

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 Kostechka Dairy, LLC (Kostechka Dairy) is a domestic limited liability company with its principal offices located at 12031 West Hillcrest Road, Whitelaw, Wisconsin 54247. Its registered agent is Shirley Baroun located at the same address.

3. Defendants Michael and Shirley Baroun reside at 12031 West Hillcrest Road, Whitelaw, Wisconsin 54247.

4. At all times relevant to the allegations in this Complaint, the Defendants owned and operated a large concentrated animal feeding operation located at 12031 West Hillcrest Road, Whitelaw, Wisconsin 54247 (the CAFO).

LEGAL BACKGROUND

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

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

7. Wisconsin Stat. § 283.01(11) defines “person” as “an individual, owner, operator, corporation, limited liability company, partnership, association, municipality, interstate agency, state agency or federal agency.”

8. Wisconsin Stat. § 283.01(9) defines “owner or operator” as “any person owning or operating a point source of pollution.”

9. Wisconsin Stat. § 283.01(20) defines “waters of the State” as “all lakes, bays, rivers, streams, springs, ponds, wells, impounding reservoirs, marshes, water courses, drainage systems and other surface water or groundwater.”

10. Wisconsin Admin. Code ch. NR 243 governs the issuance of permits required by Wis. Stat. ch. 283 and permit terms for large concentrated animal feeding operations (CAFOs).

11. 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.

12. Wisconsin Admin. Code § NR 243.12(1) states, “A large CAFO may not discharge pollutants from manure or process wastewater to waters of the state unless the discharge is covered by and in compliance with a WPDES permit.” *See also* Wis. Stat. § 283.31(1).

13. Wisconsin Admin. Code § NR 243.13(1) requires DNR to “include conditions in a WPDES permit for the production area and ancillary service

and storage areas to ensure that clean water is diverted, as appropriate, from the production area and that are necessary to achieve compliance with surface water and groundwater quality standards contained in chs. NR 102 to 105, 140 and 207, and the livestock performance standards and prohibitions prescribed in ch. NR 151.”

14. Wisconsin Admin. Code § NR 243.13(5) provides a discharge of manure or process wastewater from a CAFO production area to waters of the state may not exceed surface water quality standards.

15. Wisconsin Admin. Code § NR 243.15(2) provides, “Runoff control systems in the production area shall be designed to comply with the applicable standards in NR 243.13 using permanent runoff control systems that are consistent with accepted management practices such as wastewater treatment strips, sediment basins, waste storage facilities, roof runoff management, grassed waterways and clean water diversions.”

16. Wisconsin Admin. Code § NR 243.03(54) defines production area to include the animal confinement area and raw materials storage areas at a CAFO. The raw materials storage area “includes but is not limited to feed silos, silage bunkers and bedding materials.” The animal confinement area “includes but is not limited to open lots, housed lots, feedlots, confinement houses, stall barns, free stall barns, milkrooms, milking centers, cowyards, barnyards, medication pens, walkers, animal walkways and stables.”

17. Process wastewater includes wastewater from the production area “that comes into contact with any raw materials or animal byproducts including manure, feed, milk, eggs or bedding.” Wis. Admin. Code § NR 243.03(53)(d).

18. Wisconsin Admin. Code § NR 151.08(4) provides that a CAFO may not have “direct runoff from a feedlot or stored manure into waters of the state.”

19. Feedlot is defined as “a barnyard, exercise area, or other outdoor area where livestock are concentrated for feeding or other purposes and self-sustaining vegetative cover is not maintained.” Wis. Admin. Code § NR 151.015(8).

20. Direct runoff is defined as “[r]unoff from a feedlot that can be predicted to discharge a significant amount of pollutants to surface waters of the state.” Wis. Admin. Code § NR 151.015(7)(a).

21. Wisconsin Admin. Code § NR 103.03 provides water quality standards for wetlands.

22. The water quality standards for wetlands provide that “substances which are toxic or harmful to human, animal or plant life may not be present in amounts which individually or cumulatively may cause significant adverse impacts to wetlands.” Wis. Admin. Code § NR 103.03(2)(d).

GENERAL ALLEGATIONS

23. At all times relevant to the allegations in this Complaint, Kostechka Dairy held Wisconsin Pollutant Discharge Elimination System permit no. WI-0063894-01-0 (WPDES Permit) that authorized it to discharge to groundwater and surface waters in the Branch River Watershed from the CAFO in accordance with the terms of the permit.

