

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

In the Matter of the Alleged Violations of Article 17 of the New York State Environmental Conservation Law (ECL), Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (NYCRR), and SPDES CAFO General Permit GP-04-02,

- by -

RULING
DEC Case No.
CO6-20160210-04
Permit ID #NYA001358

EDWARD GALLAGHER,

Respondent.

Proceedings

By notice of hearing and complaint dated July 21, 2016, staff of the New York State Department of Environmental Conservation (Department) commenced this enforcement proceeding against respondent Edward Gallagher (respondent) for alleged violations of ECL article 17, 6 NYCRR part 750 and State Pollutant Discharge Elimination System (SPDES) General Permit for Concentrated Animal Feeding Operations (CAFO General Permit) No. GP-04-02 at respondent's farm located at 2341 NY Route 315, Deansboro, New York. Staff served the notice of hearing and complaint on respondent by certified mail on July 21, 2016 and by personal service on August 5, 2016. By answer dated August 15, 2016 (Answer), respondent answered the complaint.

Department staff's complaint contains one cause of action alleging respondent violated ECL 17-0803, 6 NYCRR 750-2.1(e) and CAFO General Permit No. GP-04-2 by failing to (i) implement a silage leachate collection system, (ii) implement a vegetated treatment area, and (iii) install a high flow/low flow collection system, at respondent's farm.

On August 15, 2017, Department staff served a notice of motion for an order without a hearing dated January 31, 2017, together with the affirmation of Kenson Jeffrey (Jeffrey Affirmation), dated August 14, 2017, and the affidavit of Lyudmila Green (Green Affidavit), sworn to June 23, 2017, with exhibits, (see Appendix A attached hereto), on respondent by first-class mail. On September 12, 2017, respondent served a verified response (Response) to Department staff's notice of motion for order without hearing, dated September 12, 2017, together with a verified answer (Verified Answer) to the complaint, dated September 12, 2017, and eight exhibits.

Staff's motion requests that the Commissioner issue an order: (i) finding that respondent violated the law, regulations and permit as set forth in the complaint; (ii) directing respondent to implement the best management practices (BMPs) as required in respondent's comprehensive nutrient management plan; (iii) imposing a civil penalty of \$48,000 on respondent; and (iv) for such other further relief as the Commissioner may deem appropriate.

Respondent argues that all the required comprehensive nutrient management plan BMPs have been implemented as of July 2017, and that the penalty sought by staff is vindictive rather than fair. Respondent requests dismissal of the complaint.

FINDINGS OF FACT

1. Respondent Edward Gallagher (respondent) is the owner and operator of Gallagher Farms, LLC (farm) located at 2341 Route 315, Deansboro, New York. See Jeffrey Affirmation ¶¶ 3 and 4, Green Affidavit ¶ 5, Staff Exhibit D, Complaint ¶ 5; Response at 1, Verified Answer at 1.
2. Respondent's farm contains between 200 and 699 mature dairy cows and between 300 and 999 heifers. See Jeffrey Affirmation ¶¶ 5 and 23, Green Affidavit ¶ 6, Staff Exhibits A, B, D, G, L, M, N, O, and P, Complaint ¶ 6; Response at 1, Verified Answer at 1, Attachment 4.
3. On August 20, 2002, respondent submitted a notice of intent for coverage of respondent's farm under CAFO General Permit No. GP-99-01. See Jeffrey Affirmation ¶¶ 3, 4, 5, and 21, Staff Exhibit D, Complaint ¶ 16; Response at 1, Verified Answer at 1.
4. On September 19, 2002, the Department issued an acknowledgement of respondent's notice of intent and authorized respondent's CAFO coverage under CAFO General Permit No. GP-99-01 as a medium size CAFO facility. See Jeffrey Affirmation ¶ 21, Staff Exhibit D, Complaint ¶ 16; Response at 1, Verified Answer at 1.
5. Respondent's coverage under CAFO General Permit No. GP-99-01 was transferred to CAFO General Permit No. GP-04-02 on July 1, 2004. See Jeffrey Affirmation ¶ 21, Green Affidavit ¶ 11, Staff Exhibit E, Complaint ¶¶ 3, 4, 8, and 17; Response at 1, Verified Answer at 1.
6. Pursuant to CAFO General Permit No. GP-04-02, each existing CAFO must develop a comprehensive nutrient management plan (CNMP), which is to be certified by a certified agricultural environmental management (AEM) planner by July 1, 2004. See Jeffrey Affirmation ¶ 18, Green Affidavit ¶ 14, Staff Exhibit E, Complaint ¶ 12; Response at 1, Verified Answer at 1.
7. The Department acknowledged receipt of respondent's CNMP certification on June 28, 2004. See Green Affidavit ¶ 18, Staff Exhibit F.

