

STATE OF MICHIGAN
IN THE 30TH JUDICIAL CIRCUIT
COUNTY OF INGHAM

MICHIGAN DEPARTMENT OF
ENVIRONMENTAL QUALITY,
and STEVEN E. CHESTER, Director of
the Michigan Department of
Environmental Quality,

Docket No. 09-1677-CE

Honorable James Giddings

Plaintiffs,

v

VREBA-HOFF DAIRY, LLC

Defendant

Alan F. Hoffman (P24079)
Special Assistant Attorney General
Environment, Natural Resources &
Agriculture Division
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RECEIVED

JUL 19 2010
Clerk of the Court
30th Judicial Circuit

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Attorney for Defendant

FIRST AMENDED COMPLAINT

A civil action between these parties arising out of the transaction or occurrence alleged in the complaint has been previously filed in this Court, where it was given docket number 03-1662-CE and was assigned to Judge James R. Giddings. The action remains pending.

1. This is a civil action seeking injunctive relief to require Defendant Vreba-Hoff Dairy, LLC, to undertake any and all measures to comply with the National Pollutant Discharge Elimination System (NPDES) permit lawfully issued by Plaintiffs to Defendant on August 1,

2008. This civil action also seeks statutory fines, attorney's fees and costs related to documented violations of the NPDES permit and the filing of this action.

2. Plaintiffs bring this action pursuant to Part 31, Water Resources Protection, of the Natural Resources and Environmental Protection Act,¹ (NREPA) and the applicable administrative rules. Part 31 provides that the department shall protect and conserve the water resources of the state and the Great Lakes, which are or may be affected by any type of contamination.²

JURISDICTION AND VENUE

3. This Court has jurisdiction over the subject matter of this action and over the parties pursuant to Section 3115(1) of Part 31 of the NREPA,³ and pursuant to Section 605 of the Revised Judicature Act (RJA),⁴ which provides that circuit courts have original jurisdiction to hear and determine all civil claims and remedies except where otherwise provided by statute.

4. This Court has personal jurisdiction over the Defendant pursuant to Sections 731 and 735 of the RJA.⁵ Venue is appropriate pursuant to MCL 324.3115(1).

PARTIES

5. Plaintiff Michigan Department of Environmental Quality (DEQ) is a principal department within the Executive Branch of the State of Michigan.⁶ It is responsible for

¹ 1994 PA 451, as amended, MCL 324.3101 *et seq.*

² MCL 324.3101(1).

³ MCL 324.3115(1).

⁴ MCL 600.605.

⁵ MCL 600.731, MCL 600.735.

⁶ The statutory functions and authorities of the Michigan Department of Environmental Quality and Michigan Department of Natural Resources were transferred to the new Michigan Department of Natural Resources and Environment by Executive Order 2009-45, effective January 17, 2010. For the sake of simplicity, we will continue to refer to the MDEQ.

enforcing compliance with the provisions of the NREPA, being 1994 PA 451, as amended, MCL 324.101 *et seq.* and the applicable rules.

6. Plaintiff Steven E. Chester (Now Rebecca Humphries) is the Director of the DEQ; the state agency mandated to provide for the protection of the natural resources of the state from pollution, impairment, and destruction.⁷

7. Defendant, Vreba-Hoff Dairy, LLC is registered in the state of Michigan as a Limited Liability Company. Defendant owns and transacts business at two concentrated animal feeding operations at issue in this action. One dairy is located at 7601 Dillon Highway, Hudson, Lenawee County, Michigan (hereinafter "Vreba-Hoff I") with the other dairy located at 8502 S. Meridian Road, Hudson, Hillsdale County, Michigan (hereinafter "Vreba-Hoff II"). Together, the two dairy operations house approximately 5,000 animals. In applying for the NPDES permit at issue here, Defendant identified its business office location as the Vreba-Hoff I dairy operation and Plaintiffs thus recognized that address, 7601 Dillon Highway, as the address for the permittee, "Vreba-Hoff Dairy."

GENERAL ALLEGATIONS

8. Plaintiffs have previously brought legal action against Defendant Vreba-Hoff Dairy, LLC before the 30th Circuit Court sitting in Ingham County. As the result of that litigation, Defendant applied for and received a National Pollutant Discharge Elimination System (NPDES) permit from Plaintiff MDEQ on August 1, 2008. [Permit appended as Exhibit A.]