24. Shirley and Michael Baroun are owners and operators of the CAFO.

25. The WPDES Permit became effective on August 1, 2011, and expired on July 31, 2016.

26. The Defendants applied for reissuance of the WPDES Permit on February 2, 2016, and are authorized to continue to discharge pursuant to the terms of the WPDES Permit after its expiration date pursuant to Wis. Stat. § 283.53(3)(a).

27. The Branch River is located to the north and east of the CAFO and is a navigable waterway and a water of the state.

28. The Branch River is designated as an Exceptional Resource Water and a warm water sport fishery. Wis. Admin. Code § NR 102.11(1)(d)23.

29. The wetlands adjacent to the Branch River and to the northeast of the CAFO are waters of the state (the Wetland).

30. At all times relevant to this Complaint, the CAFO had a feed storage area located along the east side of the CAFO at the corner of Hillcrest Road and Naidl Road.

31. The CAFO has animal housing, outdoor animal lots, and animal walkways on the west side of the CAFO.

A. September 2, 2016, DNR Inspection

32. On September 2, 2016, DNR Agricultural Runoff Management Specialist Casey Jones (Jones) inspected the CAFO. On this date, there were discharges from the animal housing areas and feed storage area at the CAFO.

33. On September 2, 2016, the feed storage area runoff control system was not adequately sized to prevent discharges to surface waters.

34. On September 2, 2016, there were accumulated feed solids and dead grass adjacent to the feed storage area and the road ditch, which indicates chronic runoff from the feed storage area.

35. The runoff from the concrete areas around animal housing and walkways on September 2, 2016, indicate that general housekeeping practices in these areas would not prevent manure-laden discharges from the CAFO to the Branch River.

B. September 22, 2016, DNR Inspection

36. On September 22, 2016, Jones and DNR Water Resources Biologist Mary Gansberg (Gansberg) inspected the CAFO. On this date, there were discharges from the CAFO into the Wetland adjacent to the Branch River.

1. Feed Storage Area Runoff Controls

37. On September 22, 2016, there was brown runoff from the feed storage area flowing away from the CAFO into the road ditch to the north of the CAFO.

38. On September 22, 2016, the pump for the feed storage runoff collection tank was not in operation and contaminated runoff was overflowing from the feed storage area into the road ditch.

39. On September 22, 2016, brown runoff was being discharged from the CAFO into a road ditch and to culvert under Hillcrest Road and flowing to the north through a concentrated flow channel and to the east across a neighboring property into the Wetland adjacent to the Branch River.

40. On September 22, 2016, a large area of the Wetland had been flooded with the brown malodorous water.

41. On September 22, 2016, Gansberg took a sample of water in the Wetland into which the CAFO's polluted runoff was discharging (Sample D-1).

42. DNR sent Sample D-1 to the Wisconsin State Laboratory of Hygiene for analysis.

43. Sample D-1 had *E. coli* of 722,000 CFU/100 mL. For reference, DNR's Beach Monitoring Program requires closure of public beaches on lakes when water quality samples are above 1,000 CFU/100 mL for *E. coli*. The Beach Monitoring Program requires an advisory notice warning the public to swim at their own risk when water quality samples are above 235 CFU/100 mL for *E. coli*.

44. Sample D-1 had total phosphorus of 30.3 mg/L. For reference, the total phosphorus water quality criterion for streams is 75 micrograms per liter, which converts to 0.075 mg/L. Wis. Admin. Code § NR 102.06(3)(b).

45. Sample D-1 had a biological oxygen demand of 1,560 mg/L. For reference, untreated municipal wastewater generally has a biological oxygen demand between 100 and 300 mg/L.

46. The concentration of pollutants in Sample D-1 is toxic to aquatic life.

2. *Animal Housing and Animal Walkway Runoff Controls*

47. On September 22, 2016, uncontrolled runoff from the animal housing area and animal walkways was discharged from the CAFO production area.

48. On September 22, 2016, there was brown, manure-smelling runoff being discharged from the CAFO into a culvert under Hillcrest Road and

flowing to the north through a concentrated flow channel and to the east across a neighboring property into the Wetland adjacent to the Branch River.

49. On September 22, 2016, Gansberg took a sample of the contaminated runoff where it left the CAFO and flowed into a road ditch on the south side of West Hillcrest Road (Sample P-2).

