

**STATE OF MICHIGAN
DEPARTMENT OF ENVIRONMENTAL QUALITY
WATER RESOURCES DIVISION**

In the matter of:

ACO-000201
Date Entered: 12-11-2013

Autumn Vista Dairy, LLC
1060 West Stoney Corners Road
McBain, Michigan 49657

ADMINISTRATIVE CONSENT ORDER

This document results from allegations by the Department of Environmental Quality (DEQ), Water Resources Division (WRD), that Autumn Vista Dairy, LLC (Autumn Vista) owns and operates a large concentrated animal feeding operation (CAFO) located at 1060 West Stoney Corners Road, McBain, Michigan 49657 (Facility), and is currently in violation of Part 31, Water Resources Protection, of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended (NREPA), MCL 324.3101 *et seq.* and the administrative rules promulgated thereunder. Specifically, the DEQ alleges that Autumn Vista has failed to demonstrate that the waste storage structure(s) at the Facility meet the Natural Resources Conservation Service Conservation Practice Standard No. 313, Waste Storage Facility (NRCS 313), or the environmental performance equivalent to NRCS 313 through the submittal of an evaluation conducted by a licensed professional engineer as required by the National Pollutant Discharge Elimination System (NPDES) Permit No. MIG019000 issued by the WRD to Autumn Vista for the Facility. The violation of this permit is a violation of state laws set forth in detail within Section I, below. Autumn Vista is a person, as defined by Section 301 of the NREPA, and is registered with the Michigan Department of Licensing and Regulatory Affairs as able to conduct business in the State of Michigan under Identification No. B1578P. Autumn Vista and the DEQ agree to resolve the violations set forth herein through entry of this Administrative Consent Order (Consent Order).

I. STIPULATIONS

Autumn Vista and the DEQ stipulate as follows:

- 1.1 The NREPA, MCL 324.101 *et seq.*, is an act that controls pollution to protect the environment and natural resources in the state.
- 1.2 Pollution Control, Part 31, Water Resources Protection, of the NREPA (Part 31), MCL 324.3101 *et seq.*, and the rules promulgated pursuant thereto, provides for the protection, conservation, and the control of pollution of the water resources of the state.
- 1.3 Section 3106 of Part 31, MCL 324.3106, states that, “[t]he department shall issue permits that will assure compliance with state standards to regulate municipal, industrial, and commercial discharges or storage of any substance that may affect the quality of the waters of the state.”
- 1.4 A large CAFO means 700 or more mature dairy cows; or 1,000 or more cattle other than mature dairy cows; or 2,500 or more swine weighing 55 pounds or more; or 10,000 or more swine weighing less than 55 pounds, 2006 ACS, R 323.2103(g).
- 1.5 All large CAFOs in the state are required to obtain an NPDES permit. Certain large CAFOs are afforded the opportunity to operate under a general permit (MIG019000), as is the case for Autumn Vista. A Certificate of Coverage (COC) is a facility-specific certificate issued to facilities operating under an NPDES General Permit.
- 1.6 Autumn Vista was issued COC No. MIG010116 on May 4, 2012, providing coverage under MIG019000. That COC states, “On or before November 30,

2012 all large CAFO waste storage structures at the Autumn Vista Dairy facility shall be constructed in accordance with NRCS standards, set forth in Conservation Practice Standard No. 313, Waste Storage Facility, dated June 2003.”

- 1.7 Specifically, the failure to demonstrate construction to NRCS 313 or the environmental performance equivalent is a violation of Part I, Section A.4.a.2b “Structural Design” of NPDES Permit No. MIG019000. The above-referenced permit condition states, in part, at (C) Existing Storage Structures at Previously-Permitted CAFOs:

“CAFOs previously permitted under General Permit No. MIG019000, issued November 2005, shall comply with the requirements for storage structures as contained in that permit, including NRCS 313 2003 and any compliance dates set forth in the previously-issued COC, unless the Department modified the compliance dates in the reissued COC. Submittals shall be as follows:

ii) For demonstrations of environmental performance equivalent to NRCS 313 2003 submit the demonstration as accomplished through an evaluation by a professional engineer to the Department, on a form provided by the Department.”

