

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

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

- by -

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

**EDWARD GALLAGHER,**

Respondent.

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This administrative enforcement proceeding concerns alleged violations of ECL 17-0803, 6 NYCRR 750-2.1(e), and State Pollutant Discharge Elimination System (SPDES) General Permit for Concentrated Animal Feeding Operations (CAFO) General Permit No. GP-04-02 by respondent Edward Gallagher at his farm located at 2341 Route 315, Deansboro, New York. Staff of the New York State Department of Environmental Conservation (Department or DEC) alleged that respondent failed to implement two of the best management practices (BMPs) required by the comprehensive nutrient management plan (CNMP) for respondent's farm.

Department staff commenced this proceeding by serving respondent with a notice of hearing and complaint dated July 21, 2016. On or about August 15, 2016, respondent served an answer on the Department.

On August 15, 2017, Department staff served respondent with a motion for order without hearing requesting that I issue an order: (i) finding respondent violated the law, regulations, and permit as set forth in the complaint; (ii) directing respondent to implement the BMPs as required in respondent's CNMP; and (iii) imposing a civil penalty of \$48,000 on respondent.

Respondent opposed Department staff's motion for order without hearing stating the BMPs were implemented in July 2017 and claiming the penalty request was not fair (see Response to Notice of Motion for Order without Hearing dated September 12, 2017 at 3-4). Respondent requested dismissal of the complaint.

The matter was assigned to Administrative Law Judge (ALJ) Michael S. Caruso, who by ruling dated October 12, 2017, granted Department staff's motion on the issue of liability against respondent for violations of ECL 17-0803, 6 NYCRR 750-2.1(e), and CAFO General Permit No.

GP-04-02 contained in staff's single cause of action. The ALJ denied staff's motion on the issues of the penalties and remedial relief requested by Department staff and set the matter down for a hearing (see Matter of Gallagher, Ruling of the ALJ, October 12, 2017 [Ruling], at 4-5).

The hearing was held on December 13, 2017 in the Department's Region 6 sub-office in Utica, New York. ALJ Caruso prepared the attached hearing report which I adopt, together with the Ruling and the Findings of Fact in the Ruling, as my decision in this matter, subject to my comments below.

Respondent operates a medium sized CAFO and obtained coverage under CAFO General Permit No. GP-04-02, which required existing CAFOs covered by the General Permit to develop a CNMP by a certified agricultural environmental management planner (see Hearing Report at 3 [Finding of Fact No. 4]). Respondent's certified CNMP was received by the Department on June 28, 2004 (id.). The General Permit also required the CNMP to contain a schedule for BMPs to be fully operational and mandated that medium sized CAFOs were to have all BMPs operational by June 30, 2009 (id. [Finding of Fact No. 5]).

In 2015, as part of an expedited enforcement initiative, Department staff sent notices of violation (NOVs) to 123 medium sized CAFOs that did not implement their BMPs by the required deadline (see Hearing Transcript [Tr.] at 53; see also Hearing Report at 5, 9). The NOVs required that each of those CAFOs provide the Department with a certification that the CAFO's BMPs were fully implemented or, in the alternative, to provide the Department with a compliance schedule describing the BMPs that were still outstanding and the date by which each would be completed (see Hearing Report at 6, 9). The deadline to provide the certification or schedule was December 31, 2015 (id.). For those CAFOs that submitted a schedule of compliance, Department staff sent them an order on consent which incorporated a schedule of compliance dates (see Tr. at 54).

In response to the NOV, respondent submitted a schedule of compliance in which he noted that the two BMPs at issue would "be completed in 2016 if possible, or 2017 at the latest" (see Staff Exhibit E; see also Hearing Report at 4 [Finding of Fact No. 11]). Respondent indicated that he could not sign an order on consent that would require him to have these two BMPs completed by December 31, 2016 (see Hearing Report at 8; see also Affidavit of Lyudmila Green [DEC Junior Environmental Engineer] sworn to June 23, 2017, ¶ 28).

Staff used the Division of Water Technical and Operational Guidance Series (TOGS) 1.4.2, Compliance and Enforcement of SPDES Permits (June 24, 2010) to determine the base penalty. As part of the expedited enforcement initiative, Department staff developed a penalty table intended to treat all noncompliant CAFOs similarly (see Hearing Report at 5-7). Rather than analyzing and applying each individual TOGS 1.4.2 penalty adjustment factor to each CAFO, staff applied a uniform multiplier of 1.0 for culpability, cooperation and history of noncompliance (see id. at 5-6). Staff then used the aforementioned penalty table to apply the unique and other factors component.