9. Defendant Vreba-Hoff Dairy, LLC also continues to operate under a Consent Judgment (Original Consent Judgment) and amendment thereto, known as the "Interim Order" that remain under the jurisdiction of the 30th Circuit. By the express terms of the Interim Order,

⁷MCL 324.101, MCL 324.301, MCL 324.501, Executive Orders 1973-2, 1976-8, and 1995-18.

Plaintiff MDEQ reserved its right to pursue a separate enforcement action against Defendant for any violation of any provision of applicable federal and state law, rule, regulation, permit, or administrative order that may also be a violation of the Interim Order and Consent Judgment. [Interim Order, Paragraph XVII.F.] The issuance and enforcement of NPDES permits by Plaintiff MDEQ is governed by Part 31 of the NREPA.

10. The order established several requirements that, when implemented as a whole, would provide protection against unlawful pollution of the waters of the state.

11. In order to maintain consistency with the Interim Order and to protect the waters of the state from unlawful pollution, the MDEQ adopted the effluent limits originally offered by Defendant, and later incorporated into the Interim Order, as permit limits.

12. Plaintiff MDEQ relied upon Defendant's representations regarding the treatment capabilities of the "EarthMentor Treatment System" installed at both Vreba-Hoff I and Vreba-Hoff II pursuant to the Interim Order after Defendant failed to properly manage the initial treatment system installed pursuant to the Original Consent Judgment.

13. During the process of issuing the NPDES permit to Defendant, construction was completed on both EarthMentor Treatment Systems and Defendant Vreba-Hoff began filling the two treatment systems with the approximately 55 million gallons of waste it generates per year at its two dairy operations. Of the 55 million gallons of waste, approximately 33 million gallons is cow excrement with the remaining volume consisting of various washwaters and contaminated storm water.

14. Both the Interim Order and NPDES permit establish limits on certain parameters, based upon Defendant's representations discussed in Paragraphs 11 and 12, above, to ensure that wastes generated at the dairy operations are adequately treated to levels achievable by the

installed treatment technology and protective of both surface and groundwater resources of the state of Michigan. The concentration-based effluent limitations within the Vreba-Hoff permit are: 300 mg/L ammonia nitrogen; 300 mg/L total kjeldahl nitrogen; and 1500 mg/L total volatile solids. [Exhibit A, Part I.A.2.b.]

15. In addition to the concentration-based effluent limitations set forth in Paragraph 14 above, Defendant must comply with various additional limitations set forth within the permit, including rates and timing of liquid waste application through a center pivot irrigation system. Subsequent to issuance of the NPDES permit, Vreba-Hoff contested certain provisions of the permit, including a seasonal application limit on the amount of effluent that may be applied to any given acre in use by Vreba-Hoff for land disposal of effluent. The Parties agreed to hold contested permit provisions in abeyance pending an administrative hearing with remaining, uncontested terms (including the concentration-based limits set forth in Paragraph 14, above) in effect.

16. Defendant Vreba-Hoff commenced land application of effluent by irrigation from the EarthMentor Treatment Systems on July 31, 2008, one day prior to permit issuance, despite failing to meet the effluent limits set forth in the permit. Subsequent to the issuance of the NPDES permit, and during the irrigation seasons in 2008 and 2009 (May 1-November 15) Vreba-Hoff irrigated effluent on 139 days on various fields resulting in 747 instances [Exhibit B and addendum to B] where Vreba-Hoff irrigated waste at concentrations more than two times the amount allowed under the NPDES permit [Exhibit C].

17. The NPDES permit does not authorize a discharge to groundwater [Exhibit A, Paragraph I.A.1]. Plaintiffs allege that continued irrigation of effluent at the concentrations identified by Defendant Vreba-Hoff in its Monthly Progress Reports [compiled results presented

as Exhibit C] may adversely affect groundwater quality by contributing to nitrate contamination and mobilizing certain metals from soils into groundwater.

18. Finally, investigations by the MDEQ continue to reveal unacceptably high levels of copper in waste effluent irrigated by Defendant Vreba-Hoff. Vreba-Hoff did not identify copper within its permit application and as such, the NPDES permit does not authorize any discharge of waste onto the ground or to surface waters containing copper. The MDEQ previously advised Vreba-Hoff of its concerns regarding copper, specifically regarding the potential impact of copper on treatment system efficiencies yet Vreba-Hoff continues to accumulate unacceptable levels of copper in its waste effluent as evidenced by the analysis of effluent samples collected by the MDEQ on May 19, 2009, as well as a discharge of irrigated effluent to the North Medina Drain on or about August 5, 2009. Rather than work to resolve this issue, Defendant terminated its relationship with its former "certified operator" tasked with ensuring that treatment facilities were maintained in good working order to enable achievement of effluent limitations. Since April 20, 2009, the EarthMentor Treatment Systems have not been maintained by a properly certified operator, contrary to Part II.C.2 of the permit.