- 1.8 From 2008 to the present time, WRD staff has provided guidance on the waste storage structure evaluation requirements during on-site inspections and in written communications.
- 1.9 Autumn Vista did not submit all of the required equivalency evaluations of the Facility’s waste storage structure(s) to the DEQ by the November 30, 2012, deadline.

- 1.10 On January 8, 2012, the WRD issued Autumn Vista a Violation Notice (VN) No. VN-005487, advising Autumn Vista of the missed deadline, and to submit the waste storage structure equivalency evaluation(s) by not later than January 18, 2013; the WRD did not receive the evaluation(s) by this date.
- 1.11 In a letter to the WRD dated September 6, 2013, Golder Associates Inc. (Golder), on behalf of Autumn Vista, stated that the "Original Clay Waste Storage Facility (WSF) and "Leachate WSFs¹" were evaluated by Wilcox Professional Services, LLC (Wilcox), in January 2013, and failed to meet the environmental performance equivalent to NRCS 313.
- 1.12 The September 6, 2013, letter, referenced above, described various remedial actions taken on the "Original Clay WSF" subsequent to the January 2013 evaluation, and states the following: "As a result...the Original Clay WSF meets the MDEQ Environmental Performance Equivalent to the NRCS 313 Standard. The former report will be updated and submitted to the MDEQ."
- 1.13 The September 6, 2013, letter describes the Leachate WSFs, and states that the remediation activities necessary to bring the WSFs into compliance with NRCS 313 or the environmental performance equivalent will be completed in 2014.
- 1.14 Autumn Vista consents to the issuance and entry of this Consent Order and stipulates that the entry of this Consent Order constitutes a final order of the DEQ and is enforceable as such under Section 3112(4) of Part 31, MCL 324.3112(4). Autumn Vista agrees not to contest the issuance of this Consent Order, and that the resolution of this matter by the entry of this Consent Order is appropriate and acceptable. It is also agreed that this Consent Order shall become effective on

¹ Note: From the September 6, 2013, letter from Golder: "In the previous Wilcox evaluation, the three WSFs were evaluated collectively and referred to as the Leachate WSFs."

the date it is signed by the chief of the WRD, delegate of the director, pursuant to Section 301(b) of the NREPA, MCL 324.301(b).

- 1.15 Autumn Vista and the DEQ agree that the signing of this Consent Order is for settlement purposes only and does not constitute an admission by Autumn Vista that the law has been violated.
- 1.16 The Signatory to this Consent Order on behalf of Autumn Vista agrees and attests that he is fully authorized to assure that Autumn Vista will comply with all requirements under this Consent Order.
- 1.17 Autumn Vista shall achieve compliance with the aforementioned regulations in accordance with the requirements contained in Section II, Compliance Program, of this Consent Order.

II. COMPLIANCE PROGRAM

It is therefore agreed and ordered that Autumn Vista shall take the following actions to comply with Part 31:

- 2.1 Not later than **30 days** after the effective date of this Consent Order, Autumn Vista shall submit to the WRD the as-built documentation for the "Original Clay WSF" and the "Leachate WSFs".
- 2.2 Autumn Vista shall complete all necessary construction on the waste storage structures at the Facility. A final engineering review demonstrating compliance with NRCS 313 or environmental performance equivalent to NRCS 313 shall be submitted not later than **October 1, 2014**.

- 2.3 Autumn Vista shall submit all reports, work plans, specifications, schedules, or any other writing required by this section to the WRD Grand Rapids District Supervisor, State Office Building, 350 Ottawa NW, Unit 10, Grand Rapids, Michigan 49503. The cover letter with each submittal shall identify the specific paragraph and requirement of this Consent Order that the submittal is intended to satisfy.