50. DNR sent Sample P-2 to the Wisconsin State Laboratory of Hygiene for analysis.

51. Sample P-2 had *E. coli* of 1,793,000 CFU/100 mL.

52. Sample P-2 had total phosphorus of 10.1 mg/L.

53. Sample P-2 had a biological oxygen demand of 277 mg/L.

54. Based on these sampling results, the water discharged from the CAFO to the Wetland was highly polluted, exceeded state water quality standards, and was toxic to aquatic life.

55. The presence of *E. coli* in a water sample indicates contamination by animal or human waste.

56. On October 18, 2016, DNR issued a Notice of Violation to the Defendants for the unauthorized discharge of manure and process wastewater from the CAFO production area to waters of the state.

VIOLATION ONE: UNPERMITTED DISCHARGE OF POLLUTANTS TO WATERS OF THE STATE ON SEPTEMBER 22, 2016

57. WPDES Permit condition 1.2 requires the permittee to design and maintain all runoff control systems “to comply with production area discharge limitations.”

58. WPDES Permit condition 1.3.1 requires the permittee to “at all times properly operate and maintain all manure and process wastewater facilities and systems in compliance with the conditions of this permit.”

59. WPDES Permit condition 1.3.2 requires the permittee to “operate and maintain storage and containment facilities to prevent overflows and discharges to waters of the state.”

60. On September 22, 2016, the Defendants violated Wis. Stat. § 283.31(1), Wis. Admin. Code §§ NR 151.08(4), 243.12(1) and 243.13(5), and WPDES Permit conditions 1.2, 1.3.1, and 1.3.2 when the CAFO discharged process wastewater to the Wetland adjacent to the Branch River without a permit authorizing this discharge.

VIOLATION TWO: FAILURE TO CONSTRUCT PERMANENT RUNOFF CONTROLS FOR FEED STORAGE

61. WPDES Permit condition 1.1 prohibits any discharge of manure or process wastewater pollutants to navigable waters from the production area where manure or process wastewater is not properly stored or contained by a structure.

62. WPDES Permit condition 1.2 requires the permittee to design and maintain all runoff control systems “to comply with production area discharge limitations.”

63. WPDES Permit condition 1.3.1 requires the permittee to “at all times properly operate and maintain all manure and process wastewater facilities and systems in compliance with the conditions of this permit.”

64. WPDES Permit condition 1.3.2 requires the permittee to “operate and maintain storage and containment facilities to prevent overflows and discharges to waters of the state.”

65. WPDES Permit condition 1.8.2 requires the permittee to “control contaminated runoff from all elements of the livestock operation to prevent a discharge of pollutants to navigable waters and to comply with surface water quality standards and groundwater standards.”

66. WPDES Permit condition 2.5 requires the permittee to construct “improvements to permanently correct any adverse conditions” in and around the feed storage area by December 31, 2012.

67. On June 9, 2011, DNR notified the Defendants that their feed storage area and associated runoff controls were inadequate and did not comply with discharge limitations in Wis. Admin. Code § NR 243.13(1).

68. On December 16, 2013, DNR requested plans and a timeline for permanent upgrades to the feed storage area.

69. On January 21, 2015, DNR issued a Notice of Noncompliance to the Defendants for the violation of permit condition 2.5 and the failure to permanently correct adverse conditions in the feed storage area and associated runoff controls.

70. On April 16, 2015, DNR Agricultural Runoff Management Specialist Danielle Block conducted a compliance inspection at the CAFO. On this date, there was process wastewater overflowing from the feed storage runoff collection tank and discharging through the culvert under Hillcrest Road to the north through a concentrated flow channel toward the Wetland and the Branch River.

71. On July 8, 2015, DNR asked the Defendants to submit a plan to DNR describing interim controls for the feed storage area and runoff controls and design plans for a new feed storage area and runoff controls.

72. On March 3, 2016, Tiry Engineering, Inc. sent a letter to DNR on behalf of the Defendants noting “[t]he current runoff control system on the existing feed storage bunker no longer meets the DNR standards for capturing runoff,” and proposing to submit plans and specifications to come into compliance.

73. The Defendants did not submit plans and specifications for a new feed storage area and runoff control system by the May 2016 deadline agreed to with DNR.

74. On July 7, 2016, DNR notified the Defendants that DNR had not received plans and specifications for required upgrades of the feed storage and associated runoff control system, and DNR set a new deadline of July 15, 2016.

75. On October 18, 2016, DNR issued a Notice of Violation to the Defendants for the failure to properly maintain feed storage area runoff controls.

76. On June 27, 2017, the Defendants submitted proposed plans and specifications for permanent feed storage runoff controls to DNR.