19. By failing to meet the uncontested concentration-based effluent limitations in the properly issued NPDES permit and continuing to operate the treatment systems without supervision by a properly certified operator, Defendant has flagrantly violated the terms of the permit in violation of state law and based upon a July 23, 2009 correspondence from its agent, intends to continue doing so into the future [Exhibit D].

20. Defendant is again violating the concentration-based effluent limitations during the 2010 irrigation season in flagrant disregard of the NPDES permit. Plaintiffs received notice of Defendant's intent to again violate the permit by letter dated April 29, 2010 [Exhibit E]. This intent is realized in records submitted as part of Defendant's monthly report for May 2010

[Exhibit F which indicates that waste effluent not meeting applicable standards was applied on 3 days to 4 separate fields resulting in 9 additional instances of violation.] Defendant continues to commit similar violations as the season progresses.

21. In May 2010, Defendant also began transporting tens of thousands of gallons of wastes to a satellite storage structure located on Packard Road in Lenawee County. Defendant is not authorized to dispose of any wastes to this structure. The continued storage of wastes, including the addition of new waste, constitutes a discharge to the ground or groundwater in direct violation of Part 31. Such actions again highlight the severe threat that Vreba-Hoff poses to water quality and its continued disregard for natural resources of the state of Michigan and the well-being of its neighbors.

COUNT I

NPDES PERMIT VIOLATION #1

22. Plaintiffs reallege and incorporate by reference paragraphs 1-21.

23. Part 31 of the NREPA Section 3106 provides as follows:

The department shall establish pollution standards for lakes, rivers, streams, and other waters of the state in relation to the public use to which they are or may be put, as it considers necessary. The department shall issue permits that will assure compliance with state standards to regulate municipal, industrial, and commercial discharges or storage of any substance that may affect the quality of the waters of the state. **The department may set permit restrictions that will assure compliance with applicable federal law and regulations. . . .** The department may promulgate rules and issue orders restricting the polluting content of any waste material or polluting substance discharged to sought to be discharged into any lake, river, stream, or other waters of the state. The department shall take all appropriate steps to prevent any pollution the department considers to be unreasonable and against public interest in view of the existing conditions in any lake, river, stream, or other waters of the state. (Emphasis added.)⁸

⁸ MCL 324.3106.

24. The NPDES permit lawfully issued by the MDEQ established restrictions on when treated effluent may be applied to the ground surface at Part I.A.4.d.F (Exhibit A at page 10 of 26):

Large CAFO waste shall not be land applied if it does not meet the treatment standards of Part I.A.2.b.

25. Defendant failed to meet the treatment standards in Part I.A.2.b of the permit when it land applied large CAFO waste on 756 occasions on 142 separate days in 2009 along with May 2010 as depicted in Exhibits B and F, respectively. Accordingly, Defendant has been in continuous violation of Part I.A.4.d.F of the permit.

NPDES PERMIT VIOLATION #2

26. Plaintiffs reallege and incorporate by reference paragraphs 1-25.

27. Section 3110(1) of Part 31 states, in part:

Each industrial or commercial entity that discharges liquid wastes into any surface water or groundwater or underground or on the ground other than through a public sanitary sewer shall have waste treatment or control facilities under the specific supervision and control of persons who have been certified by the department as properly qualified to operate the facilities.⁹

28. Section 3110(3) of Part 31 further requires that:

A person certified as required by subsection (1) shall file monthly, or at such longer intervals as the department may designate, on forms provided by the department, reports showing the effectiveness of the treatment or control facility operation and the quantity and quality of discharged liquid wastes.¹⁰

29. Part II.C.2 of Defendant's permit requires that:

The permittee shall have the waste control facilities under direct supervision of operators certified by the Department, as required by Section 3110 of the Michigan Act. The permittee shall have a CAFO operator certified in the A-1k-Concentrated Animal Feeding Operation (CAFO) classification. In addition the Department will specify the appropriate classifications based on treatment

⁹ MCL 324.3110(1).