At hearing, Department staff explained that the base penalty for "failure to implement the CNMP" was used to establish a base penalty of \$3,000 per event (see Hearing Tr. at 30; see

also Hearing Report at 5). In this matter, staff determined that respondent failed to implement two BMPs required by the CNMP and assessed a base penalty of \$6,000 (\$3,000 for each). Because respondent indicated that he would need two years to implement the BMPs, Department staff multiplied the \$6,000 base penalty times 2 for an adjusted base penalty of \$12,000 (see Hearing Report at 6). Staff doubled the penalty amount to \$24,000 when staff's first offer of settlement expired (id.; see also Hearing Tr. at 35). Staff doubled the penalty again to \$48,000 when formal enforcement was commenced (see Hearing Report at 7; see also Hearing Tr. at 35).

With respect to the increases in the civil penalty that staff recommends above the base penalty, the ALJ identifies several concerns, including the application of multipliers that deviated from TOGS 1.4.2, the date used as the basis for the penalty multiplier, inconsistencies in the explanation of the penalty calculation, and the fact that the table created for the expedited enforcement initiative was not publicly available and not offered into evidence. Based on his review, the ALJ rejected any increase above the base penalty (see Hearing Report at 8).

Furthermore, the ALJ recommended a reduction from the base penalty of \$6,000 to \$5,000 due to several unique factors. These factors included respondent's inability to obtain lending, the economic crisis faced by dairy farmers during the period of time in question, weather events and respondent's significant financial expenditures on farm improvements to ensure future compliance with CAFO regulations (see Hearing Report at 9-10). The ALJ noted that respondent chose to move components of his farm operations that required the implementation of the BMPs and that if he had constructed the BMPs before he moved those operations, he would have incurred the expense of BMP construction and implementation twice (see Hearing Report at 7).

The farm's operation and any environmental impact are also a consideration. In April 2010, Department staff conducted an inspection of respondent's farm and found that the farm was "in general compliance" with the SPDES General Permit for CAFOs" (see Hearing Report at 7). At the hearing in December 2017, a DEC State Police Officer testified that he had not seen, nor had he been contacted by any DEC enforcement staff, regarding any incidents relating to the discharge of pollutants to waterways on the farm (see Hearing Tr. at 133). Certified CAFO Planner Bill Gallinger testified that he had never seen the farm contribute pollutants to waterbodies (see id. at 146-147).<sup>1</sup> In addition, no evidence exists on this record that respondent is a "bad actor."

I concur with the ALJ that staff's calculation of the base penalty was supported and appropriate (see Hearing Report at 8). Based on my review of the record, I also concur with the ALJ that a reduction in the requested penalty of \$48,000 is warranted. The ALJ would reduce the penalty below the base penalty of \$6,000 due to the specific factors he identifies (that is, respondent's inability to obtain lending, the economic crisis faced by dairy farmers during the period of time in question, weather events and respondent's significant financial expenditures on farm improvements to ensure future compliance with CAFO regulations).

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<sup>1</sup> Respondent completed construction of the BMPs prior to the penalty hearing (see Hearing Tr. at 20; see also Hearing Report at 4 [Finding of Fact No. 16]).

I conclude that the factors that the ALJ identified support the position that the civil penalty should not be increased above the base amount of \$6,000. However, I would not consider them as support to reduce the penalty below the base penalty calculated for respondent's failure to timely implement the two BMPs. Based on the record before me, the base penalty of \$6,000 is authorized and appropriate. Respondent is to submit payment of \$6,000 to the Department within sixty (60) days of service of this order upon him.

**NOW, THEREFORE**, having considered this matter and being duly advised, it is **ORDERED** that:

- I. Pursuant to 6 NYCRR 622.12, Department staff's motion for order without hearing is granted on the issue of liability and respondent Edward Gallagher is adjudged to have violated ECL 17-0803, 6 NYCRR 750-2.1(e), and CAFO General Permit No. GP-04-02.
- II. Respondent Edward Gallagher is hereby assessed a civil penalty of six thousand dollars (\$6,000) for the above referenced violations.
- III. Respondent Edward Gallagher is hereby directed to submit the payment of the civil penalty in the amount of six thousand dollars (\$6,000) within sixty (60) days of service of this order on respondent. Payment shall be made by cashier's check, certified check or money order made payable to the "New York State Department of Environmental Conservation" and mailed or hand-delivered to the Department at the following address:  
  

Kenson Jeffrey, Esq.  
Office of General Counsel  
NYSDEC  
625 Broadway, 14th Floor  
Albany, New York 12233-1500
- IV. The provisions, terms and conditions of this order shall bind respondent Edward Gallagher, and his agents, successors and assigns, in any and all capacities.

