



STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

LORI SWANSON
ATTORNEY GENERAL

April 2, 2009

102 STATE CAPITOL
ST. PAUL, MN 55155
TELEPHONE: (651) 296-6196

Mr. George Schwint
Senior Engineer
Minnesota Pollution Control Agency
1601 East Highway 12, Suite 1
Willmar, Minnesota 56201

RE: *Public Notice of Intent to Revoke and Reissue National Pollutant Discharge Elimination System (NPDES) / State Disposal System (SDS) Permit MN0068594*

Dear Mr. Schwint:

I submit these written comments in opposition to the Minnesota Pollution Control Agency's (MPCA) Public Notice of Intent to Revoke and Reissue National Pollutant Discharge Elimination System (NPDES) / State Disposal System (SDS) Permit MN0068594, which relates to the Excel Dairy located at 22615 - 120th Avenue Northeast, Thief River Falls, Marshall County, Minnesota.

I respectfully request that the MPCA commence revocation proceedings with regard to the Excel Dairy's permit and that the MPCA abandon any plans to reissue the Excel Dairy's permit. In my view, the permit proposed for reissuance by the MPCA is facially deficient and cannot protect the health and safety of the neighboring residents and the State's natural resources.

Statement of Interest

The Attorney General appears on behalf of the State in all causes wherein the State is directly affected and in all civil causes of like nature whenever, in the Attorney General's opinion, the interests of the State require it. MINN. STAT. § 8.01.

The State maintains a quasi-sovereign interest in health and well-being of its residents, and the State works to assure that its residents enjoy the full benefit of the laws. *State of Minnesota by Humphrey v. Ri-Mel, Inc.*, 417 N.W.2d 102, 112 (Minn. Ct. App. 1987); *see also State of Minnesota by Humphrey v. Standard Oil Co. (Indiana)*, 568 F. Supp. 556, 563 (D. Minn. 1983). The State "has the last word as to whether . . . its inhabitants shall breathe pure air." *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237-238 (1907).

Excel Dairy's Permit Should Be Revoked Without Reissuance

In its Notice of Intent to Revoke and Reissue Excel Dairy's NPDES / SDS Permit MN0068594 dated March 4, 2009 ("Notice"), the MPCA cites Minn. R. 7001.0170(A) as justification for its action. (Notice at 2.) Minn. R. 7001.0170(A) allows for revocation and reissuance of a permit where there have been "alterations or modifications to the permitted

facility.” The MPCA states that Excel Dairy¹ “has *altered* its Facility in . . . ways that result in or have the potential to result in significant alteration of the nature of quantity of air emissions from the Facility.” (*Id.* (emphasis added).)

Pursuant to Minn. R. 7001.0180(A), however, the MPCA should commence proceedings to revoke a permit without reissuance based upon:

[the] existence at the permitted facility of unresolved noncompliance with applicable state and federal pollution statutes and rules or a condition of the permit, and refusal of the permittee to undertake a schedule of compliance to resolve the noncompliance

The environmental calamity arising from the operations at Excel Dairy is the result of Excel Dairy’s failure to comply with State statutes, rules, and permits. The Excel Dairy’s environmental issues are not the result of mere *alterations* that may justify reissuance. Therefore, I strongly encourage the MPCA to commence proceedings to revoke Excel Dairy’s permit without reissuance.

Excel Dairy’s permit should also be revoked without reissuance because of the false and misleading statements made by Excel Dairy’s representatives and because of the dangers to human health and the environment posed by the facility. *See* Minn. R. 7001.0180(B-C).

Excel Dairy Refuses to Comply with Pollution Statutes and Rules or its Permit

The following conditions evidence Excel Dairy’s noncompliance with statutes, rules, and its permit and its refusal to undertake a schedule of compliance. Such circumstances justify the commencement of proceedings to revoke Excel Dairy’s permit without reissuance.

- *Although its Facility is Permitted for 1,545 Animal Units, Excel Dairy Has Stocked Its Facility with 2,163 Animal Units.* In its Notice, the MPCA states: “the Permittee also appears to have altered its Facility by stocking the Facility with more animal units than the permit allows.”² (Notice at 2.) The MPCA further acknowledges:

. . . the Permittee represented to the MPCA that it would either house 1,104 mature dairy cattle over 1,000 pounds or house a hybrid cow that weighed less than 1,000 pounds so that the Facility could stock a total of 1,545 cattle.

Information recently obtained from the Permittee has instead chosen to stock 1,545 cattle over 1,000 pounds at the Facility. This would equate to 2,163 animal units; *significantly more than the permit allows.*

¹ The term “Excel Dairy,” as used herein, refers not only to the facility but also to the owners, permittees, and operators of the facility.

