

FILED
06-07-2022
Circuit Court
St. Croix County, WI
2022CX000006

STATE OF WISCONSIN CIRCUIT COURT ST. CROIX COUNTY
BRANCH ____

STATE OF WISCONSIN,
17 West Main Street
Post Office Box 7857
Madison, Wisconsin 53707-7857,

Plaintiff,

v.

Case No. 22-CX-____
Complex Forfeiture: 30109

EMERALD SKY DAIRY, LLC,
2670 D Road
Rising City, Nebraska 68658-3857

Defendant.

THE AMOUNT CLAIMED IS
GREATER THAN THE AMOUNT
CLAIMED UNDER WIS. STAT.
§ 799.01(1)(d).

CIVIL COMPLAINT

The State of Wisconsin by its attorneys, Attorney General Joshua L. Kaul and Assistant Attorney General Emily M. Ertel, brings this action against the above-named defendant at the request of the Wisconsin Department of Natural Resources (DNR) and alleges as follows:

1. Plaintiff State of Wisconsin is a sovereign state of the United States of America with its principal offices at the State Capitol in Madison, Wisconsin.

2. Defendant Emerald Sky Dairy, LLC (Emerald Sky Dairy) is a domestic limited liability company with its principal office located at 2670 D Road, Rising City, Nebraska 68658-3857. Its registered agent is C T Corporation System, whose office is located at 301 South Bedford Street, Suite 1, Madison, Wisconsin 53703-3691.

3. At all times relevant to the allegations in this Complaint, Emerald Sky Dairy owned and operated a large concentrated animal feeding operation located at 2487 County Road G, Town of Emerald, St. Croix County, Wisconsin (“the CAFO”).

4. The State of Wisconsin enacted Wis. Stat. ch. 283 and DNR administers regulations to prevent and minimize water pollution in the state.

5. Wisconsin Stat. § 283.31(1) prohibits any person from discharging any pollutant into any waters of the state except in compliance with a permit issued by DNR.

6. Wisconsin Stat. § 283.01(20) defines “waters of the state” as “those portions of Lake Michigan and Lake Superior within the boundaries of Wisconsin, all lakes, bays, rivers, streams, springs, ponds, wells, impounding reservoirs, marshes, water courses, drainage systems and other surface water or groundwater, natural or artificial, public or private within the state or under its jurisdiction,” subject to an exception not applicable here.

7. Wisconsin Admin. Code ch. NR 243 governs issuance of permits required by Wis. Stat. ch. 283 for animal feeding operations.

8. Wisconsin Admin. Code § NR 243.11(3)(a) requires any person owning or operating a large CAFO to have a Wisconsin Pollutant Discharge Elimination System (WPDES) permit.

9. On July 1, 2015, DNR issued to Emerald Dairy LLC WPDES permit no. WI-0059315-04-0 that authorized Emerald Dairy LLC to discharge to a wetland tributary to Dry Run Creek and to the groundwater and to the Lower Willow River watershed of the St. Croix River Basin in accordance with the terms of the permit (the “WPDES permit”). The WPDES permit was effective on July 1, 2015 and expired on June 30, 2020.

10. On February 24, 2016, Emerald Sky Dairy filed a Stipulation of WPDES Permit Acceptance with DNR, effective March 1, 2016, to take over the WPDES permit from Emerald Dairy LLC.

VIOLATION ONE: PONDING ON LAND APPLICATION SITE

11. Wisconsin Admin. Code § NR 243.14(2)(b) lists the land application restrictions that a permittee must comply with when land applying manure and process waste. Wisconsin Admin. Code § NR 243.14(2)(b)1. states, “Manure or process wastewater may not pond on the application site.”

12. Section 1.5.1 of the WPDES permit repeats the requirement in Wis. Admin. Code § NR 243.14(2)(b)1.

13. On November 20, 2019, Emerald Sky Dairy land applied liquid manure on an agricultural field identified as “Eric-3” in its Nutrient Management Plan. Field Eric-3 is located east of the CAFO and immediately south of County Road G in Emerald, Wisconsin.

14. On November 20, 2019, DNR Agricultural Runoff Specialist Jeff Jackson conducted a manure hauling audit on field Eric-3.

15. On November 20, 2019, manure was ponded on the surface of field Eric-3.

16. On November 20, 2019, Emerald Sky Dairy violated Wis. Admin. Code § NR 243.14(2)(b)1. and section 1.5.1 of the WPDES permit when it land applied manure and that manure ponded on field Eric-3.

VIOLATION TWO: FAILURE TO LAND APPLY MANURE USING PRACTICES THAT RETAIN MANURE WHERE IT WAS APPLIED WITH MINIMAL MOVEMENT

17. Wisconsin Admin. Code § NR 243.14(2)(b)6. states, “[Land application] [p]ractices shall retain land applied manure and process wastewater on the soil where they are applied with minimal movement.”