For the New York State Department  
of Environmental Conservation

By: \_\_\_\_\_/s/\_\_\_\_\_  
Basil Seggos  
Commissioner

Dated: January 31, 2019  
Albany, New York

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

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

- by -

**HEARING REPORT**  
DEC Case No.  
CO6-20160210-04  
Permit ID #NYA001358

**EDWARD GALLAGHER,**

Respondent.

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Appearances of Counsel:

- Thomas Berkman, Deputy Commissioner and General Counsel (Kenson Jeffrey of counsel), for staff of the Department of Environmental Conservation
- Edward Gallagher, respondent pro se

In this administrative enforcement proceeding, New York State Department of Environmental Conservation (DEC or Department) staff charges respondent Edward Gallagher with failing to construct and implement respondent's Comprehensive Nutrient Management Plan (CNMP) practices by June 30, 2009 as required by Concentrated Animal Feeding Operations (CAFO) General Permit No. GP-04-02. Department staff filed a motion for order without hearing addressing the alleged violations and respondent opposed staff's motion.

By ruling, including findings of fact, dated October 12, 2017, which is incorporated herein by reference, I granted Department staff's motion on the issue of liability against Edward Gallagher for the violation of ECL 17-0803, 6 NYCRR 750-2.1(e) and CAFO General Permit No. GP-04-02 (see Matter of Gallagher, Ruling, October 12, 2017 [Ruling], at 4-5). I reserved on the penalty and remedial relief requested by Department staff and scheduled a hearing on those issues. Evidence and testimony regarding the penalty and relief requested were to be presented at the hearing.

Because this matter concerns Department staff's enforcement of the ECL, regulations and permit conditions, the proceedings are governed by 6 NYCRR part 622 - Uniform Enforcement

Hearing Procedures (see 6 NYCRR 622.1[a][1]). Department staff bears the burden of proving the proposed penalty is authorized and appropriate.

## **I. Summary of the Parties' Positions**

### **A. Department Staff**

Prior to calling its first witness, Department staff withdrew staff's request for an order directing respondent to implement the best management practices (BMPs) as required by respondent Gallagher's CNMP (see Transcript of December 13, 2017 Hearing [Tr.] at 20). Staff indicated that staff was satisfied with the proof submitted by respondent that the BMPs required by the CNMP were fully implemented before the hearing (Tr. at 9).

Department staff seeks a civil penalty of \$48,000. Department staff argues the penalty requested is supported by Division of Water Technical and Operational Guidance Series (TOGS) 1.4.2, Compliance and Enforcement of SPDES Permits (June 24, 2010) and the Department's Civil Penalty Policy (DEE-1) (June 20, 1990).

### **B. Respondent**

Respondent argues that the penalty sought by staff is excessive. Respondent alleges that despite his efforts, he was unable to obtain financing for the construction of the BMPs and that low milk prices and weather events contributed to the delay of construction. Respondent also argues that if he had a working relationship with the Department and Department staff came to his farm, he could have shown staff all the work he was doing. If staff had done so, respondent argues he could have demonstrated he was not trying to get around implementing his BMPs, but instead he was trying to balance cash flow to meet the CAFO regulations and keep the farm functioning during years of low milk prices.

## **II. Hearing**

The hearing was held on December 13, 2017 in the Department's Region 6 sub-office, located at 207 Genesee Street, Utica, New York. Staff attorney Kenson Jeffrey appeared on behalf of Department staff and presented two witnesses: Lyudmila Green, Environmental Engineering Technician, DEC Division of Water, and Edward Hampston, Environmental Engineer 3, DEC Division of Water.

Edward Gallagher appeared pro se and presented three witnesses: Scott White, President, Bank of Cooperstown at USNY Bank; Ricardo Grisolini, DEC Environmental Conservation Officer; and Bill Gallinger, CAFO Planner. In addition, Mr. Gallagher testified on his own behalf.

Department staff offered five exhibits at the hearing. Mr. Gallagher offered seven exhibits at the hearing. Each exhibit was received into evidence and is described in the attached exhibit chart. The matter concluded in one day. The transcript of the hearing was received on January 3, 2018.