² Under Minnesota law, a mature dairy cow weighing over 1,000 pounds is 1.4 animal units. MINN. STAT. § 116.06, subd. 4a. A mature dairy cow weighing less than 1,000 pounds is 1.0 animal units. *Id.*

(*Id.* (emphasis added).) Excel Dairy never intended to abide by the permit's limitation of 1,545 animal units. In a letter dated July 27, 2006, Howard Person, the Marshall County Feedlot Administrator, wrote to the Marshall County Commissioners:

The original plan for the dairy was to increase cow numbers from 1100 to 1800 head of dairy cows which would have required the addition of another barn to the existing barns and an expansion of the existing lagoon system. . . . [T]he corporation has [now] revised their plan and for the time being is planning to stay with 1100 cows with an expansion to the lagoons system. . . .

You should be aware however that had the corporation stayed with the 1800 cows, they would have been required to complete an environmental assessment worksheet, which is fairly challenging and time consuming. The attached letter [from Excel Dairy] now says they will stick with the 1100 cows and the lagoon expansion. Two items come to mind with this new plan. First of all, the existing lagoon is 209 feet wide and 718 feet long. This is supposed to be enough to provide nine months of manure storage for 1100 cows. The proposed expansion to the lagoon is being requested at 368 feet wide and 718 feet long. This will give them total square footage of 414,286 of lagoon surface, a 63% increase in lagoon surface area. I know they want 15 months of lagoon storage as the old system only provided 9; however, an additional 100,000 square feet would provide this added storage. Not surprisingly, the amount of lagoon storage being requested would be 15 months of capacity for 1800 cows.

As you know, folks around the dairy are strongly against the expansion of the dairy and especially of the lagoon. . . .

It is my understanding that residents surrounding the facility have already developed and signed a petition against the larger lagoon and will be requesting the EAW Excel Dairy is trying to avoid. If MPCA accepts their petition, Excel Dairy may well go back to requesting the *1800 cows* again as it's obvious this *is their long term goal anyway*.

(Exhibit A at 1-2 (emphasis added).) In short, by simply refusing to abide by the permit's 1,545 animal unit limitation, Excel Dairy was able to have its cake and eat it too, *i.e.*, Excel Dairy milked as many cows as it wanted while avoiding the need to prepare an EAW and while surreptitiously circumventing the wrath of residents living near the facility. The Excel Dairy's stocking of 2,163 animal units is a violation -- not a mere alteration -- of its permit that justifies the commencement of proceedings to revoke without reissuance.

- *Excel Dairy Refuses to Comply with Minnesota's Ambient Air Quality Standards.* Minnesota Ambient Air Quality Standards require that there be no more than two 30 minute periods of hydrogen sulfide (H₂S) above 30 parts per billion (ppb) in 5 days, and no more than two 30 minute periods of H₂S above 50 ppb in any year. Minn. R. 7009.0080. Excel Dairy's current permit allows the MPCA "to establish and maintain a continuous air monitoring (CAM) device, on the property" for purposes of determining whether the dairy's H₂S emissions have the potential to exceed the state ambient air quality standards. (Permit at § 4.6 (A-B).)

According to the MPCA, Excel Dairy "has violated Minnesota's hydrogen sulfide standards hundreds of times from May 2008 through October 2008." (Notice at 3.) Although Excel Dairy admits that its sludge is "intensely malodorous,"³ it refuses to acknowledge its noncompliance with the ambient air quality standards, let alone undertake a schedule of compliance. Rather, Excel Dairy posits three dubious rationalizations for its noncompliance.

First, Excel Dairy claims that, in 2008, it was entitled to a 58-day exemption from the ambient air quality standards.⁴ Contrary to Excel Dairy's assertion, MINN. STAT. § 116.0713 provides:

(b) Livestock production facilities are exempt from state ambient air quality standards while manure is being removed and for seven days after manure is removed from barns or manure storage facilities.

(c) For a livestock production facility having greater than 300 animal units, *the maximum cumulative exemption in a calendar year* under paragraph (b) *is 21 days* for the removal process. (Emphasis added.)