III. DEQ APPROVAL OF SUBMITTALS

- 3.1 For any work plan, proposal, or other document, excluding applications for permits or licenses, that are required by this Consent Order to be submitted to the DEQ by Autumn Vista, the following process and terms of approval shall apply.
- 3.2 All work plans, proposals, and other documents required to be submitted by this Consent Order shall include all of the information required by the applicable statute and/or rule, and all of the information required by the applicable paragraph(s) of this Consent Order.
- 3.3 In the event the DEQ disapproves a work plan, proposal, or other document, it will notify Autumn Vista, in writing, specifying the reasons for such disapproval. Autumn Vista shall submit, after 30 days of receipt of such disapproval, a revised work plan, proposal, or other document which adequately addresses the reasons for the DEQ's disapproval. If the revised work plan, proposal, or other document is still not acceptable to the DEQ, the DEQ will notify Autumn Vista of this disapproval.
- 3.4 In the event the DEQ approves with specific modifications a work plan, proposal, or other document, it will notify Autumn Vista, in writing, specifying the

modifications required to be made to such work plan, proposal, or other document prior to its implementation and the specific reasons for such modifications. The DEQ may require Autumn Vista to submit, prior to implementation and after 30 days of receipt of such approval with specific modifications, a revised work plan, proposal, or other document which adequately addresses such modifications. If the revised work plan, proposal, or other document is still not acceptable to the DEQ, the DEQ will notify Autumn Vista of this disapproval.

- 3.5 Upon DEQ approval, or approval with modifications, of a work plan, proposal, or other document, such work plan, proposal, or other document shall be incorporated by reference into this Consent Order and shall be enforceable in accordance with the provisions of this Consent Order.
- 3.6 Failure by Autumn Vista to submit an approvable work plan, proposal, or other document, within the applicable time periods specified above, constitutes a violation of this Consent Order and shall subject Autumn Vista to the enforcement provisions of this Consent Order, including the stipulated penalty provisions specified in paragraphs 8.2 and 8.3 below.
- 3.7 Any delays caused by Autumn Vista's failure to submit an approvable work plan, proposal, or other document when due shall in no way affect or alter Autumn Vista's responsibility to comply with any other deadline(s) specified in this Consent Order.
- 3.8 No informal advice, guidance, suggestions, or comments by the DEQ regarding reports, work plans, specifications, schedules or any other writing submitted by Autumn Vista will be construed as relieving Autumn Vista of its obligation to obtain written approval, if and when required by this Consent Order.

IV. EXTENSIONS

- 4.1 Autumn Vista and the DEQ agree that the DEQ may grant Autumn Vista a reasonable extension of the specified deadlines set forth in this Consent Order. Any extension shall be preceded by a written request in duplicate to the DEQ, WRD, Enforcement Unit Chief, Constitution Hall, 525 West Allegan Street, Lansing, Michigan 48909-7773, and the WRD Grand Rapids District Supervisor no later than ten business days prior to the pertinent deadline, and shall include:
- a. Identification of the specific deadline(s) of this Consent Order that will not be met.
 - b. A detailed description of the circumstances that will prevent Autumn Vista from meeting the deadline(s).
 - c. A description of the measures Autumn Vista has taken and/or intends to take to meet the required deadline.
 - d. The length of the extension requested and the specific date on which the obligation will be met.

The WRD Grand Rapids District supervisor, in consultation with the Enforcement Unit Chief, shall respond in writing to such requests. No change or modification to this Consent Order shall be valid unless in writing from the DEQ, and if applicable, signed by both parties.

V. REPORTING

- 5.1 Autumn Vista shall verbally report any violation(s) of the terms and conditions of this Consent Order to the WRD Grand Rapids District Supervisor by no later than the close of the next business day following detection of such violation(s) and shall follow such notification with a written report within five business days following detection of such violation(s). The written report shall include a detailed

description of the violation(s), as well as a description of any actions proposed or taken to correct the violations(s). Autumn Vista shall report any anticipated violation(s) of this Consent Order to the above-referenced individual in advance of the relevant deadlines whenever possible.

VI. RETENTION OF RECORDS

- 6.1 Upon request by an authorized representative of the DEQ, Autumn Vista shall make available to the DEQ all records, plans, logs, and other documents required to be maintained under this Consent Order or pursuant to Part 31 or its rules. All such documents shall be retained by Autumn Vista for at least a period of five years from the date of generation of the record unless a longer period of record retention is required by Part 31 or its rules.