77. On July 18, 2017, DNR approved the Defendants' plans and specifications for permanent feed storage runoff controls at the CAFO.

78. In the July 18, 2017, approval, DNR required the Defendants to notify DNR prior to construction and after construction is complete.

79. The July 18, 2017, approval for permanent runoff controls expires on July 18, 2019.

80. As of the date this Complaint was filed, the Defendants have not installed permanent feed storage runoff controls at the CAFO.

81. Since at least April 15, 2016, the Defendants have been in intermittent violation of WPDES permit conditions 1.1, 1.2, 1.3.1, 1.3.2, and 1.8.2 on at least 3 occasions by failing to operate and maintain feed storage runoff controls to prevent overflows and discharges to waters of the state and to comply with production area discharge limitations.

82. Since January 1, 2013, the Defendants have been in continuous violation of WPDES Permit condition 2.5 by failing to construct permanent runoff controls for the feed storage area that comply with permit terms and discharge limitations.

VIOLATION THREE: FAILURE TO CONSTRUCT RUNOFF CONTROLS FOR AREAS WHERE ANIMALS ARE HOUSED

83. WPDES Permit condition 1.1 requires the permittee to “comply with the livestock performance standards and prohibitions in ch. NR 151.”

84. WPDES Permit condition 1.1 prohibits any discharge of manure or process wastewater pollutants to navigable waters from the production area where manure or process wastewater is not properly stored or contained by a structure.

85. WPDES Permit condition 1.1 provides, “All structures shall be designed and operated in accordance with ss. NR 243.15 and NR 243.17 to control manure and process wastewater for the purpose of complying with discharge limitations established above and groundwater standards.”

86. WPDES Permit condition 1.2 requires the permittee to design and maintain all runoff control systems “to comply with production area discharge limitations.”

87. WPDES Permit condition 1.3.1 requires the permittee to “at all times properly operate and maintain all manure and process wastewater facilities and systems in compliance with the conditions of this permit.”

88. WPDES Permit condition 1.3.2 requires the permittee to “operate and maintain storage and containment facilities to prevent overflows and discharges to waters of the state.”

89. WPDES Permit condition 1.8.2 requires the permittee to “control contaminated runoff from all elements of the livestock operation to prevent a discharge of pollutants to navigable waters and to comply with surface water quality standards and groundwater standards.”

90. In June 2011, DNR advised the Defendants to evaluate the CAFO’s runoff control system to determine if it met permit requirements. The Defendants did not do so.

91. On June 8, 2017, DNR conducted an inspection at the CAFO and identified the need for permanent runoff controls for outdoor concrete lots around the animal housing and animal walkways in order to meet permit requirements.

92. On June 27, 2017, the Defendants submitted proposed plans and specifications for permanent runoff controls to DNR.

93. On July 28, 2017, DNR approved the plans and specifications for permanent runoff controls submitted to DNR on June 27, 2017.

94. On August 11, 2017, DNR sent a summary of the June 8, 2017, inspection to the Defendants reiterating the need for runoff containment for the outdoor concrete areas around animal housing and animal walkways.

95. Since at least September 2, 2016, Kostechka Dairy has been in intermittent violation of WPDES Permit conditions 1.2, 1.3.1, 1.3.2, and 1.8.2 on at least 3 occasions by failing to maintain runoff controls and control contaminated runoff to prevent discharges of manure and process wastewater to waters of the state and to comply with production area discharge limitations.

PENALTIES AUTHORIZED

96. Wisconsin Stat. § 299.95 authorizes the attorney general to enforce Wis. Stat. ch. 283 and all rules promulgated and permits issued under that chapter, subject to exceptions not applicable in this case.

97. Wisconsin Stat. § 283.89(1) authorizes 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 for prosecution.

98. Under 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.

99. 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 ch. 283, a rule promulgated under it, or a term or condition of any permit issued under Wis. Stat. ch. 283.

100. 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.”

101. 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 asks for judgment as follows:

1. An injunction pursuant to Wis. Stat. §§ 283.91 and 299.95 requiring the Defendants to comply with all terms and conditions of the WPDES Permit and to promptly install permanent runoff controls for the CAFO’s feed storage area and around animal housing and walkways in compliance with the WPDES permit;

2. Forfeitures as provided for in Wis. Stat. § 283.91(2);

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 laboratory and drug 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);

4. The costs and disbursements of this action; and
5. Such other relief as the court may deem appropriate.

Dated this 21st day of January, 2021.

JOSHUA L. KAUL
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Electronically signed by Sarah C. Geers

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