In addition, the MPCA wrote to Excel Dairy on June 11, 2008, expressly stating: "Please note that Minnesota law establishes 21 days as the maximum number of days that a feedlot can be exempt from the hydrogen sulfide standard. That number cannot be extended." (Exhibit B.) When issuing an Interim Order in the civil enforcement action brought by the State against Excel Dairy, the Marshall County Court further concluded that the "MPCA **did not grant** Excel Dairy . . . the right to exceed the 21 days allowed for the removal of manure from the facility. . . ." (Exhibit C at 5 (court's emphasis).) Thus, Excel Dairy violated its permit when it

³ *State of Minnesota v. The Dairy Dozen - Thief River Falls, LLP*, Marshall Co. Court File No. 45-CR-08-264 and 45-CR-08-393, Defendant The Dairy Dozen, LLP's Memorandum of Law in Support of Its Motion to Suppress CAM Data (Sept. 19, 2008) at 3.

⁴ *State of Minnesota by Swanson v. The Dairy Dozen - Thief River Falls, LLP*, Marshall Co. Court File No. 45-CV-08-303, Defendant's Memorandum of Law in Support of its Motion to Strike Plaintiffs' Improper and Immaterial Complaint Allegations (June 30, 2008) at 5-7. State court pleadings are not attached as exhibits hereto because they are already part of the administrative record and are available for review at the Office of the Attorney General or at the MPCA.

claimed “a cumulative 58 days of exemptions instead of the maximum 21 days that the law allows.” (Notice at 3.)

Second, Excel Dairy argues that its ambient air quality violations were “anticipated and unavoidable odor problems caused by Excel Dairy’s completion of the MPCA-ordered remediation work on Basin 1.”⁵ On November 20, 2006, MPCA personnel inspected the Excel Dairy, noting that “no animals” were present and that the clay liner of basin #1 was as thin as 4 inches in some places and needed repair. (Exhibit D at 2.) On January 24, 2007, MPCA Feedlot Specialist Gary Lackey formally notified Excel Dairy that the interior sidewalls of basin #1 had eroded and required repair. (Exhibit E at 1.) Lackey further noted that there was only three feet of manure in the basin. (*Id.* at 2.) Rather than immediately remove the three feet of sludge and repair the structure, Excel Dairy stocked the dairy with cows and embarked on the construction of two additional basins in 2007 while pumping fresh manure into the damaged basin #1.

Because basin #1 is 12 feet deep and there was only 3 feet of manure in the basin before the dairy was restocked with cows, the basin could have accommodated eight additional feet of manure while leaving the standard 12 inches for freeboarding. By August 15, 2007, Excel Dairy informed the MPCA that manure had consumed the remaining eight feet of basin #1. (Exhibit F.) Even then, Excel Dairy did not clean out basin #1; rather, it requested forbearance of up to 4-6 inches above freeboard or permission to pump manure into basin #2 (even though construction of basin #2 was not complete). (*Id.*)

Excel Dairy’s current permit required that remediation of basin #1 be completed by November 1, 2007 (Permit at § 3.3(A)), the MPCA extended the deadline to June of 2008.

According to a chronology prepared by Excel Dairy, it finally began remediation of basin #1 in mid-2008. Pumping of manure began on May 1, 2008. (Exhibit G.) Removal of solid and liquid manure from basin #1 was not complete until 50 days later, on June 20, 2009. (*Id.*) Some of the manure was applied to fields, but given the artificial exigency created by Excel Dairy’s decision to delay remediation, Excel Dairy had only enough time to transfer some solid sewage from basin #1 to basin #2. (*Id.*) The remediation work was completed on basin #1 by June 30, 2008. (*Id.*)

In short, Excel Dairy decided to postpone remediation of basin #1 in 2007 when it easily could have removed 3 feet of manure within the 21-day exemption period and performed the MPCA’s mandated remediation work. Instead, Excel Dairy decided to ignore the remediation work in 2007, fill basin #1 with an additional 8 feet of manure, and simply take as much time as it wanted in 2008 to clean-out basin #1 --

⁵ *State of Minnesota by Swanson v. The Dairy Dozen - Thief River Falls, LLP*, Marshall Co. Court File No. 45-CV-08-303, Defendant’s Reply Memorandum in Opposition to Plaintiffs’ Motion for Temporary Injunction (July 15, 2008) at 2.

ignoring the 21-day exemption period. This strategy may have been in Excel Dairy's interest, but it was an affront to the MPCA's regulatory authority and the right of the surrounding residents to breath non-putrefied air.

Moreover, Excel Dairy's ambient air quality violations did not terminate on June 30, 2008, but continued throughout September of 2008. (Exhibit H at ¶ 5.) Excel Dairy's own experts acknowledge that the most likely sources of the continuing H₂S emissions are Excel Dairy's failure to maintain a crust over basin #1 and the sludge that was transferred from basin #1 to basin #2. (Exhibit I at 6-7.) To this day, Excel Dairy has not bothered to remove the odiferous sludge from basin #2, and there can be no doubt that Excel Dairy's ambient air quality violations have long surpassed any statutory exemption period.