VII. RIGHT OF ENTRY

- 7.1 Autumn Vista shall allow any authorized representative or contractor of the DEQ, upon presentation of proper credentials, to enter upon premises of the Facility at all reasonable times for the purpose of monitoring compliance with the provisions of this Consent Order. This paragraph in no way limits the authority of the DEQ to conduct tests and inspections pursuant to the NREPA and the rules promulgated thereunder, or any other applicable statutory provision.

VIII. PENALTIES

- 8.1 Autumn Vista agrees to pay to the State of Michigan **\$5,000.00** in resolution of this matter. Payment shall be made within **30 days** of the effective date of this Consent Order.

- 8.2 For each failure to comply with a provision of Section II or Section III of this Consent Order, Autumn Vista shall pay stipulated penalties of **\$100.00** per violation per day for 1 to 7 days of violation, **\$250.00** per violation per day for 8 to 14 days of violation, and **\$500.00** per violation per day for each day of violation thereafter.
- 8.3 To ensure timely payment of the above civil fine and stipulated penalties, Autumn Vista shall pay an interest penalty to the General Fund of the State of Michigan each time it fails to make a complete or timely payment. This interest penalty shall be based on the rate set forth at MCL 600.6013(8), using the full increment of amount due as principal, and calculated from the due date for the payment until the delinquent payment is finally made in full.
- 8.4 Autumn Vista agrees to pay all funds due pursuant to this agreement by check made payable to the State of Michigan and delivered to Accounting Services Division, Cashier's Office for the DEQ, P.O. Box 30657, Lansing, Michigan 48909-8157, or hand delivered to the Accounting Services Division, Cashier's Office for the DEQ, 425 W. Ottawa St., Lansing, Michigan 48933. To ensure proper credit, all payments made pursuant to this Consent Order must include the **Payment Identification No. WRD40048**.
- 8.5 Autumn Vista agrees not to contest the legality of the civil fine or costs paid pursuant to paragraph 8.1 above. Autumn Vista further agrees not to contest the legality of any stipulated penalties or interest penalties assessed pursuant to paragraphs 8.2 or 8.3, above, but reserves the right to dispute the factual basis upon which a demand by the DEQ for stipulated penalties or interest penalties is made.

IX. FORCE MAJEURE

- 9.1 Autumn Vista shall perform the requirements of this Consent Order within the time limits established herein, unless performance is prevented or delayed by events that constitute a 'Force Majeure.' Any delay in the performance attributable to a "Force Majeure" shall not be deemed a violation of Autumn Vista's obligations under this Consent Order in accordance with this section.
- 9.2 For the purpose of this Consent Order, "Force Majeure" means an occurrence or nonoccurrence arising from causes not foreseeable, beyond the control of, and without the fault of Autumn Vista, such as: an Act of God, untimely review of permit applications or submissions by the DEQ or other applicable authority, and acts or omissions of third parties that could not have been avoided or overcome by Autumn Vista's diligence and that delay the performance of an obligation under this Consent Order. "Force Majeure" does not include, among other things, unanticipated or increased costs, changed financial circumstances, or failure to obtain a permit or license as a result of Autumn Vista's actions or omissions.
- 9.3 Autumn Vista shall notify the DEQ, by telephone, within 48 hours of discovering any event that causes a delay in its compliance with any provision of this Consent Order. Verbal notice shall be followed by written notice within ten calendar days and shall describe, in detail, the anticipated length of delay, the precise cause or causes of delay, the measures taken by Autumn Vista to prevent or minimize the delay, and the timetable by which those measures shall be implemented. Autumn Vista shall adopt all reasonable measures to avoid or minimize any such delay.
- 9.4 Failure of Autumn Vista to comply with the notice requirements and time

provisions under paragraph 9.3 shall render this Section IX void and of no force and effect as to the particular incident involved. The DEQ may, at its sole discretion and in appropriate circumstances, waive in writing the notice requirements of paragraph 9.3 above.

9.5 If the parties agree that the delay or anticipated delay was beyond the control of Autumn Vista, this may be so stipulated, and the parties to this Consent Order may agree upon an appropriate modification of this Consent Order. However, the DEQ is the final decision-maker on whether or not the matter at issue constitutes a force majeure. The parties to this Consent Order understand and agree that the final decision by the DEQ regarding a force majeure claim is not subject to judicial review. The burden of proving that any delay was beyond the reasonable control of Autumn Vista, and that all the requirements of this Section IX have been met by Autumn Vista, rests with Autumn Vista.

