

**STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

In the Matter of the Alleged Violations of Article 17 of
the Environmental Conservation Law of the State of New York
(ECL) and Section 750-2.5 of Title 6 of the Official
Compilation of Codes, Rules and Regulations of the State of
New York (6 NYCRR),

ORDER

DEC Case No:
CO 6-20090827-1

-by-

BADLANDS DAIRY LLC,

Respondent.

On June 23, 2010, an adjudicatory hearing was convened before Richard R. Wissler, Administrative Law Judge (ALJ) of the Office of Hearings and Mediation Services of the New York State Department of Environmental Conservation (Department). Respondent Badlands Dairy LLC is the owner of Badlands Dairy which is located at 31911 State Route 37, Evans Mills, New York (facility).

The hearing addressed allegations of Department staff that respondent Badlands Dairy LLC violated 6 NYCRR 750-2.5 and Section IX.L. of the State Pollutant Discharge Elimination System (SPDES) General Permit for Concentrated Animal Feeding Operations (CAFOs), General Permit (CAFO General Permit) No. GP-04-02, by failing to file annual compliance reports for the facility's concentrated animal feeding operation for calendar years 2007 and 2008.¹ The facility's concentrated animal feeding operation has been subject to a CAFO General Permit since September 18, 2001 (see Hearing Exh 2 [facility first subject to CAFO General Permit No. GP-99-01 which has been superseded by CAFO General Permit No. GP-04-02]).

By memorandum dated June 29, 2010, Alexander B. Grannis, Commissioner of the Department, delegated decision making authority in this matter to the undersigned, Louis A. Alexander, Assistant Commissioner for Hearings and Mediation Services.

ALJ Wissler prepared the attached hearing report, which I adopt as my decision in this matter. As set forth in the hearing report, respondent is required to file CAFO annual compliance reports, and failed to do so for calendar years 2007 and 2008.

¹ Section IX.L. of CAFO General Permit No. GP-04-02 reads as follows: "**Annual Compliance Report.** The permittee shall submit an **Annual Compliance Report** form (**Appendix D**) to the Department. The report shall be for the calendar year and must be submitted by March 31st of each year. The **Annual Compliance Report** form for this permit is specified in (**Appendix D**) of this Permit."

Respondent failed to file an answer to the complaint served by Department staff in this matter, and failed to appear for the adjudicatory hearing held on June 23, 2010. As a consequence of respondent's failure to answer or appear in this matter, the ALJ recommended that Department staff's motion for default be granted, and I concur that staff is entitled to a default judgment pursuant to 6 NYCRR 622.15. Furthermore, at the hearing, Department staff presented a prima facie case on the merits, and proved its case by a preponderance of the evidence (see Hearing Report, at 3). Accordingly, Department staff is entitled to a judgment based on record evidence.

The civil penalty and remedial relief recommended by the ALJ are authorized and appropriate.

NOW, THEREFORE, having considered this matter and being duly advised, it is **ORDERED** that:

I. Department staff's motion for a default judgment pursuant to 6 NYCRR 622.15 is granted. By failing to answer or appear in this proceeding, respondent Badlands Dairy LLC waived its right to be heard at the hearing.

II. Furthermore, based on record evidence, respondent Badlands Dairy LLC is adjudged to have violated 6 NYCRR section 750-2.5 and Section IX. L. of State Pollutant Discharge Elimination System (SPDES) General Permit for Concentrated Animal Feeding Operations (CAFOs), General Permit No. GP-04-02 with respect to the facility that it owns at 31911 State Route 37, Evans Mills, New York.

III. Within fifteen (15) days of the service of this order upon respondent, respondent Badlands Dairy LLC shall submit CAFO annual compliance reports for calendar years 2007 and 2008 to the Department in accordance with the requirements of General Permit No. GP-04-02.

IV. Within fifteen (15) days of the service of this order upon respondent, respondent Badlands Dairy LLC shall pay a civil penalty in the amount of twelve thousand dollars (\$12,000) by certified check, cashier's check or money order made payable to the New York State Department of Environmental Conservation.

V. The CAFO annual compliance reports and the penalty payment shall be sent to:

Office of General Counsel
New York State Department of Environmental Conservation
625 Broadway, 14th Floor
Albany, New York 12233-1500
Attn: Elissa Armater.

VI. Any questions or other correspondence regarding this order, other than those relating to the payment of the penalty, shall be addressed to ;

Meredith Streeter, P.E.
Chief, Compliance Assurance Section
Bureau of Water Compliance, Division of Water
New York State Department of Environmental Conservation
625 Broadway, 4th Floor
Albany, New York 12233-3506.