Third, in the criminal case pending against it, Excel Dairy has chosen to litigate the validity of Minnesota's ambient air quality standards by arguing, among other things, that readings obtained from "so-called continuous air monitoring (CAM) devices" are not reliable and the standards are invalid.⁶ The standards being challenged by Excel Dairy have been in effect for nearly 40 years. Regardless of whether Excel Dairy is violating the standards by 1 ppb or 1000 ppb, the dairy admits that its sludge is "intensely malodorous."⁷ Excel Dairy's own experts recorded H₂S levels at 270-320 ppb over basin #1 in September of 2008. (Exhibit I at 29.)

Excel Dairy's experts also report that: ". . . a prolonged period of severe odors is usually a sign that something is wrong with the way the lagoon is being operated . . ." (Id. at 26.) Excel Dairy's experts further suggested several ways to reduce odor from the basins, e.g.,

- The influent from Lagoon No. 1 should be relocated to the east end of the lagoon and the discharge to Pond No. 2 relocated to the far west end of the lagoon. (Id. at 22-23.)
- The inlet of the overflow pipe between Lagoon No. 1 and 2 "should be submerged at all times . . . to prevent any floating solids from reaching the second stage lagoon." (Id. at 23.)

Excel Dairy has yet to undertake either of these corrective measures. Likewise, months before Excel Dairy's experts issued their report, the MPCA directed Excel Dairy to "immediately refrain from depositing manure into the basins from the top" (Exhibit B); yet, in September of 2008, Excel Dairy's experts were continuing to advise that wastewater should be loaded into Lagoon No. 1 below the water column to "aid in minimizing odors." (Exhibit I at 23.)

⁶State of Minnesota v. The Dairy Dozen - Thief River Falls, LLP, Marshall Co. Court File Nos. 45-CR-08-264 and 45-CR-08-393, Defendant the Dairy Dozen, LLP's Memorandum in Support of Its Motion to Suppress CAM Data (Sept. 19, 2008) at 1.

⁷ Id. at 3.

Excel Dairy's experts also opined that the odor being produced by basin #2 could be reduced by removing the sludge and pumping back into basin #1. (*Id.* at 24.) Excel Dairy not only ignored the advice of its experts to return the sludge in basin #2 to basin #1 but expanded the odor issue by dumping sludge in basin #3. A September 29, 2008 affidavit from George Schwint, a Senior Engineer for MPCA, states:

. . . [U]nfortunately, . . . Excel Dairy is [now] loading fresh manure from basin number one into basins two and three, the air monitoring shows significant hydrogen sulfide exceedances. From September 15, 2008 through September 22, 2008, the data shows twenty-seven exceedances of the 30 ppb hydrogen sulfide standard and thirteen exceedances of the fifty ppb hydrogen sulfide standard. . . . (Exhibit J at ¶ 9.)

Excel Dairy refuses to implement even the simple remediation measures recommended by its own experts. Rather than operate the dairy in a professional and environmentally responsible manner, the principals of Excel Dairy have clearly demonstrated their preference to blame others for the odor problem (in particular the MPCA) and to litigate. The State should not confer the privilege of operating a dairy on an ownership group that has consistently avoided the path of responsibility and pursued the path of convenience and profit.

- *Excel Dairy Has Violated Its Permit By Implementing Mechanical Aeration of Its Manure Basins and By Adding Microbes to Its Manure Basins.* In the spring of 2008, Excel Dairy began utilizing mechanical aeration and microbial addition in a purported effort to reduce H₂S emissions. The MPCA's Notice states that "these measures had never been approved or permitted by the MPCA." (Notice at 3.) In an affidavit dated July 8, 2008, James Ziegler, the MPCA supervisor who oversaw the writing and issuing of Excel Dairy's permits, states:

Although I understand that Excel Dairy has implemented aeration and microbial addition of its basins, to my knowledge, Excel Dairy has never sought or received approval from the MPCA to implement either of these measures. . . . By implementing these changes without receiving prior approval from the MPCA, Excel Dairy is in violation of the March 2007 individual feedlot permit that my staff issued to Excel Dairy.

(Exhibit K at ¶7.) In particular, Excel Dairy's addition of microbes to the basins violates section 4.2(A) of the current permit, which states:

The Permittee is prohibited from discharging, depositing, or otherwise placing , any substance into manure storage areas except manure and process wastewater unless expressly authorized in writing by the MPCA.⁸

In its Interim Order, the Marshall County Court also determined that “the MPCA **did not grant** Excel Dairy . . . the right to aerate Basin 3 without express permission and permitting by MPCA.” (Exhibit C at 5 (court’s emphasis).) Excel Dairy’s use of aerators and microbes constitutes a violation -- not a mere alteration -- of its permit that justifies the commencement of revocation proceedings.