18. Section 1.5.1 of the WPDES permit repeats the requirement in Wis. Admin. Code § NR 243.14(2)(b)6.

19. Field Eric-3 slopes considerably towards the road ditch along County Road G.

20. On November 20, 2019, Specialist Jackson observed manure that had been land applied by Emerald Sky Dairy flowing downhill across field Erics-3.

21. On November 20, 2019, Specialist Jackson could hear the manure flowing downhill on field Erics-3.

22. On November 20, 2019, Specialist Jackson told Emerald Sky Dairy to reduce manure application rates and conduct additional tillage along the boundary of field Erics-3 to prevent manure from running off field Erics-3. Emerald Sky Dairy agreed to reduce application rates and conduct additional tillage. Emerald Sky Dairy agreed to monitor field Erics-3 to ensure manure did not leave the field boundary.

23. On November 20, 2019, Emerald Sky Dairy violated Wis. Admin. Code § NR 243.14(2)(b)6. and section 1.5.1 of the WPDES permit when it land applied manure in a manner that did not retain the manure on the soil where it was applied with minimal movement but instead allowed it to flow downhill across field Erics-3.

**VIOLATION THREE: MANURE RUNOFF FROM LAND
APPLICATION SITE INTO WATERS OF THE STATE**

24. Wisconsin Admin. Code § NR 243.14(2)(b)4. states:

Manure or process wastewater may not run off the application site nor discharge to waters of the state through subsurface drains due to precipitation or snowmelt except if the permittee has complied with all land application restrictions in this subchapter and the WPDES permit

and the runoff or discharge occurs as a result of a rain event that is equal to or greater than a 25-year, 24-hour rain event.

25. Section 1.5.1 of the WPDES permit repeats the requirement in Wis. Admin. Code § NR 243.14(2)(b)4.

26. Late in the evening on November 20, 2019, and into November 21, 2019, it rained on field Erics-3. The rain event did not exceed the 25-year, 24-hour rain event for St. Croix County.

27. On November 21, 2019, Specialist Jackson and DNR Conservation Wardens Isaac Kruse and Paul Sickman responded to an anonymous complaint, received on the evening of November 20, 2019, stating that manure was running multiple feet deep in the road ditch along County Road G.

28. On November 21, 2019, runoff contaminated with manure was flowing off field Erics-3 into a grassed waterway, then into the road ditch on the south side of County Road G, and then into Hutton Creek.

29. On November 21, 2019, the manure-contaminated runoff entering Hutton Creek was brown, turbid, and smelled like manure. There was an abundance of white foam, which indicates the presence of pollution, at the confluence of the County Road G ditch with Hutton Creek.

30. On November 21, 2019, after DNR notified Emerald Sky Dairy of the discharge and requested it take immediate actions to contain and clean up the manure runoff, Emerald Sky Dairy constructed an earthen berm in the

grassed waterway and placed straw bales in the road ditch along County Road G. Emerald Sky Dairy contracted with a septic hauler to pump out manure-contaminated water in the road ditch along County Road G. Emerald Sky Dairy tilled field Erics-3 to work manure into the soil and retain it on the field.

31. On November 20 and 21, 2019, Emerald Sky Dairy violated Wis. Admin. Code § NR 243.14(2)(b)4. and section 1.5.1 of the WPDES permit when manure ran off field Erics-3 and that runoff did not occur as a result of a 25-year, 24-hour rain event.

**VIOLATION FOUR: EXCEEDANCE OF WATER QUALITY
STANDARD IN HUTTON CREEK CAUSED BY MANURE RUNOFF**

32. Wisconsin Admin. Code § NR 243.13(5)(a) states, “If a discharge of manure or process wastewater pollutants to waters of the state occurs, including a discharge allowed under subs. (2) to (4), the discharge shall comply with groundwater and surface water quality standards.”

33. Hutton Creek is a water of the state as defined in Wis. Stat. § 283.01(20).

34. On November 21, 2019, Specialist Jackson took water quality samples in Hutton Creek approximately 60 meters upstream of the County Road G bridge crossing (the “upstream sample”); in the road ditch on the south side of County Road G one meter upstream of its confluence with Hutton Creek

(the “road ditch sample”); and in Hutton Creek approximately 12 meters downstream of the County Road G bridge crossing (the “downstream sample”).

35. Specialist Jackson sent the water quality samples to the Wisconsin State Laboratory of Hygiene for analysis.

36. The upstream sample had ammonia of 0.236 mg/L; the road ditch sample had ammonia of 107 mg/L; and the downstream sample had ammonia of 116 mg/L.