VII. The provisions, terms and conditions of this order shall bind respondent Badlands Dairy LLC, its agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

/s/

By: _____
Louis A. Alexander
Assistant Commissioner

Dated: Albany, New York
July 30, 2010

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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In the Matter of the Alleged Violations of Article 17 of
the Environmental Conservation Law of the State of New York
(ECL) and Section 750-2.5 of Title 6 of the Official
Compilation of Codes, Rules and Regulations of the State of
New York (6 NYCRR),

HEARING REPORT

DEC Case No:
CO 6-20090827-1

-by-

BADLANDS DAIRY LLC,

Respondent.

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Procedural History

Respondent/permittee Badlands Dairy LLC (respondent) was served with a notice of hearing and complaint, dated April 9, 2010, alleging two (2) violations of 6 NYCRR 750-2.5 for failure to file CAFO annual compliance reports for the years 2007 and 2008, as required by State Pollutant Discharge Elimination System (SPDES) General Permit for Concentrated Animal Feeding Operations (CAFOs), General Permit No. GP-04-02 [superseding former general permit GP-99-01] (General Permit), for a CAFO it owns known as Badlands Dairy (facility), located at 31911 State Route 37, Evans Mills, New York 13637. Upon its filing of a Notice of Intent, received by the Department, effective August 3, 2001, and designated NYA 000633, respondent had sought coverage for the facility under the General Permit. The complaint seeks the following relief: (1) a finding that respondent is in violation of the cited regulation and the General Permit, (2) a direction that respondent submit the overdue annual compliance reports, (3) the assessment of a civil penalty in the amount of \$12,000, and (4) such other relief as the Commissioner may deem just and proper. In addition, the notice of hearing advised respondent that any answer to the complaint must be filed by May 15, 2010, and that an adjudicatory hearing in the matter was scheduled for June 23, 2010, requiring its appearance. As shown by United States Postal Service (USPS) records, service of the notice of hearing and complaint on respondent by certified mail was unsuccessful because unclaimed. However, inasmuch as respondent is an active business corporation in the State of New York, service of the notice of hearing and complaint was made on the Secretary of State on April 13, 2010. Respondent failed to file an answer to the complaint and failed to appear for the adjudicatory hearing scheduled for June 23, 2010.

On June 23, 2010, the adjudicatory hearing was convened before the undersigned Administrative Law Judge (ALJ) of the Department of Environmental Conservation's (Department) Office of Hearings and Mediation Services (OHMS) in the Department's Region 6 Sub-Office, State Office Building, Utica, New York 13501. Department staff was represented by Carin Spreitzer, Esq., Senior Attorney in the Department's Office of General Counsel. No one appeared on behalf of respondent.

Department staff called one witness, Meredith Streeter, P.E., Environmental Engineer 2, Chief of the SPDES Compliance Assurance Section of the Department's Division of Water. Department staff submitted seven (7) exhibits, all of which were received in evidence. The undersigned took official notice of and received into evidence as an OHMS exhibit a copy of General Permit No. GP-04-02 entitled, "New York State Department of Environmental Conservation SPDES General Permit for Concentrated Animal Feeding Operations (CAFOs)" (General Permit). The General Permit was effective July 1, 2004, and expired June 30, 2009. It supersedes former General Permit No. GP-99-01. At the close of the hearing, Department staff moved for a default judgment.

Applicable Regulatory Provisions

6 NYCRR 750-2.5(e)(1): "The permittee shall submit the results of any wastewater or ambient monitoring results required by the permit at the end of each month, unless otherwise specified by the department. Such reports shall be made on the reporting forms supplied to the permittee by the department, in a format acceptable to the department, or by the electronic transfer of data as approved by the department. Electronic submissions shall conform to the format, standards and other conditions specified by the department. The regional water engineer may also require the submittal of such other information as is necessary to determine the validity of monitoring results submitted in accordance with permit requirements. In no event shall reports on discharges to surface waters required by this subdivision be submitted at a frequency of less than once per year."

Findings of Fact

1. Upon its filing of a Notice of Intent, received by the Department, effective August 3, 2001, and designated NYA 000633, Badlands Dairy LLC (respondent) sought coverage under "New York State Department of Environmental Conservation SPDES General Permit for Concentrated Animal Feeding Operations (CAFOs)," General Permit No. GP-99-01 [now GP-04-02] (General Permit), for a CAFO it owns known as Badlands Dairy (facility), located at 31911 State Route 37, Evans Mills, New York 13637. On the Notice of Intent, respondent stated that it was the owner of the facility.
2. The facility is a Medium CAFO managing approximately 500 mature dairy cattle.
3. All CAFOs subject to the General Permit, including Medium CAFOs such as that of respondent, must be managed pursuant a comprehensive nutrient management plan (CNMP) developed by a certified agricultural management planner, embracing best management practices and best technology economically available and appropriate to the particular CAFO.
4. Section IX.L of the General Permit requires that a permittee covered by the General Permit file an annual compliance report with the Department assessing the CAFO's compliance with its CNMP for the reporting year.
5. Meredith Streeter, P.E., is an employee of the Department whose duties include the care,

custody, and maintenance of CAFO annual compliance reports filed with the Department.

