

NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION

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Application of :
NORTH ADIRONDACK FARMS, INC. : DECLARATORY RULING
for a Declaratory Ruling Pursuant to : DEC 17-07
Section 204 of the State Administrative :
Procedure Act :
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INTRODUCTION

This matter has been referred by the Office of Hearings to the General Counsel for a Declaratory Ruling pursuant to 6 NYCRR §481.10(f)(4). The sole issue to be decided is whether North Adirondack Farms, Inc. is required to obtain a State Pollutant Discharge Elimination System ("SPDES") permit.

BACKGROUND

Pursuant to Title 6 of Environmental Conservation Law ("ECL") Article 72, the New York State Department of Environmental Conservation ("Department") assessed North Adirondack Farms regulatory program fees for fiscal years 1987, 1988, and 1989 in the amounts of \$500.00, \$533.61, and \$1,065.07, respectively. The fees are based on a SPDES permit that was issued on July 1, 1986, to North Adirondack Farms for the discharge of approximately 96,000 gallons per day (gpd) of vegetable wash water and equipment cleaning water into a lagoon for collection, with subsequent discharge through a spray irrigation system. The SPDES permit contains an effluent limitation of 50 mg/l of chloride and requires sampling once every two months just prior to irrigation.

In accordance with ECL §72-0201(5) and 6 NYCRR Part 481, the company disputed the imposition of the fee. The 1987 fee was paid by North Adirondack Farms under protest; the 1988 and 1989 fees were not paid. The dispute was referred to the Office of Hearings. After a prehearing conference, the Administrative Law Judge ("ALJ") determined that no issues of fact were in dispute. Therefore, pursuant to 6 NYCRR

§481.10(f)(4), the ALJ canceled the hearing, prepared a report summarizing the material facts and disputed issues, and referred the matter to the General Counsel for a Declaratory Ruling.

According to the ALJ's report, North Adirondack Farms is a spinach and cauliflower farm operation located in Malone, New York, devoting about 1,000 acres for spinach. The growing season commences around May 1 each year, with a harvest around October 15. The company grows spinach and processes it for marketing. The processing of its product includes washing and packaging for fresh produce, and washing, blanching, and packaging for frozen produce. The packing and marketing season commences around July 1 and concludes by around November 1. The processing equipment is cleaned with a solution containing chlorine at a concentration of 25 mg/l. The vegetable wash water and the equipment wash water is discharged and stored in an unlined (also described as "clay lined") lagoon, and is subsequently discharged through a spray irrigation system onto crops in the fields.

North Adirondack Farms asserts that it is exempt from the requirement to obtain a SPDES permit, although it in fact has one, and therefore is exempt from the requirement to pay regulatory fees. For the reasons set forth below, North Adirondack Farms is required to hold a valid SPDES permit for its discharge, and is required to pay the appropriate regulatory fees.

ANALYSIS

A. Requirement for SPDES Permit.

The requirements to obtain a SPDES permit are set forth in Titles 7 and 8 of ECL Article 17. ECL §17-0803 states, in relevant part, that:

[I]t shall be unlawful to discharge pollutants to the waters of the state from any outlet or point source without a SPDES permit issued pursuant hereto or in

a manner other than prescribed by such permit....¹

Therefore, for a SPDES permit to be required, it must be determined that: (1) a pollutant (2) is discharged from an outlet or point source (3) to the waters of the state. The question presented is whether North Adirondack Farm's use of the vegetable wash water and equipment cleaning water to irrigate its crops meets all three criteria.

1. Pollutant

The first threshold issue which must be addressed is whether the vegetable wash water and equipment cleaning water (hereinafter referred to collectively as "waste wash water") constitute or contain a pollutant or pollutants.

ECL §17-0105(17) defines the term "pollutant" as:

dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand and industrial, municipal, and agricultural waste discharged into water (emphasis added).

¹Although this ruling focuses on ECL §17-0803 for purposes of determining whether a SPDES permit is required, the same result obtains under an analysis of ECL §17-0701. That provision prohibits any person, until a SPDES permit has been obtained, to

[m]ake or cause to make or use any outlet or point source for the discharge of sewage, industrial waste or other wastes or the effluent therefrom, into the waters of this state....

As noted later, the term "pollutant" encompasses such items as sewage, industrial waste, and other wastes.

In addition to the undesirable elements of the spinach crop (dust, dirt, insects, etc.), the waste wash water contains levels of chlorinated water previously used to clean the vegetable processing equipment. In this context, the chlorine residual in the waste wash water constitutes a "chemical waste" and, therefore, a "pollutant".² See Hudson River Fishermen's Association v. City of New York, 751 F.Supp. 1088 (S.D.N.Y. 1990).

In addition to constituting a chemical waste, the waste wash water containing the chlorine residual fits the definition of a pollutant because it is also an industrial waste.³ ECL §17-0701(2)(a) defines industrial waste as:

any liquid, gaseous, solid or waste substance or a combination thereof resulting from any process of industry, manufacturing, trade, or business ... which may cause or might reasonably be expected to cause pollution of the waters of the state.