8. CAFO General Permit No. GP-04-02 requires each CNMP to contain a schedule for practices to be fully operational, and mandates, “[f]or Medium CAFOs, the completion schedule shall have all practices operational by June 30, 2009.” See Jeffrey Affirmation ¶¶ 19 and 22, Green Affidavit ¶ 17, Staff Exhibit E at 12, Complaint ¶ 13; Response at 1, Verified Answer at 1.
9. Respondent did not complete all practices identified in respondent’s CNMP by June 30, 2009. See Jeffrey Affirmation ¶¶ 24, 26, 27, 28, 29, 30, and 32, Green Affidavit ¶¶ 8, 19, 22, 24, 25, and 30, Staff Exhibits A, B, G, I, M, N, and O, Complaint ¶¶ 18, 19, 20, and 21; Response at 1, Verified Answer at 1.
10. In particular, respondent’s Annual Compliance Reports identified the following CNMP practices to be constructed and implemented:
 - (a) a silage leachate collection system,
 - (b) a vegetated treatment area, and
 - (c) a high flow/low flow collection system. See Jeffrey Affirmation ¶¶ 24, 26, 27, 28, 29, 30, and 32, Green Affidavit ¶¶ 24 and 25, Staff Exhibits A, B, G, I, M, N, and O, Complaint ¶¶ 18, 19, 20, and 21; Response at 1, Verified Answer at 1.
11. As of December 21, 2015, respondent had not constructed and implemented the high flow/low flow collection system. See Jeffrey Affirmation ¶ 32, Green Affidavit ¶ 24, Staff Exhibit I, Complaint ¶¶ 19 and 20; Response at 1; Verified Answer at 1.
12. As of March 31, 2016, respondent had not constructed and implemented the silage leachate collection system and the vegetated treatment area. See Jeffrey Affirmation ¶¶ 29 and 30, Green Affidavit ¶ 25, Staff Exhibit A, Complaint ¶ 21; Response at 1; Verified Answer at 1.
13. Respondent admits Findings of Fact Nos. 1 through 6 and 8 through 12. See Response at 1; Verified Answer at 1.

DISCUSSION

Section 622.12 of 6 NYCRR provides for an order without hearing when upon all the papers and proof filed, the cause of action or defense is established sufficiently to warrant granting summary judgment under the CPLR in favor of any party. “Summary judgment is appropriate when no genuine, triable issue of material fact exists between the parties and the movant is entitled to judgment as a matter of law.” (Matter of Frank Perotta, Partial Summary Order of the Commissioner, January 10, 1996, at 1, adopting ALJ Summary Report.)

CPLR 3212(b) provides that a motion for summary judgment shall be granted, “if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.” Once the

moving party has put forward a prima facie case, the burden shifts to the non-movant to produce sufficient evidence to establish a triable issue. (Matter of Locaparra, Commissioner's Decision and Order, June 16, 2003.)

Department staff's proof presents a prima facie showing that respondent failed to construct and implement all respondent's CNMP practices by July 30, 2009 as required by CAFO General Permit No. GP-04-02. Respondent denies violating ECL article 17, 6 NYCRR 750-2.1(e), and the conditions and terms of CAFO General Permit No. GP-04-02 (see Response at 1, Verified Answer at 1). Respondent, however, admits the underlying material facts constituting the violations in this matter (see Findings of Fact 1-6, 8-13). As a result, there are no material facts that would require a hearing on the issue of liability. I conclude that Department staff is entitled to summary judgment on liability for the first cause of action for violation of ECL 17-0803, 6 NYCRR 750-2.1(e) and CAFO General Permit No. GP-04-02 (VII)(C)(v).

