

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA POLLUTION CONTROL AGENCY

In the Matter of The Dairy Dozen –  
Thief River Falls, LLP d/b/a Excel Dairy

**FINDINGS OF FACT,  
CONCLUSIONS AND  
RECOMMENDATION**

A contested case hearing was ordered in this matter on behalf of the Minnesota Pollution Control Agency (“MPCA”) on March 12, 2010. A Notice and Order for Prehearing Conference was issued by the Minnesota Pollution Control Agency on May 10, 2010.

Robert B. Roche, Assistant Attorney General, appeared on behalf of the Minnesota Pollution Control Agency Staff. Nancy Quattelbaum Burke of the law firm of Gray, Plant, Mooty entered a notice of appearance on behalf of AgStar Financial Services and its affiliates. Jack Perry of the law firm of Briggs and Morgan entered a notice of appearance on behalf of The Dairy Dozen – Thief River Falls, LLP d/b/a Excel Dairy. Mr. Perry filed a notice of withdrawal on June 15, 2010 and there has been no subsequent notice of appearance on behalf of The Dairy Dozen – Thief River Falls, LLP d/b/a Excel Dairy. On September 7, 2010, the MPCA staff filed a Motion for Default. Proposed Findings of Fact, Conclusions and Recommendation were filed on November 1, 2010. The Hearing record closed on that date.

**STATEMENT OF ISSUES**

Under Minn. Stat. § 115.076, the MPCA may deny reissuance of a feedlot permit based on the following factors:

- (i) the experience of the permit applicant in constructing or opening commercial waste facilities or animal feedlot facilities;
- (ii) the expertise of the permit applicant;
- (iii) the past record of the applicant in operating commercial waste facilities or animal feedlot facilities in Minnesota and other states;
- (iv) any criminal convictions of the permit applicant in state or federal court during the past five years that bear on the likelihood that permit applicant will operate the facility in conformance with the

applicable requirements of this chapter and chapters 114C and 116; and

- (v) in the case of a corporation or business entity, any criminal convictions in state of federal court during the past five years of any of the permit applicant's officers, partners or facility managers that bear on the likelihood that the facility will be operated in conformance with the applicable requirements of this chapter and chapters 114C and 116:

Applying the above-referenced factors, the issue in this proceeding is whether there are facts upon which the Agency may make a determination under Minn. Stat. § 115.076 to deny reissuance of Excel Dairy's feedlot permit. Specifically, the issues are whether there are facts sufficient for the Agency to determine that:

1. The permit applicant does not possess sufficient expertise and competence to operate the feedlot facility in conformance with applicable requirements?
2. Circumstances exist that demonstrate that the permit applicant may not operate the feedlot facility in conformance with applicable statutory, rule and permit requirements?

Based on the proceedings herein, the undersigned Administrative Law Judge (ALJ) makes the following:

### **FINDINGS OF FACT**

1. On March 12, 2010, the MPCA granted Excel Dairy's request for a contested case hearing on the MPCA's proposed denial of reissuance of Excel Dairy's feedlot permit.
2. On May 7, 2010, the MPCA issued a Notice and Order for Prehearing Conference in this matter. The Notice and Order for Prehearing Conference identified the allegations be addressed in this contested case hearing as follows:

Excel Dairy has applied to the MPCA for reissuance of the company's National Pollutant Discharge Elimination System/State Disposal System ("NPDES/SDS") Permit for the company's feedlot facility in Marshall County, Minnesota. The applicant has a history of non-compliance with Minnesota rules, statutes, and permit conditions with respect to the operation of its feedlot facility in Marshall County, Minnesota. The applicant has a history of modifying feedlot facilities without authorization from the MPCA, allowing discharges to waters of the state, creating a public health threat to nearby residents by violating state air quality standards, and failing to comply with the Permit and Administrative Order requirements. The MPCA Commissioner has made a preliminary determination to deny reissuance of Excel Dairy's NPDES/SDS Permit for the Marshall County feedlot based in part on the authority of the Agency

under Minn. Stat. § 115.076. Other authorities that may be invoked or determinations that may be made by the Agency with respect to denial of the permit are not at issue in this proceeding. This proceeding is solely for the purpose of receiving and considering evidence concerning the factors provided in Minn. Stat. § 115.076, subd. 1(b) which may form the basis for the Agency's determination to deny reissuance of the permit under Section 115.076. Further detailed facts concerning historical noncompliance by Excel Dairy with its MPCA feedlot permit, as well as noncompliance at seven other dairy facilities associated with this permit applicant, are contained in the attached MPCA "Fact sheet and Public Notice of Intent to Deny the Application for Reissuance of National Pollutant Discharge Elimination System (NPDES)/State Disposal System (SDS) Permit MN0068594."

3. The Notice and Order for Prehearing Conference identified the issues to be addressed in this contested case hearing as follows:

The MPCA Commissioner has made a preliminary determination under Minn. Stat. § 115.076 to deny reissuance of Excel Dairy's NPDES/SDS Permit for its feedlot facility in Marshall County, Minnesota.