### **III. Findings of Fact**

1. Respondent Edward Gallagher (respondent) is the owner and operator of Gallagher Farms, LLC (farm) located at 2341 Route 315, Deansboro, New York (see Ruling at 2 [Finding of Fact No. 1]).
2. On September 19, 2002, the Department authorized respondent's CAFO coverage under CAFO General Permit No. GP-99-01 as a medium size CAFO facility (id. [Finding of Fact No. 4]).
3. Respondent's coverage under CAFO General Permit No. GP-99-01 was transferred to CAFO General Permit No. GP-04-02 on July 1, 2004 (id. [Finding of Fact No. 5]).
4. Pursuant to CAFO General Permit No. GP-04-02, each existing CAFO must develop a comprehensive nutrient management plan (CNMP), which is to be certified by a certified agricultural environmental management (AEM) planner by July 1, 2004. The Department acknowledged receipt of respondent's CNMP certification on June 28, 2004 (id. [Findings of Fact Nos. 6 and 7]).
5. CAFO General Permit No. GP-04-02 requires each CNMP to contain a schedule for practices to be fully operational, and mandates, "[f]or Medium CAFOs, the completion schedule shall have all practices operational by June 30, 2009" (id. at 3 [Finding of Fact No. 8]).
6. Respondent did not complete all practices identified in respondent's CNMP by June 30, 2009 (id. [Finding of Fact No. 9]).
7. In particular, respondent's Annual Compliance Reports identified the following CNMP practices to be constructed and implemented:
  - (a) a silage leachate collection system,
  - (b) a vegetated treatment area, and
  - (c) a high flow/low flow collection system (id. [Finding of Fact No. 10]).
8. On June 9, 2015, Department staff sent respondent a notice of violation (NOV) to resolve respondent's failure to complete the implementation of all BMPs required by respondent's CNMP (Testimony of Lyudmila Green [Green Testimony], Tr. at 58; Staff Exhibit E).

9. The NOV required respondent to submit, by December 31, 2015, either a certified statement to the Department that respondent had implemented the BMPs or a detailed compliance schedule describing the BMPs to be completed and a date by which each BMP would be completed (see Staff Exhibit E).
10. The NOV also advised respondent that the submitted compliance schedule may be used as part of an administrative order (see Staff Exhibit E).
11. Respondent provided Department staff with a compliance schedule, dated December 21, 2015, listing the BMPs “to be completed in 2016 if possible, or 2017 at the latest” (see Green Testimony, Tr. at 60; Staff Exhibit E).
12. Dairy farmers have experienced low milk prices since 2014 (see Testimony of Scott White [White Testimony], Tr. at 131).
13. From 2007 to 2012, respondent was unable to obtain financing (see Testimony of Edward Gallagher [Gallagher Testimony], Tr. at 148-150; Gallagher Exhibit 1).
14. In 2010, Department staff inspected respondent’s farm and noted that respondent would be constructing a new bunk silo across the street from the main farmstead and would be installing a new leachate collection system for the new bunk silo (see Testimony of Edward Hampston [Hampston Testimony], Tr. at 84; Gallagher Exhibit 6).
15. Respondent spent in excess of one million dollars from April 2013 to July 2017 developing and constructing a new manure storage lagoon with eight to nine months of storage capacity, a new bunk silo, and a new commodity storage barn, as well as the BMPs required by his CNMP that serve the new bunk silo (see Gallagher Testimony, Tr. at 154-157; Gallagher Exhibits 2, 3 and 4).
16. Respondent completed construction of the BMPs in July 2017 (see Gallagher Testimony, Tr. at 155; Gallagher Exhibit 4).

#### **IV. Discussion**

As noted above, Department staff acknowledged that Mr. Gallagher had fully implemented the BMPs required by his CNMP, and staff withdrew its request that respondent be ordered to do so. Accordingly, this discussion is limited to staff’s request that respondent be assessed a civil penalty of forty-eight thousand dollars (\$48,000). ECL 71-1929, which is applicable here, provides, in part, that “[a] person who violates any of the provisions of, or who fails to perform any duty imposed by titles 1 through 11 inclusive and title 19 of article 17, or the rules, regulations, orders or determinations of the commissioner promulgated thereto or the terms of any permit issued thereunder, shall be liable to a penalty of not to exceed thirty-seven thousand five hundred dollars per day for each violation” (ECL 71-1929[1]).

During the course of this proceeding, Department staff provided two different justifications for staff's penalty calculation. The first was provided in staff's motion for order without hearing, referenced in part in my October 12, 2017 ruling (see Ruling at 4), and the second at hearing. Both explanations apply TOGS 1.4.2, use the same base penalty and result in the same penalty request. The similarity ends there. Because the penalty calculation provided at hearing was subject to cross-examination, that calculation will be the subject of this discussion. It is, however, noted that staff's justification at hearing for the penalty request differs considerably from that set forth in staff's motion for order without hearing.

According to Department staff, staff sent NOV's to 123 CAFOs in 2015 as part of an expedited enforcement initiative (see Green Testimony, Tr. at 32). The NOV sent to respondent was part of this initiative. In support of the expedited enforcement initiative, Department staff developed guidance and a penalty table to treat all the CAFOs the same and apply the same penalty multipliers for all the noncompliant CAFOs (id.). At hearing, Department staff based its justification for the \$48,000 requested penalty on the guidance and penalty table developed as part of the expedited enforcement initiative.

