director of Water Compliance, New York State Department of Environmental Conservation, 625 Broadway, Albany, New York 12233-3506.
  
- B.     Communications from Department to the Respondent relating to this Order shall be made as follows:
  - 1.     Send one copy to David L. Cook, Esq., Nixon Peabody, LLP, PO Box 31051, Rochester, New York 14603.
  - 2.     Send one copy to Mr. David Peck, Marks Dairy Farm, East Martinsburg Road, Lowville, New York 13367.

**ARTICLE XI:        MODIFICATION OR AMENDMENT**

If the Respondent desires to modify any provision of this Order, Respondent shall make a timely written request therefor to the Department, by submitting copies of such request, and any supporting documentation, in accordance with Article X of this Order, setting forth reasonable grounds for the relief sought. If Respondent's financial conditions are such that a payment as prescribed herein will create significant financial hardship, Respondent may seek relief from such payment pursuant to the provisions of this Article. For purposes of this paragraph, "timely" shall mean that the written request is made as soon as reasonably possible after Respondent identifies, or is made aware of, the grounds for such relief. The Commissioner or the Commissioner's designee shall have absolute discretion but will not arbitrarily withhold consent to the requested change and will respond promptly to the request.

**ARTICLE XII:        FAILURE, DEFAULT AND VIOLATION OF ORDER**

Respondent's failure to comply fully and in timely fashion with any provision, term, or condition of this Order shall constitute a default and a failure to perform an obligation under this Order and the ECL and shall constitute sufficient grounds for revocation of any permit, license, certification, or approval issued to Respondent by the Department.

**ARTICLE XIII:        BINDING EFFECT OF ORDER**

The provisions of this Order shall inure to the benefit of and be binding upon the Department and Respondent, its agents, employees, successors (including successors in title) and assigns, and all persons, firms, and corporations acting subordinate thereto.

**ARTICLE XIV:        INDEMNIFICATION**

Respondent shall indemnify and hold harmless the Department, the State of New York, and their representatives and employees for all claims, suits, actions, damages and costs of every name and description arising out of or resulting from the fulfillment or attempted fulfillment of this Order by Respondent or Respondent's successors (including successors in title) and assigns.

**ARTICLE XV:        EFFECTIVE DATE**

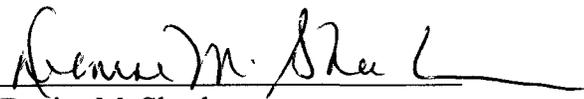
The effective date of this Order shall be the date that it is signed by the Commissioner or the Commissioner's designee. The Department will provide Respondent with a fully executed copy of this Order as soon as practicable after it has been signed by the Commissioner or the Commissioner's designee.

**ARTICLE XVI:     ENTIRE ORDER**

The provisions herein shall constitute the complete and entire Order between Respondent and the Department. No terms, conditions, understandings or agreements purporting to modify or vary the terms hereof shall be binding or become effective except as set forth in writing, signed by the Commissioner or by the Commissioner's designee, pursuant to Article XI of this Order. No informal oral or written advice, guidance, suggestions or comments by the Department regarding reports, proposals, plans, specifications, schedules or any other writing submitted by Respondent shall be construed as relieving Respondent of its obligations to obtain such formal approvals as may be required by this Order.

DATED: August 3 , 2006  
Albany, New York

NEW YORK STATE  
DEPARTMENT OF ENVIRONMENTAL  
CONSERVATION

By:   
Denise M. Sheehan  
Commissioner

**CONSENT BY RESPONDENT**

Respondent, Marks Dairy Farm hereby consents to the issuance of this Order, waives Respondent's right to a hearing prior to the issuance of this Order, and agrees to be bound by this Order and not to contest the Department's jurisdiction to issue it.

By: David M. Peck  
Title: MANAGING PARTNER  
Date: 7/20/06

STATE OF NEW YORK )  
COUNTY OF Lewis ) ss.:

On the 20<sup>th</sup> day of July in the year 2006 before me, the undersigned, personally appeared David M. Peck, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his/her capacity, and that by his/her signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

Beverly A. Dunn  
Notary Public

BEVERLY A. DUNN  
NOTARY PUBLIC STATE OF NEW YORK  
QUALIFIED IN LEWIS CO. NO. 01046117860  
MY TERM EXPIRES NOV 1, 2008