9.6 An extension of one compliance date based upon a particular incident does not necessarily mean that Autumn Vista qualifies for an extension of subsequent compliance date without providing proof regarding each incremental step or other requirement for which an extension is sought.

X. GENERAL PROVISIONS

10.1 With respect to any violations not specifically addressed and resolved by this Consent Order, the DEQ reserves the right to pursue any other remedies to which it is entitled for any failure on the part of Autumn Vista to comply with the requirements of NREPA and its rules. Further, the WRD reserves its right to pursue appropriate action, including injunctive relief, to enforce the provisions of this Consent Order.

- 10.2 The DEQ and Autumn Vista consent to enforcement of this Consent Order in the same manner and by the same procedures for all final orders entered pursuant to Part 31, MCL 324.3101 *et seq.* and enforcement pursuant to Part 17, Michigan Environmental Protection Act, of the NREPA, MCL 324.1701 *et seq.*
- 10.3 This Consent Order in no way affects Autumn Vista's responsibility to comply with any other applicable state, federal, or local laws or regulations.
- 10.4 The DEQ reserves its right to pursue appropriate action, including injunctive relief to enforce the provisions of this Consent Order, and at its discretion, may also seek stipulated fines or statutory fines for any violation of this Consent Order. However, the DEQ is precluded from seeking both a stipulated fine under this Consent Order and a statutory fine for the same violation.
- 10.5 Nothing in this Consent Order is or shall be considered to affect any liability Autumn Vista may have for natural resource damages caused by Autumn Vista's ownership and/or operation of the Facility. The State of Michigan does not waive any rights to bring an appropriate action to recover such damages to the natural resources.
- 10.6 In the event Autumn Vista sells or transfers the Facility, it shall advise any purchaser or transferee of the existence of this Consent Order in connection with such sale or transfer. Within 30 calendar days, Autumn Vista shall also notify the WRD Grand Rapids District Supervisor, in writing, of such sale or transfer, the identity and address of any purchaser or transferee, and confirm the fact that notice of this Consent Order has been given to the purchaser and/or transferee. As a condition of the sale or transfer, Autumn Vista shall obtain the consent of the purchaser and/or transferee, in writing, to assume all of the obligations of this Consent Order. A copy of that agreement shall be forwarded to the WRD Grand

Rapids District Supervisor within 30 days of assuming the obligations of this Consent Order.

- 10.7 The provisions of this Consent Order shall apply to and be binding upon the parties to this action, and their successors and assigns.
- 10.8 This Consent Order constitutes a civil settlement and satisfaction as to the resolution of the violations specifically addressed herein; however, it does not resolve any criminal action that may result from these same violations.

XI. TERMINATION

- 11.1 This Consent Order shall remain in full force and effect until terminated by a written Termination Notice (TN) issued by the DEQ. Prior to issuance of a written TN, Autumn Vista shall submit a request consisting of a written certification that Autumn Vista has fully complied with the requirements of this Consent Order and has made payment of any fines, including interest penalties, required in this Consent Order. Specifically, this certification shall include:
- a. The date of compliance with the provision of the compliance program in Section II, and the date any fines or penalties were paid.
 - b. A statement that all required information has been reported to the WRD District Supervisor.
 - c. Confirmation that all records required to be maintained pursuant to this Consent Order are being maintained at the Facility.

The DEQ may also request additional relevant information. The DEQ shall not unreasonably withhold issuance of a TN.

SIGNATORIES

The undersigned CERTIFY they are fully authorized by the party they represent to enter into this Consent Order to comply by consent and to EXECUTE and LEGALLY BIND that party to it.

DEPARTMENT OF ENVIRONMENTAL QUALITY



William Creal, Chief
Water Resources Division

12/4/13
Date

Autumn Vista Dairy, LLC



By: Chad Gernaat

Title: Owner
11-14-13
Date

APPROVED AS TO FORM:



By: Neil D. Gordon, Assistant Attorney General
For: S. Peter Manning, Chief
Environment, Natural Resources, and Agriculture Division
Michigan Department of Attorney General

12/4/2013
Date