#### A. Department Staff's Penalty Calculation

##### Base Penalty

TOGS 1.4.2 Appendix C provides the base penalty amounts to be used in settlement negotiations. Table E applies to base penalties for CAFO General Permit violations (see Staff Exhibit B, TOGS 1.4.2, at 39). At hearing, Department staff explained that the base penalty for "[f]ailure to implement the CNMP" was used to establish a base penalty of \$3,000 per event (see Green Testimony, Tr. at 30). Staff then used two BMPs that had not been implemented as separate events of failure to implement the CNMP and arrived at a base penalty of \$6,000 (see id. at 30 and 36).

##### Penalty Adjustment Factors

Appendix D of TOGS 1.4.2 sets forth the penalty adjustment factors to be considered by staff (see Staff Exhibit B, TOGS 1.4.2, at 49). The factors are culpability, cooperation, history of noncompliance, and unique or other factors. Each of the factors sets forth multiplier ranges for purposes of adjusting the base penalty.

##### Culpability

According to TOGS 1.4.2, when considering culpability, Department staff considers the intent, recklessness or negligence associated with the violation. The multipliers range from 1.0 when the violation is limited or accidental to 1.5 for reckless violations (see Staff Exhibit B, TOGS 1.4.2, Appendix D). Staff assessed a multiplier of 1.0 in this matter to treat respondent similar to other medium sized CAFO enforcements being enforced through the expedited enforcement initiative (Green Testimony, Tr. at 32).

### Cooperation

When considering a violator's cooperation, Department staff views the overall cooperation of the violator in remedying the violation. The multipliers range from 0.5 for excellent cooperation to 1.25 for an uncooperative violator (see Staff Exhibit B, TOGS 1.4.2, Appendix D). Staff assessed a multiplier of 1 for cooperation. (Green Testimony, Tr. at 32).

### History of Noncompliance

Here, Department staff considers the history of violations and any previous enforcement. TOGS 1.4.2 provides, "[u]nless the violations are the result of factors beyond the control of the permittee, the penalties should be more severe with subsequent enforcement" (see Staff Exhibit B, TOGS 1.4.2, Appendix D). The multipliers range from 1.0 for no previous violations to 1.5 for previous violations of a similar nature at the same site within three years and at other sites under respondent's control within the last three years (*id.*). Staff assessed a multiplier of 1 for respondent's history of noncompliance based on policy and the expedited enforcement initiative (Green Testimony, Tr. at 33).

### Unique or Other Factors

TOGS 1.4.2 provides that "unique or other factors may be appropriate to consider in the final penalty assessment to promote fairness and effectively deter violations. These factors are determined by the best professional judgement of Department staff. This multiplier can range from 0.75 to 1.25" (see Staff Exhibit B, TOGS 1.4.2, Appendix D). The ability of respondent to pay penalties or implement corrective actions may also be considered (*id.*).

Department staff testified that as part of the expedited enforcement initiative, the Division of Water used the unique or other factors provision of TOGS 1.4.2 to develop a penalty table based on the duration of noncompliance after December 31, 2015 for each BMP (Green Testimony, Tr. at 33). December 31, 2015, was the deadline for the 123 CAFOs which were sent notices of violation in June 2015 to respond to the notice of violation with a certification that the farm had implemented all its BMPs or submit a schedule for when each BMP would be implemented. The penalty table described by staff created a BMP implementation timeframe after December 31, 2015. If the permitted CAFO required 6 months to implement the BMP, staff assigned a multiplier of 1. If the CAFO needed between 6 months and one year, the multiplier was 1.25. If the CAFO needed between one year and two years, staff applied a multiplier of 2. If it was going to take the CAFO more than two years, staff would add 1 to the previous multiplier for each additional year (*id.* at 33-34).

In this matter, Department staff applied a multiplier of 2 to the base penalty because respondent indicated he would need two years to implement both BMPs (*id.* at 34, Staff Exhibit E). As a result, Department staff multiplied the \$6,000 base penalty times 2 for an adjusted base penalty of \$12,000 (Green Testimony, Tr. at 34).

When staff's first offer of settlement expired, staff recommended doubling the penalty amount to \$24,000 (*id.* at 35). When formal enforcement proceedings were commenced,

program staff recommended doubling the penalty to the \$48,000 requested in the complaint (id. at 34-35). According to staff, an economic benefit component was not included as part of the penalty calculation (id.). Staff testified that if the penalty was calculated as it normally would, and not through the expedited enforcement initiative, the penalty would have been \$84,800, which included a \$20,000 economic benefit component (id. at 36-39).

#### B. Respondent's Position

Farmers in New York, and across the nation, have been facing low milk prices for the last three years (Testimony of Scott White, Tr. at 131). Dairy farmers may even be selling their milk at a price that is lower than the cost of production (id.).