37. Pursuant to Wis. Admin. Code ch. NR 105, Table 2C, the ammonia acute toxicity water quality criteria for Hutton Creek at the downstream sample location was 12.1 mg/L.

38. On November 21, 2019, the manure discharge caused an exceedance of the ammonia water quality criteria in Hutton Creek.

39. The manure discharge caused elevated levels of ammonia in Hutton Creek that were acutely toxic to aquatic life, including fish.

40. On November 21, 2019, DNR staff observed 24 dead forage fish immediately downstream of County Road G in Hutton Creek. Dead fish species included central mud minnow, fathead minnow, creek chub, and brook stickleback.

41. The road ditch and downstream samples also had significantly higher concentrations of *E. coli*, chemical oxygen demand (COD), total Kjeldahl

nitrogen, nitrate and nitrite, and total phosphorus compared to the upstream sample.

42. The upstream sample had *E. coli* of 214 MPN/100 mL; the road ditch sample had *E. coli* of 27,230 MPN/100 mL; and the downstream sample had *E. coli* of 48,840 MPN/100 mL.

43. The upstream sample had a chemical oxygen demand of 38.8 mg/L; the road ditch sample had a chemical oxygen demand of 2,500 mg/L; and the downstream sample had a chemical oxygen demand of 2,730 mg/L.

44. The upstream sample had total Kjeldahl nitrogen of 1.22 mg/L; the road ditch sample had total Kjeldahl nitrogen of 154 mg/L; and the downstream sample had total Kjeldahl nitrogen of 173 mg/L.

45. The upstream sample had nitrate and nitrite of 0.252 mg/L; the road ditch sample had nitrate and nitrite of 16.6 mg/L; and the downstream sample had nitrate and nitrite of 15.6 mg/L.

46. The upstream sample had total phosphorus of 0.339 mg/L; the road ditch sample had total phosphorus of 14.8 mg/L; and the downstream sample had total phosphorus of 15.2 mg/L.

47. On November 21, 2019, Emerald Sky Dairy violated Wis. Admin. Code § NR 243.13(5)(a) when it discharged manure to Hutton Creek and the discharge did not comply with surface water quality standards.

RELIEF AUTHORIZED

48. Wisconsin Stat. § 299.95 authorizes the Attorney General to enforce Wis. Stat. ch. 283 and all rules promulgated and permits issued under that chapter by “injunctive and other relief appropriate for enforcement,” subject to exceptions not applicable in this case.

49. Pursuant to Wis. Stat. §§ 283.89(4) and 299.95, the circuit court for the county where the violation occurred has jurisdiction to enforce Wis. Stat. ch. 283.

50. Wisconsin Stat. § 283.89(1) requires DNR to refer any person who violates Wis. Stat. ch. 283 and rules or permits issued pursuant to Wis. Stat. ch. 283 to the Department of Justice (DOJ) for prosecution.

51. Wisconsin Stat. § 283.91(1) states the Department of Justice may “initiate a civil action for a temporary or permanent injunction” for any violation of Wis. Stat. ch. 283, rules promulgated pursuant to Wis. Stat. ch. 283, or terms or conditions of any permit issued pursuant to Wis. Stat. ch. 283.

52. Wisconsin Stat. § 283.91(2) states:

Any person who violates this chapter, any rule promulgated under this chapter, any term or condition of a permit issued under this chapter . . . shall forfeit not less than \$10 nor more than \$10,000 for each day of violation, except that the minimum forfeiture does not apply if the point source at which the violation occurred is an animal feeding operation.

53. Wisconsin Stat. § 283.91(5) states the court may assess the costs of the investigation, including monitoring, and the reasonable and necessary expenses of the prosecution, including attorney fees, as an additional penalty.

RELIEF REQUESTED

WHEREFORE, the State of Wisconsin asks for judgment as follows:

1. Forfeitures as provided for in Wis. Stat. § 283.91(2);
2. The costs of the investigation and the reasonable and necessary expenses of the prosecution, including attorney fees, as provided for in Wis. Stat. § 283.91(5);
3. The 26 percent penalty surcharge pursuant to Wis. Stat. § 814.75(18); the 20 percent environmental surcharge pursuant to Wis. Stat. § 814.75(12); the \$25.00 court costs pursuant to Wis. Stat. § 814.63(1); the \$13.00 crime laboratories and drug law enforcement surcharge pursuant to Wis. Stat. § 814.75(3); the \$68.00 court support services surcharge pursuant to Wis. Stat. § 814.75(2); the 1 percent jail assessment surcharge pursuant to Wis. Stat. § 814.75(14); and the \$21.50 justice information system surcharge pursuant to Wis. Stat. § 814.75(15); and
4. Such other relief as the Court may deem appropriate.

Dated this 7th day of June, 2022.

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by Emily M. Ertel

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