- *Excel Dairy Violated its Permit by Doubling the Size of Its Feedpad and by Failing to Control Runoff from the Feedpad.* The MPCA’s Notice states:

In the fall of 2007, the Facility roughly doubled the size of an existing concrete feedpad. The Facility did this without first obtaining the necessary permission from the MPCA. As part of an enforcement action for this violation, the Facility was required to install a clay liner on an existing borrow pit on the site so that the borrow pit can serve as a runoff pond for any runoff from the feedpad. The Facility was also required to construct a second runoff pond to capture runoff the feedpad. The Facility has failed to manage that second runoff pond properly and in September of 2008 discharged manure-contaminated runoff from the pond into the waters of the State in violation of the Facility’s permit.

(Notice at 1-2.) Excel Dairy’s permit violations related to the feedpad also justify commencement of revocation proceedings.

- *Contrary to Its Current Permit, Excel Dairy Has Failed to Cover Basins #2 and #3 With Straw.* In its Notice, the MPCA states: “when it applied for its current permit, the Permittee submitted a narrative Air Emission Plan that stated that the Permittee would apply straw to the manure basins and maintain a crust on the basis to control air emissions from the basins. On June 11, 2008, the Deputy Commissioner of the MPCA directed the Facility in writing to apply straw to the basins in order to establish crusts on the basins. The Permittee refused and has instead indicated that it cannot and will not cover basins numbers two and three with straw as required by the narrative Air Emission Plan that the Permittee submitted with its permit application.” (Notice at 2.)

The conditions described above are not mere facility alterations that may be managed by modifications to Excel Dairy’s existing permit. All of the episodes described above constitute violations of Excel Dairy’s current permit, and on the basis of these violations (among others), the MPCA should commence proceedings to revoke Excel Dairy’s permit without reissuance.

⁸ Not only is Excel Dairy’s use of aerators and microbes a violation of its permit, but Excel Dairy’s own experts state that it is not using these measures properly. Excel Dairy’s experts opine that “the aerators should be re-distributed in a more geometric pattern.” (Exhibit I at 21.)

Excel Dairy Has Submitted False or Misleading Information to the MPCA

On June 19, 2008, the State of Minnesota, through the Attorney General's Office and the MPCA, filed an enforcement action against the Excel Dairy in Marshall County District Court. In the context of this litigation, Excel Dairy has submitted false or misleading statements not only to the court, but to MPCA as its opposing party. Excel Dairy's false or misleading statements have interfered with the MPCA's right and ability to enforce the current permit. Minn. R. 7001.0180(B). The following are examples:

- *Excel Dairy Falsely Stated That it Cannot Crust Its Basins and that Its Experimental Aeration and Microbial Addition Technique has Reduced Odor at a Sister Dairy Known as New Horizon Dairy.* Excel Dairy claims that basins #2 and #3 cannot be crusted and that use of aeration and microbial addition have reduced odor at a sister dairy known as New Horizon Dairy. (Exhibit L, Exhibit M at ¶ 7.) Such claims are false. George Schwint, a Senior Engineer for the MPCA, refutes Excel Dairy's claim by reference to the basins at the West River Dairy, which are crusted and larger than the basins at Excel Dairy, and by reference to academic publications. (*Id.* at ¶¶ 8, 11-12.) Mr. Schwint and Mark Steuart, an MPCA feedlot inspector, both testified that New Horizon is crusting a basin that is larger than either basin #2 or #3 at Excel Dairy. (*Id.* at ¶ 9; Exhibit L at ¶ 12.) In fact, Mr. Steuart further testified that "new Horizon Dairy is not aerating its basins" and "New Horizon Dairy is crusting all three of its basins as its permit requires." (*Id.*) In an effort to rationalize its falsehood, counsel for Excel Dairy replied that Mr. Steuart had merely observed a "slimely, foamy film" on the basins at New Horizon.⁹ Excel Dairy knows full well that the MPCA interchangeably uses the terms "crusting" and "scum," *i.e.*, a "slimely, foamy film." In an MPCA memorandum dated October 24, 2006 regarding the Excel Dairy and produced in the Marshall County litigation, the MPCA states that "[t]he crust or 'scum' has been used by the previous operators to control air emissions." (Exhibit N at 1.) Moreover, Excel Dairy's own experts acknowledge the odor reducing qualities of a crust or layer of scum on basin #2:

Readings above the scum layer at the water surface of [basin #2] were 17-23 ppb. When the scum layer water [was] disturbed the readings averaged 87 ppb.