In my October 12, 2017 ruling, I noted respondent's arguments regarding his inability to finance his BMPs due to financial hardship (see Ruling at 4). At hearing, respondent provided evidence and testimony in support of his argument that he was unable to obtain financing from 2007 to 2012 (Gallagher Testimony, Tr. at 148-150; Gallagher Exhibit 1). Once financing was available, respondent admitted he may have made business decisions that delayed the construction of the BMPs he was required to implement (Gallagher Testimony, Tr. at 151; Gallagher Exhibits 2 and 3). Mr. Gallagher testified that he never intended to avoid or delay compliance, but chose to move components of his farm operations that required the implementation of BMPs (Gallagher Testimony, Tr. at 157). In short, if he had constructed the BMPs before he moved those operations, he would have incurred the expense of BMP construction and implementation twice. When milk prices dropped in 2015, and remained low in 2016 and 2017, it became difficult to fund the completion of the BMPs and associated capital improvements to the farm (id.). Overall Mr. Gallagher feels that if the Department had a better working relationship with him, as a farmer, these issues would have been resolved without the need for formal enforcement.

Respondent also argues that in April 2010, Department staff conducted a comprehensive inspection of respondent's farm and found the farm was in "general compliance with the conditions and requirements of the SPDES General Permit for CAFOs" (see Gallagher Exhibit 6). During the inspection, staff was advised and the inspection report notes that respondent planned to move the bunk silo across the street where a new leachate collection system would be implemented (id.). Staff also noted that no significant water quality concerns had been observed at the time (id.).

#### C. Discussion

Staff's penalty calculation raises several issues. First, and most importantly, is that the table created for the expedited enforcement initiative is not publicly available, was not offered into evidence and deviates from TOGS 1.4.2. Appendix D of TOGS 1.4.2 provides that for unique or other factors the multiplier can range from 0.75 to 1.25. The table used by staff, however, is applying multipliers of 2 and higher.

Secondly, the table is using a prospective date for attaining compliance as a basis for the penalty multiplier. That may be acceptable when the resulting penalty amount is being used in settlement negotiations or if the prospective compliance date has passed when the Department

commences its enforcement. Here, however, staff served respondent Gallagher with the notice of hearing and complaint on July 21, 2016, which according to staff's testimony included a penalty calculation based on the violations continuing until December 31, 2017. I am not familiar with any orders of the Commissioner assessing penalties for prospective violations.<sup>1</sup>

I also find it problematic that the explanation of the penalty calculation in Department staff's motion for order without hearing differs considerably from the testimony of staff. Staff did not address this issue at hearing. Such practice, however, raises serious questions. For example, how is a respondent to prepare for a hearing on the penalty when the explanation given before the hearing is different from that provided at the hearing? How is a respondent to apply TOGS 1.4.2 in cross-examining staff witnesses, when staff has deviated from the TOGS in an unpublished guidance and penalty table developed within the Division of Water's expedited enforcement initiative? Additionally, staff's explanation of how much higher the penalty would be (\$84,800) if it was calculated as a normal enforcement case, rather than the expedited enforcement initiative, is incomplete and does not add up (see Green Testimony, Tr. at 35-39).

As discussed above, Department staff assigned a multiplier of 2 to the base penalty in reliance upon respondent advising staff that he would have his BMPs fully implemented in 2016, or 2017 at the latest, therefore, taking two years to come into compliance. According to staff, staff incorporated the schedules of compliance provided by the noncompliant CAFOs, and incorporated those dates in orders on consent and compliance schedules (Green Testimony, Tr. at 54). Staff testified that if the date was sometime in the end of a year, staff chose December 31 of that year for the compliance deadline (*id.* at 55). Even though respondent advised staff that his BMPs would be "completed in 2016 if possible, or 2017 at the latest" (see Staff Exhibit E), staff chose December 31, 2016 as the deadline for compliance in the order on consent provided to respondent (Green Testimony, Tr. at 60). When questioned why December 31, 2017, was not used in the consent order, staff explained that "it was or 2017 at the latest. And I didn't have a specific date for that year" (*id.* at 61). It is clear that respondent's statement means the BMPs would be completed in 2016 or in 2017. To read his schedule of compliance to mean "by" 2017 would be redundant of "in 2016". This is relevant to this discussion because staff doubled the penalty based on respondent's failure to settle the matter by order on consent and respondent advised the undersigned by correspondence dated October 12, 2017, that, in 2016, he could not sign an order on consent that required him to have the BMPs completed by December 31, 2016.