6. On June 23, 2010, Meredith Streeter searched the files of the Department for any and all CAFO annual compliance reports filed by respondent or anyone else on behalf of the facility as required under the General Permit.
7. As a result of her search, Meredith Streeter determined that there were no CAFO annual compliance reports for respondent's facility on file with the Department for the years 2007 and 2008.
8. The Department attempted to serve respondent by certified mail with the notice of hearing and complaint in this matter, dated April 13, 2010, alleging two (2) violations of 6 NYCRR 750-2.5(e) for failure to file CAFO annual compliance reports for the years 2007 and 2008, as required by the General Permit. As shown by United States Postal Service (USPS) records, service of the notice of hearing and complaint on respondent by certified mail was unsuccessful because unclaimed. However, inasmuch as respondent is an active business corporation in the State of New York, service of the notice of hearing and complaint was made on the Secretary of State on April 13, 2010.
9. The notice of hearing advised respondent that it was required to file an answer to the complaint by May 15, 2010, and that an adjudicatory hearing in this matter would be convened on June 23, 2010, at the Department's Region 6 Sub-Office.
10. Respondent failed to file an answer to the complaint and failed to appear for the adjudicatory hearing scheduled for June 23, 2010.

Discussion

Department staff's proof presents a prima facie case demonstrating that respondent failed to submit CAFO annual compliance reports for the years 2007 and 2008 for its CAFO facility, in violation of 6 NYCRR 750-2.5(e) and of the express provisions of General Permit GP-04-02.

The record shows that respondent, as directed in the notice of hearing, failed to file an answer to the complaint and failed to appear for the adjudicatory hearing scheduled in the matter on June 23, 2010. The Department is entitled to a default judgment in this matter pursuant to the provisions of 6 NYCRR 622.15.

Moreover, the proof adduced at the hearing, conducted in respondent's absence, demonstrates by a preponderance of the evidence that respondent failed to submit CAFO annual compliance reports for the years 2007 and 2008 for its CAFO facility, in violation of 6 NYCRR 750-2.5(e) and of the express provisions of General Permit GP-04-02. The Department is entitled to judgment upon the facts proven.

Department staff's proposed \$12,000 civil penalty is consistent with the Department's penalty policy as well as applicable provisions of ECL article 71.

Recommendation

Based upon the foregoing, I recommend that the Commissioner issue an order:

1. Granting Department staff's motion for default, finding respondent in default pursuant to the provisions of 6 NYCRR 622.15.
2. Finding respondent in violation of 6 NYCRR 750-2.5(e) for failure to submit CAFO annual compliance reports for the years 2007 and 2008, in violation of 6 NYCRR 750-2.5(e) and of the express provisions of General Permit GP-04-02 for a CAFO facility it owns located known as Badlands Dairy (facility), located at 31911 State Route 37, Evans Mills, New York 13637, based upon the proof adduced at the adjudicatory hearing;
3. Directing respondent to submit CAFO annual compliance reports for the years 2007 and 2008 to the Department for the above facility;
4. Directing respondent to pay a civil penalty in the amount of twelve thousand dollars (\$12,000.00); and
5. Directing such other and further relief as he may deem just and proper.

/s/

Richard R. Wissler
Administrative Law Judge

Dated: Albany, New York
July 29, 2010

EXHIBIT CHART – DMR EXPEDITED PROCEEDINGS

Matter of Badlands Dairy LLC

June 23, 2010 – Region 6

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Notes
1	April 13, 2010 cover letter, with attached Complaint, Notice of Hearing, and Statement of Readiness (all dated April 13, 2010); Affidavit in Support of Meredith U. Streeter, P.E., sworn to February 9, 2010	✓	✓	Department Staff	
2	September 18, 2001 acknowledgement of notice of intent, with attached notice of intent	✓	✓	Department Staff	
3	Affidavit of Service of Elissa Armater, sworn to June 21, 2010 (certified mail)	✓	✓	Department Staff	
4	Photocopy of envelope marked “Unclaimed”	✓	✓	Department Staff	
5	Affidavit of Service of Elissa Armater, sworn to June 21, 2010 (service on NYSDOS)	✓	✓	Department Staff	
6	DOS Printout – Badlands Dairy, LLC	✓	✓	Department Staff	
7	Penalty Calculation	✓	✓	Department Staff	
OHMS A	SPDES General Permit for Concentrated Animal Feeding Operations (“CAFO”) – GP-04-02 (July 1, 2004 – June 30, 2009)	✓	✓	Official Notice	