Under Section 115.076, subd. 1(b), the Agency may consider the following factors in making such a determination:

- (i) the experience of the permit applicant in constructing or operating commercial waste facilities or animal feedlot facilities;
- (ii) the expertise of the permit applicant;
- (iii) the past record of the permit applicant in operating commercial waste facilities or animal feedlot facilities in Minnesota and other states;
- (iv) any criminal convictions of the permit applicant in state or federal court during the past five years that bear on the likelihood that the permit applicant will operate the facility in conformance with the applicable requirements of this chapter and chapters 114C and 116; and
- (v) in the case of a corporation or business entity, any criminal convictions in state or federal court during the past five years of any of the permit applicant's officers, partners, or facility managers that bear on the likelihood that the facility will be in conformance with the applicable requirements of this chapter and chapters 114C and 116;

Applying the above-referenced factors, the issue in this proceeding is whether there are facts upon which the Agency may make a determination under Minn. Stat. §

115.076 to deny reissuance of Excel Dairy's permit. Specifically, the issues are whether there are facts sufficient for the Agency to determine that:

1. The permit applicant does not possess sufficient expertise and competence to operate the feedlot facility in conformance with applicable requirements?
2. Circumstances exist that demonstrate that the permit applicant may not operate feedlot facility in conformance with applicable statutory, rule and permit requirements?

4. On May 24, 2010, the law firm of Briggs and Morgan filed a Notice of Appearance on behalf of The Dairy Dozen – Thief River Falls, LLP d/b/a Excel Dairy (hereafter "Excel Dairy"). On June 15, 2010, the law firm of Briggs and Morgan filed a Notice of Withdrawal as counsel for Excel Dairy. There has been no new Notice of Appearance filed on behalf of Excel Dairy, and no effort by Excel Dairy to prosecute this contested case hearing.

5. On June 3, 2010, Excel Dairy voluntarily converted a previously – filed Chapter 11 bankruptcy proceeding to a Chapter 7 bankruptcy petition. Gene W. Doeling has been appointed the trustee in bankruptcy. Mr. Doeling has indicated that he does not intend to prosecute the contested case hearing on behalf of the company.

6. On August 26, 2010, the MPCA Staff filed a Motion for an Order of Default in this matter on the grounds that Excel Dairy had not taken reasonable steps to prosecute this contested case hearing. The MPCA Staff properly served its Motion for an Order of Default on the other parties to the contested case hearing.

7. No party has objected or otherwise responded to the MPCA's Motion for an Order of Default.

Based on the Findings of Fact, the Administrative Law Judge makes the following:

### **CONCLUSIONS**

1. The ALJ and the MPCA are authorized to consider the allegations and issues identified above pursuant to Minn. Stat. §§ 14.50 and 115.076, subd. 5.

2. The MPCA properly notified Excel Dairy of the allegations and issues to be addressed in this proceeding in the written Notice and Order for Prehearing Conference dated May 7, 2010. This matter is therefore properly before the MPCA and the ALJ.

3. The MPCA Staff's Motion for Order of Default is unopposed.

4. Excel Dairy is in default as a result of its failure to take reasonable steps to prosecute this contested case hearing.

5. Minn. R. 1400.6000 provides that a contested case may be decided adversely to a party who defaults. Upon default the allegations and claims set forth in the original notice and order initiating the contested case hearing may be taken as true or deemed proved without further evidence.

6. The allegations contained in the Notice and Order for Prehearing Conference are deemed proved and taken as true.

7. The facts set forth in the Notice and Order for Prehearing Conference provide a basis for the MPCA to deny Excel Dairy's request for reissuance of its feedlot permit pursuant to Minn. Stat. § 115.076.

Based on the Conclusions, the Administrative Law Judge makes the following:

**RECOMMENDATION**

**IT IS RECOMMENDED** that the MPCA **DENY** Excel Dairy's request for reissuance of its feedlot permit.

Dated: November 10th, 2010

/s/ Richard C. Luis  
RICHARD C. LUIS  
Administrative Law Judge

Reported: Default

**NOTICE**

This Report is a recommendation, not a final decision. The Minnesota Pollution Control Agency will make the final decision after a review of the record. The Minnesota Pollution Control Agency may adopt, reject or modify these Findings of Fact, Conclusions, and Recommendation. Under Minn. Stat. § 14.61, the final decision of the Agency shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the MPCA. Parties should contact Paul Eger, Commissioner, Minnesota Pollution Control Agency 520 Lafayette Road North, St. Paul, MN 55155 to file exceptions or present argument regarding this report.

If the Agency fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to the report and the presentation of argument to the Agency, or on the expiration of the deadline for doing so. The Agency must notify the parties and the Administrative Law Judge of the date on which the record closes.

Under Minn. Stat. § 14.62, subd. 1, the Agency is required to serve its final decision on each party and the Administrative Law Judge by first class mail or as otherwise provided by law.