(Exhibit I at 29.) Thus, Excel Dairy has made false and misleading representations in effort to justify its refusal to crust or to propagate a scum over basins #2 and #3.

- *Excel Dairy Falsely Stated that Section 4.6 of the Current Permit Constitutes a License from the MPCA to Violate the Ambient Air Quality Standards for An Additional 30 Days.* Citing Section 4.6(C)(1) of its current permit, Excel Dairy has

⁹ *State of Minnesota by Swanson v. The Dairy Dozen - Thief River Falls, LLP*, Marshall Co. Court File No. 45-CV-08-303, Letter from Jack Y. Perry to the Honorable Jeffrey S. Remick (July 22, 2008) at 2.

stated that the “MPCA and Excel Dairy agreed to a further exemption or forbearance period to allow Excel Dairy sufficient time to evaluate and submit an operation and management plan in the event its air emission plan proved deficient.”¹⁰ Section 4.6(C)(1) of the current permit does not provide Excel Dairy with an additional 30-day exemption or any forbearance period. Section 4.6(C)(1) states:

Within 30 days following notification by the MPCA that the facility has the “potential to exceed”¹¹, [Excel Dairy shall] prepare and submit to the Commissioner, for approval, a manure storage system Operation and Management Plan (OMP). The OMP shall describe how the Permittee will manage the manure storage system to assure compliance with the state ambient hydrogen sulfide standards (Minn. R. 7009.0080) during daily operations and during agitation and pump-out (**except during any “agitation and pump-out exemption” period**). The permittee shall implement the OMP upon receiving approval by the Commissioner. Upon approval, the OMP becomes an enforceable part of this permit.

Section 4.6 was drafted in 2007 and provided the MPCA with the right to install CAMs to record H₂S between April 1 and October 31, 2008. (Permit at § 4.6(A - D).) The OMP procedure outlined in section 4.6 was triggered only if the CAMs detected a “potential to exceed” the state ambient hydrogen sulfide standards.” Section 4.6 did not address and had no impact on Excel Dairy’s obligations and the MPCA’s rights in response to the “hundreds of violations” that were actually recorded at the Excel Dairy’s property line between May 2008 and October 2008. (Notice at 2.) In particular, nothing in section 4.6(C)(1) expressly or impliedly authorized Excel Dairy to engage in continuing violations of the ambient air quality standards for any period of time, and nothing in section 4.6(C)(1) evidenced any intent by the MPCA to forego or delay its right to enforce the ambient air quality standards. Excel Dairy’s attempt to construe section 4.6 as a license to continue to violate the ambient air quality standards for an additional 30 days was false and misleading.

Given Excel Dairy’s false and misleading statements, the MPCA should commence proceedings to revoke the Excel Dairy’s permit without reissuance.

The Activities of Excel Dairy Endanger Human Health or the Environment and those Dangers Cannot be Removed by Modification of the Permit

¹⁰*State of Minnesota by Swanson v. The Dairy Dozen - Thief River Falls, LLP*, Marshall Co. Court File No. 45-CV-08-303, Defendant’s Memorandum of Law in Support of its Motion to Strike Plaintiffs’ Improper and Immaterial Complaint Allegations (June 30, 2008) at 6.

¹¹ “‘Potential to exceed’ means a half-hour average value for hydrogen sulfide equal to or greater than 0.030 parts per million (ppm) (i.e., 30 parts per billion) derived from data collected by a method approved in accordance with Minn. R. 7009.0060 for continuous air monitoring; or by a Jerome Meter method set forth in MPCA ‘Air Sampling Strategy of Hydrogen Sulfide Around Animal Feedlots in Minnesota’ (dated January 16, 1998).” (Permit at § 4.6(D)(1).)

Excel Dairy cannot legitimately dispute that its activities pose a danger to human health. The comments submitted by the neighboring residents are the best evidence of the adverse affects that Excel Dairy has had on human health and support the conclusion already reached by the MPCA:

. . . [T]he Facility has violated Minnesota's hydrogen sulfide standards hundreds of times from May 2008 through October 2008. These standards are primary standards. This means that the hydrogen sulfide standards that the Facility is violating are set at a level necessary to protect human health. Neighbors of the Facility have reported being physically sickened by the noxious emissions from the Facility's manure basins on numerous occasions. The neighbors' symptoms included but are not limited to headaches, dizziness, respiratory difficulty, nausea, vomiting, sore throats, and eye irritation. In fact, several of the neighbors have literally been driven from their homes on numerous occasions as a result of emissions from the Facility.