Staff's base penalty calculation of \$6,000 is supported and appropriate. For the reasons stated above, I cannot apply staff's multiplier of 2 based upon the application of the expedited enforcement initiative penalty table, which establishes a multiplier based upon future noncompliance to arrive at an adjusted base penalty of \$12,000. Moreover, staff did not express any rational basis for simply doubling staff's adjusted base penalty of \$12,000 to \$24,000 and then \$48,000. Although the requested penalty is a small fraction of the maximum penalty allowed by law, nothing in this record supports increasing the base penalty eight fold over the course of seven months to arrive at the requested penalty. The Civil Penalty Policy's directive that penalties in adjudicated matters "must, on the average and consistent with consideration of

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<sup>1</sup> Suspended penalties are based on past violations, whereas stipulated penalties, used in orders on consent, are penalties for future violations of the terms of an order (see Matter of Corona Heights Trading, Inc., Order of the Commissioner, February 20, 2014, at 4).

fairness, be significantly higher than the penalty amounts which DEC accepts in consent orders which are entered into voluntarily by respondents” does not absolve staff from providing a rational basis for the penalty calculation. The consideration of fairness requires more than the simple doubling of penalties, it requires a balancing of what is needed to deter recidivism by the respondent and similar violations by other members of the regulated community with what would be unfair to those who voluntarily comply with the law. In an adjudicated matter, fairness also requires a review of the entire record before the ALJ.

As part of the expedited enforcement initiative developed by staff, an NOV was issued in 2015 that provided the 123 CAFOs a deadline of December 31, 2015 to certify that the CAFO was in compliance with its CNMP. If the CAFO could not certify that it had implemented all the BMPS required by its CNMP, then the CAFO needed to provide a compliance schedule by December 31, 2015 that would be incorporated into an order on consent, which would include penalties for not meeting the December 31, 2015 deadline. In effect, Department staff exercised its enforcement discretion in order to expedite compliance and ignored the fact that the violations for many, if not most, of the CAFOs dated back to June 30, 2009.<sup>2</sup> Because the duration of the violation is typically calculated as the period between the commencement of the violation and the service of the notice of hearing and complaint, I consider the length of time from the December 31, 2015 deadline to respond to the NOV (essentially a compliance date created by the expedited enforcement initiative) to the date of service of the notice of hearing and complaint, July 21, 2016 (203 days) for the purpose of determining an appropriate penalty.<sup>3</sup>

To arrive at an appropriate penalty based upon the facts in this matter, I adopt the penalty adjustment factors of TOGS 1.4.2 used by Department staff on the first three adjustment factors pursuant to staff’s expedited enforcement initiative. For culpability, cooperation and history of noncompliance I apply staff’s multiplier of 1.00 for each. Although not discussed by staff, for environmental significance I also use a multiplier of 1.00.

Lastly, I look at unique or other factors. For the reasons stated above, I do not use Department staff’s expedited enforcement initiative penalty table. I do, however review the record for aggravating or mitigating factors that may be the basis for adjusting the base penalty. Respondent spent in the neighborhood of one million dollars over the course of four and a half years developing and constructing a new manure storage lagoon with more than six-month capacity, a new bunk silo, and a new commodity storage barn, as well as the BMPs required by his CNMP that serve the new bunk silo.

I also consider the fact that three years of low milk prices affected respondent’s ability to implement the BMPs. Different from most businesses, dairy producers cannot pass increased costs of production, including the cost of complying with federal, state and local laws, along to the consumer. Farmers cannot increase the price at which they sell their milk because the

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<sup>2</sup> When staff described what the maximum penalty would be in this matter, part of that calculation included one BMP that was to be completed by June 30, 2009. Staff used July 1, 2009 as the start of the violation and the date of the notice of hearing and complaint, July 21, 2016 as the end date (see Green Testimony, Tr. at 27). Combined with a second BMP that staff used December 28, 2015 as the start date (date that staff received Gallagher’s response to the NOV) to July 21, 2016, the combined total maximum penalty computed by staff is \$104,400,000.

<sup>3</sup> The maximum penalty for two BMPS that were not implemented would be \$15,225,000 (2 x \$37,500 x 203).

wholesale milk prices are set by a combination of markets and regulations (see e.g. 7 CFR parts 1000 and 1001). Testimony demonstrates that respondent, due, in part, to three years of low milk prices, borrowed money from his bank to pay his school taxes in September 2017 (see White Testimony, Tr. at 129-130). Weather events also caused some delay implementing the BMPs (see Testimony of Ricardo Grisolini, Tr. at 137; Gallagher Testimony, Tr. at 155). Due to the totality of the circumstances in this matter, I recommend reducing the base penalty to \$5,000. Accordingly, I find an adjusted base penalty of \$5,000 is supported and appropriate.

TOGS 1.4.2 provides that the total penalty should include recovery of the economic benefit that a respondent gained through delayed or avoided compliance (see Staff Exhibit B, TOGS 1.4.2, at 32). Because I am determining the appropriate penalty based upon 203 days of violation and no showing what the economic benefit may have been during that period was made on this record, I do not apply an economic benefit component to the penalty calculation in this matter.