Penalty

Department staff requests that respondent be assessed a civil penalty of forty-eight thousand dollars (\$48,000). Staff applied the penalty guidance in TOGS 1.4.2 to calculate an adjusted base penalty of twelve thousand dollars (\$12,000). Staff determined that a forty thousand dollars (\$40,000) economic benefit component should be added to the penalty based on respondent's avoided cost of compliance. Respondent's 2016 Annual Compliance Report (Staff Exhibit P) estimated that it would cost \$40,000 to complete the leachate collection system and vegetated treatment area. Based on those penalty components, staff requests a total penalty of forty-eight thousand dollars (\$48,000).¹

Respondent argues that due to financial hardship, he was prevented from constructing and implementing the CNMP practices until recently. Respondent argues that due to ongoing litigation, bank financing was unavailable to him from 2007 to 2012. Once financing was available, respondent argues he prioritized the farm's needs and relocated the manure storage in 2012 and 2013 and relocated the feed storage in 2013 and 2014. Feed storage expansion continued in 2015, and according to respondent, in 2016, respondent began construction of the high flow/low flow collection system and completed the leachate collection system and vegetated treatment area in 2017. Respondent states that, as of July 20, 2017, he is in compliance with his CNMP. Respondent argues that he spent hundreds of thousands of dollars bringing the farm into compliance and that the penalty requested by staff appears to be more vindictive than fair.

Although inability to pay, or in this instance inability to fund compliance, is not an affirmative defense for noncompliance, it may be considered in determining an appropriate penalty. Therefore, I conclude that respondent has raised triable issues of fact regarding the appropriateness of the requested penalty.

¹ Staff's total calculated penalty is \$52,000, but there is no reference to that amount in staff's papers.

Corrective Action

Department staff requests as part of the relief in this matter that respondent be directed to implement the best management practices as required by respondent Gallagher's CNMP. Respondent states that he has implemented those practices as of July 20, 2017. Accordingly, I conclude respondent has raised triable issues of fact regarding the requested corrective action.

RULING

Based on the foregoing, my ruling on Department staff's motion for order without hearing is as follows:

1. Department staff's motion for order without hearing is granted on the issue of liability against respondent Edward Gallagher for the violation of ECL 17-0803, 6 NYCRR 750-2.1(e) and CAFO General Permit No. GP-04-02.
2. On the issue of the civil penalty and remedial relief requested in Department staff's motion, the motion for an order without hearing is denied.
3. Respondent's motion to dismiss the complaint is denied.

Accordingly, Department staff's motion for order without hearing is granted in part, as detailed herein. A conference call will be arranged to schedule a hearing on the requested penalty and relief.

_____/s/_____
Michael S. Caruso
Administrative Law Judge

Dated: October 12, 2017
Albany, New York

APPENDIX A

Matter of Edward Gallagher
DEC File No. CO6-20160210-04
Permit ID #NYA001358
Motion for Order Without Hearing

Department Staff's Papers

1. Notice of Hearing and Complaint, dated July 21, 2016
2. Notice of Motion for an Order Without a Hearing, dated January 31, 2017
3. Affirmation of Kenson Jeffrey in Support of Motion for Order Without a Hearing, dated August 14, 2017, and Affidavit of Lyudmila Green In Support of Motion for Order Without Hearing, sworn to June 23, 2017, combined attaching the following exhibits:
 - A. Concentrated Animal Feeding Operation (CAFO) Annual Compliance Report for calendar year 2015, submitted by Edward Gallagher, pursuant to GP-0-09-001, dated March 10, 2016
 - B. Request for Information from United States Environmental Protection Bureau (EPA) to Edward Gallagher, dated March 5, 2015 with (i) EPA Water Compliance Inspection Report, dated February 2, 2015, (ii) EPA CAFO Compliance Inspection Report, dated November 26, 2014 and (iii) New York State Department of Environmental Conservation, Division of Water, CAFO Facility Inspection Report, dated November 26, 2014 attached
 - C. New York State Department of Environmental Conservation, General Permit (GP-0-99-001), State Pollutant Discharge Elimination System (SPDES), Concentrated Animal Feeding Operations (CAFOs), Effective July 1, 1999, Modified October 12, 2001 and October 11, 2002
 - D. Correspondence (Acknowledgment of Notice of Intent) from Joseph DiMura (NYSDEC) to Edward Gallagher, dated September 19, 2002
 - E. New York State Department of Environmental Conservation, (GP-04-02), State Pollutant Discharge Elimination System (SPDES) General Permit for Concentrated Animal Feeding Operations (CAFOs), Effective July 1, 2004
 - F. Correspondence (Required Submission of the Agricultural Waste Management Plans [AWMPs] for Medium Concentrated Animal Feeding Operations [CAFOs]) from Angus Eaton (NYSDEC) to Edward Gallagher, dated July 29, 2003 and correspondence from Toni Cioffi (NYSDEC) to Edward Gallagher, dated “28/2004” acknowledging receipt of AWMP certification
 - G. Concentrated Animal Feeding Operation (CAFO) Annual Compliance Report for calendar year 2014, submitted by Edward Gallagher, pursuant to GP-0-09-001, dated February 11, 2015
 - H. Notice of Violation from Edward Hampston (NYSDEC) to Edward Gallagher, dated June 9, 2015
 - I. First page of Exhibit H with addressee and facility changes and completed Best Management Practices (BMPs) Implementation Compliance Schedule, dated December 21, 2015