North Adirondack Farms, in engaging in commercial activities for gain or livelihood, may be deemed a business under ECL §17-0701. Black's Law Dictionary (5th Ed., 1979). The chlorine solution in the waste wash water entering the lagoon is a liquid waste substance because it is a waste product of

²Because the vegetable wash water and the equipment wash water are combined, it is not necessary to reach the issue of whether the vegetable wash water itself constitutes a pollutant. As long as the two waste wash waters are combined, and one clearly fits the definition of a pollutant, then the combined wash water constitutes a pollutant.

³The definition of pollutant also includes agricultural waste. However, since the waste wash water constitutes a pollutant because it is a chemical and industrial waste, it is not necessary to address the issue of whether it is also an agricultural waste.

the vegetable chemical cleaning process conducted by the company. Under these circumstances it is an industrial waste under ECL §17-0701(2)(a). Therefore, either as a chemical waste or an industrial waste, the waste wash water containing the chlorine solution falls within the definition of pollutant, satisfying the first element for a SPDES permit.

2. Discharge from a Point Source

The second issue which must be addressed is whether the waste wash water is discharged from an outlet or point source. 6 NYCRR §750.2(a)(9) defines the term "discharge" as:

any addition of any pollutant to State waters, waters of the contiguous zone, or the ocean through an outlet or point source.

The equipment cleaning process adds chlorine which becomes part of the waste wash water applied to the fields as irrigation. In this context, the chlorine is "discharged".

For a SPDES permit to be required, however, the discharge must occur through an outlet or point source.

ECL §17-0105(11) defines the term "outlet" as:

the terminus of a sewer system, or the point of [emergence] of any water-borne sewage, industrial waste or other wastes or the effluent therefrom, into the waters of the state.

ECL §17-0105(16) defines the term "point source" as:

any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, vessel or other floating craft, or landfill leachate collection system from which pollutants are

or may be discharged. This term does not include agricultural storm water discharges and return flows from irrigated agriculture.

After washing the vegetable processing equipment, the company conveys the waste wash water to the lagoon through a system of conduits, the terminus of which fits the definitions of "outlet" and "point source" contained in ECL §17-0105.

Moreover, the purpose of North Adirondack Farm's irrigation system is to deliver a controlled flow of the waste wash water from the lagoon to a specific location. Consequently, it is a "discernible, confined and discrete conveyance" whose "points of emergence" may be readily ascertained.

Accordingly, the irrigation system is also "outlet" and "point source" as defined by the ECL.

The discharges of the pollutant from the outlets in this case does not fall within the ECL §17-0105(16) exception for agricultural storm water discharges. For that exception to apply, the waste water being discharged must result from precipitation which runs off the crop field. In this case, the waste water is generated by the vegetable processing and not by precipitation. Nor does the discharge from the irrigation system fall within the ECL §17-0105(16) exception for return flows from irrigated agriculture. Rather, the water collected in the lagoon results from the washing of the spinach after it is harvested and the cleaning of the machines used to process the spinach. It is then discharged by means of spray irrigation. In this case, the Department does not seek to require a SPDES permit for the irrigation

return flow. Rather, it is the irrigation itself which triggers the permit requirement because pollutants have been added to the wash water which is then discharged as irrigation. Consequently, the spray irrigation in this case constitutes a discharge through a point source, thereby satisfying the second element necessary to require a SPDES permit.

3. Waters of the State

The final issue which must be addressed is whether the point source discharge is to waters of the state.

ECL §17-0105(2) defines the term "waters of the state":

to include lakes, bays, sounds ... within the territorial limits of the state of New York and all other bodies of surface and underground water, natural or artificial, inland or coastal, fresh or salt, public or private....

North Adirondack Farms stores the waste wash water in a lagoon, and then discharges it through a spray irrigation system. The waste wash water from the lagoon migrates into the surrounding underground waters and, as the waste wash water is sprayed onto the fields, there is a gradual migration of waste wash water into the groundwater and surrounding surface waters. The system at North Adirondack Farms in discharging waste wash water into the lagoon and again from the irrigation system, therefore, constitutes the

addition of a pollutant to the waters of the State. Merrill Transport Co. v. State, 94 A.D.2d 39, 42-43, 464 N.Y.S.2d 249 (A.D. 3d Dept. 1983).

B. Requirement for Regulatory Fees

The ALJ's report states that there are no facts in dispute and the only issue to be resolved is whether or not North Adirondack Farms is subject to the requirement of obtaining a SPDES permit. The report also states that if the company is required to obtain a SPDES permit, the fee will not be disputed. In view of this stipulation, it is not necessary for this ruling to address the level of fees to be paid by North Adirondack Farms pursuant to ECL Article 72.

CONCLUSION

Under the plain meaning of Titles 7 and 8 of ECL Article 17, the operations used by North Adirondack Farms, Inc. fall within the provisions of the statute requiring the issuance of a SPDES permit. The SPDES program fees and applicable penalties and interest must be paid accordingly.



Marc S. Gerstman

Dated: Albany, New York
April 7, 1992