¹⁰ MCL 324.3110(3).

systems in use at the permittees facilities. The operator for the EarthMentor treatment system shall be certified, at a minimum, in the following wastewater treatment classifications: A-1d- Impoundment, A-1f-Land Surface Disposal, and C-1c- Stabilization Ponds. If aeration is utilized by the permittee in any treatment structures or cells then the operator shall also be certified in C-1b-Aerated Lagoons. The permittee may have one person certified as both the CAFO operator and the treatment system operator. The permittee shall provide the Department, in writing, the contract information of the certified operator(s).

30. Although Defendant employs an individual with the required CAFO operator classification, since April 20, 2009, there has been no treatment system operator for either of the two EarthMentor Treatment Systems in violation of MCL 324.3110(1) and Part II.C.2 of the permit. In addition, monthly reports submitted by Defendant's CAFO operator have consistently stated that the EarthMentor Treatment Systems are "operating and treating more than daily production at both dairies" [Example appended as Exhibit G] despite Defendant's wholesale failure to manage the treatment systems in compliance with permit conditions. In addition, such monthly reports also fail to identify the contact information for a new certified operator for the treatment systems.

COUNT II

31. Plaintiffs reallege and incorporate by reference paragraphs 1-30.

32. As set forth in Paragraph 21, above, Defendant has continued to use a storage structure located on Packard Road without authorization from Plaintiffs. Specifically, Defendant has failed to obtain a Groundwater Discharge Authorization as required by the Part 22 rules promulgated pursuant to Part 31.¹¹

33. Section 3112(1) of Part 31, MCL 324.3112(1), states that:

A person shall not discharge any waste or waste effluent into the water of this state unless the person is in possession of a valid permit from the department.

¹¹ 1999 AACRS R 323.2201 *et seq.*

34. Part 31 defines “waters of the state” to include groundwater.¹²

35. Rule 2205 prohibits a person from discharging without an authorization issued in accordance with Rule 2204. Defendant has not obtained such authorization from Plaintiffs despite the fact that the activities at the Packard Road structure are a “discharge” as defined by Rule 2201(i):

“Discharge” mean any direct or indirect discharge of any of the following into the groundwater or on the ground:

- (i) Waste.
- (ii) Waste effluent.
- (iii) Wastewater.
- (iv) Pollutant.
- (v) Cooling water.
- (vi) A combination of the items specified in paragraphs (i) through (v) of this subdivision.

36. Defendant is not exempt from the requirement to obtain discharge authorization, by function or state law, administrative rule, or the Interim Order entered with this Court in June 2007. To the contrary, Defendant is specifically prohibited from using the Packard Road storage structure after February 6, 2010, absent authorization from Plaintiffs as set forth within Paragraph XXI.C of that agreement.

¹² MCL 324.3101(z).

RELIEF REQUESTED

WHEREFORE, Plaintiffs request that the Honorable Court grant the following relief:

- A. Declare and adjudge that the Defendant's conduct is unlawful and violates Part 31, of the NREPA and the applicable administrative rules;
- B. Grant a permanent injunction enjoining or restraining Defendant from polluting, impairing, or destroying water, air or other natural resources of the state of Michigan.
- C. Enjoin Defendant from the land application of waste effluent until such time as Defendant presents evidence to the Court that treatment standards in the permit have been met without relying upon dilution of the waste with less polluted water or wastewater. Should Defendant prove unable to present such evidence, then Plaintiffs request depopulation of the dairy operation until such time as Defendant may demonstrate compliance with the treatment standards in the permit.
- D. Enjoin Defendant from discharging waste or waste effluent into the Packard Road storage structure and impose a deadline for closure of that structure in accordance with the plan approved by Plaintiffs on April 13, 2010.
- E. Require Defendant to immediately employ a properly certified operator to oversee the EarthMentor Treatment Systems.
- F. Impose a civil fine not less than \$2,500 and up to \$25,000 against Defendant for each instance of violation and for each day of continued violation of Part 31 and the permit;
- G. Order Defendant to pay attorney fees and costs of surveillance and enforcement incurred by Plaintiffs; and

H. Award Plaintiffs such other relief as may be deemed just and proper.

Respectfully submitted,

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Alan Hoffman / *by Neil Jordan with permission*

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Lf:vreba-hoff IV/2009-0033822B/amended complaint