(Notice at 3.) In a letter dated September 19, 2008, the U.S. Agency for Toxic Substances and Disease Registry (ATSDR) and the Minnesota Department of Health (MDH) also stated: "Although many of these effects from acute exposure [to H₂S] are reversible, exposure to high concentrations for even a short period *can lead to long-lasting neurological impacts.*" (Exhibit O at 3 (emphasis added).) In their most recent report dated March 26, 2009, ATSDR and MDH concluded that "[c]oncentrations of H₂S in the community present an unacceptable risk to residents in the area, particularly children and others with compromised respiratory systems" and that "[a]ir emissions from the [Excel] Dairy are a public health hazard." (Exhibit P at 24-25 (original emphasis).)

ATSDR and MDH have also commented on other physical hazards at the Excel Dairy:

There is a safety hazard for adults and children living at the Dairy from unfenced manure lagoons, MDH and ATSDR staff observed a toddler on the Dairy site in July. . . .

(*Id.* at 24.) In addition to children living on the site, eleven children under the age of 18 reportedly live within 1.5 miles of Excel Dairy. (*Id.* at 2.) These basins are not enclosed by fences or obstructed in any way. Any curious child, teenager, or adult (for that matter) could fall into the basins and drown. If the owners and operators of Excel Dairy were truly concerned about protecting human health, they would -- at a minimum -- put a fence around their sewage-filled lagoons. If Excel Dairy is unwilling to take such a simple step, one cannot reasonably expect that Excel Dairy will undertake the substantial modifications called for in the proposed permit.

Moreover, in a memorandum to the Marshall County Court dated June 30, 2008, Excel Dairy articulated a callous indifference to the "alleged" health problems being suffered by the local residents and, in fact, contested the very existence of the health problems:

All of these alleged symptoms relate to time periods during the irrelevant statutory and permit-prescribed exemption period. Moreover, based on the hydrogen sulfide concentrations recorded by the MPCA's CAMs outside of the statutory exemption period, *these physical symptoms simply do not occur*.¹²

In response to the initial health concerns raised by federal and state officials on September 19, 2008, Excel Dairy's experts prepared a document entitled "Comments on ATSDR Exposure Investigation for Excel Dairy," which stated:

Review of the individual health complaints indicates these are non-specific, subjective in nature, and difficult to verify. These types of symptoms are common in the general population [T]he distinction between whether a reported non-specific symptom is truly elevated versus within normal expected background rates is blurred. In addition, interpretation of symptom surveys is difficult due to the influence of recall bias or hypervigilance of symptoms individuals who perceive they have been exposed to something.

(Exhibit Q at § 6.) In other words, Excel Dairy essentially claims that the neighboring residents' reported health issues are imaginary. It is unrealistic to expect that Excel Dairy will do any thing to modify its operations when Excel Dairy refuses to acknowledge the very existence of the health problems that such modifications are intended to remedy.

Only Revocation of the Permit Will Protect the Neighboring Residents and Environment

In my view, a reissued permit will not protect the health and safety of the residents or environment near Excel Dairy. For example:

- *The Proposed Permit May Allow Excel Dairy To Restock the Dairy Before it Covers Basins #2 and #3.* At the MPCA informational hearing held on March 23, 2009, local residents expressed concern that Excel Dairy would never cover basins #2 or #3 and the MPCA would never enforce that condition in the proposed permit. The MPCA Regional Director told the residents that the Excel Dairy would be motivated to comply with the terms of the proposed permit, including the covering of the basins, because Excel Dairy could not restock the dairy until the basins were covered. Section IV of the Proposed Permit states, however:

¹²*State of Minnesota by Swanson v. The Dairy Dozen - Thief River Falls, LLP*, Marshall Co. Court File No. 45-CV-08-303, Defendant's Memorandum of Law in Support of its Motion to Strike Plaintiffs' Improper and Immaterial Complaint Allegations (June 30, 2008) at 9 (underlined emphasis in original, italicized emphasis added). Excel Dairy's June 30, 2008, memorandum also argued that it had resolved the H₂S compliance issue. *Id.* That argument was contrary to the facts. The MPCA recorded multiple exceedances of the H₂S standard through September of 2008. (Exhibit H at ¶ 5.)