- J. Email from Lyudmila Green to William Gallinger, dated February 19, 2016
 - K. Email from Lyudmila Green to William Gallinger, dated March 9, 2016
 - L. Concentrated Animal Feeding Operation (CAFO) Annual Compliance Report for calendar year 2007, submitted by Edward Gallagher, pursuant to GP-04-02, dated May 21, 2008
 - M. Concentrated Animal Feeding Operation (CAFO) Annual Compliance Report for calendar year 2009, submitted by Edward Gallagher, pursuant to GP-04-02, dated March 29, 2010
 - N. Concentrated Animal Feeding Operation (CAFO) Annual Compliance Report for calendar year 2012, submitted by Edward Gallagher, pursuant to GP-0-09-001, dated February 13, 2013
 - O. Concentrated Animal Feeding Operation (CAFO) Annual Compliance Report for calendar year 2013, submitted by Edward Gallagher, pursuant to GP-0-09-001, dated March 14, 2014
 - P. Concentrated Animal Feeding Operation (CAFO) Annual Compliance Report for calendar year 2016, submitted by Edward Gallagher, pursuant to GP-0-09-001, dated March 28, 2017
 - Q. Affidavit of Service of Notice of Hearing and Complaint of Elissa Armater, sworn to July 26, 2016
 - R. Affidavit of Service of Notice of Hearing and Complaint of ECO R. Grisolini, undated
 - S. Answer to the Complaint, dated August 15, 2016
- 4. Statement of Readiness, dated August 14, 2017
 - 5. Affidavit of Service of Notice of Motion for Order Without Hearing and supporting papers of Ellen Shupe-Bell, sworn to August 15, 2017

Respondent's Papers

- A. Response to Notice of Motion for Order Without Hearing, verified September 12, 2017
- B. Answer to Complaint, verified September 12, 2017, with the following attachments:
 - 1. Correspondence from David E. Marcisofsky (NYSDEC) to Edward Gallagher, dated May 10, 2010 re: April 27, 2010 inspection
 - 2. Concentrated Animal Feeding Operation (CAFO) Annual Compliance Report for calendar year 2004, submitted by Edward Gallagher, pursuant to GP-04-02, dated October 12, 2005
 - 3. Correspondence from Bradd A. Larson (NYSDEC) to Edward Gallagher, dated October 4[sic], 2005 acknowledging receipt of October 12, 2005 CAFO Annual Report
 - 4. Concentrated Animal Feeding Operation (CAFO) Annual Compliance Report for calendar year 2014, submitted by Edward Gallagher, pursuant to GP-0-09-001, dated February 11, 2015 (same as staff Exhibit G)
 - 5. Notice of Violation from Edward Hampston (NYSDEC) to Edward Gallagher, dated June 9, 2015 (same as staff Exhibit H)
 - 6. Answer to Complaint, dated August 15, 2016 (same as staff Exhibit S)

7. First page of attachment 5 with addressee and facility changes and completed Best Management Practices (BMPs) Implementation Compliance Schedule, dated December 21, 2015 (same as staff Exhibit I)
 8. Construction Specifications for Gallagher Farms Leachate System Filter Area
- C. Affidavit of Service of answer to complaint and response to notice of motion for order without hearing of Karen Gallagher, sworn to September 12, 2017