#### D. Conclusion

For the aforementioned reasons, I find a total penalty of \$5,000 is supported and appropriate.

### V. Conclusion of Law

By failing to implement the BMPs required by respondent's CNMP by June 30, 2009 respondent violated ECL 17-0803, 6 NYCRR 750-2.1(e) and CAFO General Permit No. GP-04-02.

### VI. Recommendation

Based upon the foregoing, I recommend the Commissioner issue an order:

A. Granting Department staff's January 31, 2017 motion for order without hearing pursuant to 6 NYCRR 622.12, and holding respondent Edward Gallagher liable for violating ECL 17-0803, 6 NYCRR 750-2.1(e) and CAFO General Permit No. GP-04-02.

B. Directing respondent Edward Gallagher to pay a civil penalty of five thousand dollars (\$5,000) for the above referenced violations.

C. Directing respondent Edward Gallagher to submit payment of the five thousand dollars (\$5,000) by certified check payable to NYSDEC within sixty (60) days of service of the Commissioner's order on respondent to the following:

Kenson Jeffrey, Esq.  
Office of General Counsel  
NYSDEC  
625 Broadway, 14th Floor  
Albany, New York 12233-1500.

D. Directing such other relief as the Commissioner may deem appropriate.

\_\_\_\_\_/s/\_\_\_\_\_  
Michael S. Caruso  
Administrative Law Judge

Dated: February 9, 2018  
Albany, New York

**EXHIBIT CHART – HEARING**

*Matter of Edward Gallagher*

December 13, 2017

CO6-20160210-04

Permit ID #NYA001358

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Notes
A	DEE-1: Civil Penalty Policy (June 20, 1990)	✓	✓	Department Staff	
B	Division of Water Technical and Operational Guidance Series (TOGS) 1.4.2, Compliance and Enforcement of State Pollutant Discharge Elimination System (SPDES) Permits (TOGS 1.4.2) (June 24, 2010)	✓	✓	Department Staff	
C	Concentrated Animal Feeding Operation (CAFO) Annual Compliance Reports from Edward Gallagher for 2004, 2005, 2007 - 2016	✓	✓	Department Staff	
D	State Pollutant Discharge Elimination System (SPDES) General Permit for Concentrated Animal Feeding Operations (CAFOs), General Permit No. GP-04-02	✓	✓	Department Staff	
E	June 9, 2015 Notice of Violation addressed to Edward Gallagher and December 21, 2015 Response from Edward Gallagher (pages 1 and 4 of Exhibit H to staff's motion for order without hearing)	✓	✓	Department Staff	

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Notes
1	Correspondence from NBT Bank to Edward Gallagher, dated November 27, 2017; Correspondence from NBT Bank to Edward Gallagher, dated April 20, 2011; Correspondence from USDA Farm Service Agency to Edward Gallagher, dated April 22, 2011; Gallagher v Gallagher, Supreme Court Oneida County, first page of Court disposition.	✓	✓	Respondent	
2	<p style="text-align: center;">Photos (14)</p> Photos 1, 2 & 3 – Manure Storage Lagoon construction (October – November 2013) Photos 4 & 5 – Low Flow/High Flow Pit (2017) Photo 6 – Commodity Barn and Feed Loading Area (2017) Photo 7 – Commodity Barn, Feed Loading Building, Etc. (2017) Photos 8 & 9 - Construction Commodity Barn (2014) Photos 10 & 11 – Beginning of Bunk Silo (2014) Photo 12 - Utilities to Commodity Barn (2014) Photos 13 & 14 – Bunk Silo (2014)	✓	✓	Respondent	
3	Photos Satellite (3) of Gallagher Farm– Google Earth Photo 1 – 2014, showing old location of bunk silo Photo 2 – 2014, showing new location of bunk silo Photo 3 – 2017, showing new bunk silo and removal of old bunk silo	✓	✓	Respondent	
4	Spreadsheets of Costs for 2013, 2014, 2015, 2016 and 2017	✓	✓	Respondent	

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Notes
5	Correspondence from Douglas Ashline (DEC) to Gallagher Farms, LLC, dated September 11, 2017	✓	✓	Respondent	
6	Correspondence from David E. Marcisofsky to Edward Gallagher, dated May 10, 2010, with April 27, 2010 CAFO Facility Inspection Report attached.	✓	✓	Respondent	
7	Correspondence from Richard Ball (Commissioner NYS Dept. of Ag & Markets) and Basil Seggos (Commissioner NYS DEC) to New York farmers, undated, re: Clean Water Infrastructure Act grant program for CAFOs	✓	✓	Respondent	