Excel Dairy shall not be authorized to restock or otherwise house any animals at the Facility until Excel Dairy has completed each of the requirements in this Schedule of Compliance and has received written notification from the MPCA that restocking is authorized

The Permittee shall install an impermeable cover on Basin #2 and a synthetic geo-textile permeable cover on Basin #3. . . . The covers shall be installed in accordance with the schedule below:

1. Plans and specifications for installation of the impermeable cover on Basin #2 shall be submitted to the MPCA for review and approval **within thirty (30) days of the issuance of this Permit. . . .**
2. Plans and specifications for installation of the synthetic geo-textile cover on Basin #3 shall be submitted to the MPCA for review and approval **within thirty (30) days of the issuance of this Permit. . . .**
3. The cover systems on Basin #2 and Basin #3 shall be installed and fully functional **within one hundred twenty (120) days after Excel Dairy receives written notification from the MPCA that the MPCA has approved the plans and specifications for the covers.**

(Proposed Permit at § IV(A) and (D) (emphasis in the original).) These provisions leave open the question of when restocking can or must be authorized by the MPCA. The MPCA could arguably authorize restocking as soon as Excel Dairy submits plans and specifications for installation of the covers. In the alternative, restocking could be authorized when the MPCA approves the plans and specifications for the installation of the covers. In the final alternative, restocking could be authorized by the MPCA only after the covers are installed and fully functional. Only the latter alternative ensures that the basins are covered before the dairy is restocked. Given Excel Dairy's propensity to take action regardless of whether the action is contrary to the terms of its permit, and Excel Dairy's demonstrated willingness to litigate such ambiguities, the proposed permit offers no assurance to the neighboring residents that the basins will be covered *before* the dairy is restocked.

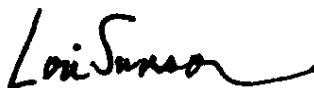
- *Excel Dairy Cannot Clean the Sludge from its Basins Within the 21 Day Exemption Period.* At the MPCA informational hearing held on March 23, 2009, local residents asked the MPCA Senior Engineer how long it would take for the Excel Dairy to clean out its basins given the current amount of sludge in the basins. He estimated that if Excel Dairy worked 7 days per week, 24 hours per day, it may be able to clean out the basins in 30 days. Minnesota's ambient air quality standards, however, allow for no more than a 21-day exemption during cleaning of the basins. MINN. STAT. § 116.0713(c). Although the proposed

permit sets a June 1, 2009, deadline for removal of manure from the basins, Excel Dairy cannot meet that deadline and comply with MINN. STAT. § 116.0713(c). This regulatory conundrum is caused by either Excel Dairy's failure to properly manage and remove manure in 2008 or by the Excel Dairy's stocking of 2,163 animal units in 2008, causing the basins to load more quickly than they should have. Although Excel Dairy is the responsible party, the proposed permit will necessarily impose unwarranted hardship on the residents. Because the proposed permit is designed to fail in the short-term, it offers no hope of a long-term solution.

- *The Proposed Permit's Anticipated Renewal Date in 2010 Will Not Provide Sufficient Opportunity to Assess Excel Dairy's Willingness or Ability to Comply with the Stricter Conditions of the Proposed Permit.* There is substantial concern that it would take Excel Dairy several months to complete all of the tasks required by the proposed permit. For example, with regard to the basin covers, Excel Dairy has 30 days to submit plans and specifications for the installation of the covers, after which the MPCA will review the plans, assuming the plans are approved by the MPCA, Excel Dairy would then have four months (120 days) to install the covers. Excel Dairy needs to apply for renewal six months (180 days) before the proposed permit expires. Thus, Excel Dairy will likely apply for renewal before the dairy is restocked, or before the odor mitigation measures have been tested for a substantial period of time. Even if the dairy was restocked for a month or two before renewal, the ability to manage odor emanating from recently cleaned basins for a couple of months does not evidence its ability to achieve long-term compliance. The proposed permit is deficient because it leaves open the possibility that Excel Dairy could be renewed for a five-year permit based on its ability to maintain compliance while operating a dairy that is devoid of livestock.

For all the reasons set forth above, I strongly encourage the MPCA to commence proceedings to revoke Excel Dairy's permit without reissuance.

Sincerely,



LORI SWANSON
Attorney General

Mr. George Schwint
April 2, 2009
Page 15

cc: Mr. Paul Eger, Chair - MPCA Citizens' Board
MPCA Citizens' Board Members
Ms. Barbara Battiste
Mr. Brian J. Bensen
Dr. Daniel D. Foley
Mr. Dennis Jensen
Ms. Kathy Lohmer
Mr. Donald Schiefelbein
Mr. Chester A. Wilander
Ms. Paige Winebarger

AG: #2403006-vi 