



Citizens for Pennsylvania's Future
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June 26, 2008

Downs Racing, L.P.
1280 Highway 315
Wilkes-Barre, PA 18702
(Certified Mail No. 7007 0220 0002 6275 0181)

**Re: Mohegan Sun at Pocono Downs
Plains Township, Luzerne County**

Dear Downs Racing, L.P.,

The purpose of this letter is to notify you that Citizens for Pennsylvania's Future ("PennFuture") intends to file an action pursuant to section 601 of the Clean Streams Law, 35 P.S. § 691.601, for violation of the Clean Streams Law, 35 P.S. §§ 691.1-691.1001, by Downs Racing, L.P., doing business as Mohegan Sun at Pocono Downs, in Plains Township, Luzerne County. PennFuture intends to bring an action to achieve long-term compliance with environmental laws and to protect the quality of the affected watersheds.

I. Background

PennFuture is a public interest membership organization dedicated to creating a just future in which the environment, communities and the economy thrive. One focus of PennFuture's work is to improve and protect water resources and water quality throughout the Commonwealth through public outreach and education, advocacy and litigation. PennFuture has worked to require adequate permitting and regulation of agricultural operations, and specifically to ensure that newly regulated concentrated animal feeding operations ("CAFOs") obtain required national pollutant discharge elimination system ("NPDES") permits and approval of nutrient management plans ("NMPs").

Downs Racing, L.P. is a limited partnership that is registered to do business in Pennsylvania under the fictitious name Mohegan Sun at Pocono Downs. The principal place of business of Downs Racing, L.P. is 1280 Highway 315, Wilkes-Barre, PA 18702 in Plains Township, Luzerne County. Downs Racing, L.P., doing business as Mohegan Sun at Pocono Downs, operates a horse harness racing track and the barns associated with the facility (collectively referred to as the "Facility").

II. Ongoing Violation of the Clean Streams Law and Implementing Regulations

The Clean Streams Law prohibits the discharge of "any substance of any kind or character resulting in pollution" of the waters of the Commonwealth. 35 P.S. § 691.401. Under Section 402 of the Clean Streams Law, if the Pennsylvania Department of Environmental Protection ("DEP") "finds that any activity, . . . including but not limited to the impounding, handling, storage, transportation, processing or disposal of materials or substances, creates a danger of pollution of the waters of the Commonwealth or that regulation of the activity is necessary to avoid such pollution, the department

may, by rule or regulation, require that such activity be conducted only pursuant to a permit issued by the department[.]” 35 P.S. 691.402(a). Regulations promulgated under the Clean Streams Law require that, “each CAFO shall have applied for an NPDES permit . . . and shall have obtained a permit.” 25 Pa. Code § 92.5a.

In Pennsylvania, an agricultural operation can be considered a CAFO under multiple circumstances. The Facility meets one or more of the circumstances that would cause it to be defined as a CAFO. The Facility meets the definition of a CAFO because it is a CAO¹ with greater than 300 AEU’s.² 25 Pa. Code § 92.1. Additionally, the Facility is a CAFO because it is an agricultural operation defined as a large CAFO under 40 C.F.R. 122.23 (relating to concentrated animal feeding operations). 25 Pa. Code § 92.1. The Facility is a large CAFO as defined under 40 C.F.R. § 122.23 because it stables or confines and feeds or maintains more than 500 horses for a total of 45 days or more in any 12-month period and does not sustain crops, vegetation, forage growth, or post-harvest residues over any portion of the animal lot or facility. *See* 40 C.F.R. § 122.23(b)(1) and (4).

Failure to obtain the required NPDES CAFO permit is an ongoing violation of 25 Pa. Code § 92.5a, which was issued pursuant to, *inter alia*, the Clean Streams Law. 35 Pa. Bull. 5796 (October 22, 2005). A newly regulated CAFO was required under Pennsylvania’s NPDES permit program to obtain a NPDES CAFO permit by January 22, 2007. To date, Downs Racing, L.P. has not applied for nor obtained an NPDES CAFO permit. This violation has been occurring on every day since January 22, 2007. Downs Racing, L.P.’s ongoing violation of this regulation constitutes unlawful conduct under Sections 402(b) and 611 of the Clean Streams Law, 35 P.S. §§ 691.402(b) and 691.611, and is actionable under Section 601(c) of the Clean Streams Law as “violation[s] of any provision of this act or any rule, [or] regulation . . . issued pursuant to this act.” 35 P.S. 691.601(c).

III. Intention to Seek Relief for Ongoing Violations of the Clean Streams Law and Implementing Regulations

If conditions causing the above violations are not corrected within 60 days, so that it is absolutely clear that the violations are not continuing and there is no reasonable likelihood that they will recur, PennFuture intends to file an action pursuant to Section 601 of the Clean Streams Law, 35 P.S. § 691.601, seeking injunctive relief, the imposition of civil penalties, and an award of litigation costs including attorney fees as provided in those statute sections. Section 601(c) of the Clean Streams Law authorizes injunctive relief and an award of damages and civil penalties to compel compliance with the Clean Streams Law or any rule, regulation, order or permit issued pursuant to the Clean Streams Law. 35 P.S. § 691.601(c). *See Centolanza v. Lehigh Valley Dairies, Inc.*, 658 A.2d 336, 339-340 (Pa. 1995) (holding that similar “compel compliance” language in Storage Tank and Spill Prevention Act authorized recovery for diminished property value and cleanup expenses). Section 601(g) authorizes a court to “award costs of litigation (including attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.” 3 P.S. § 691.601(g).

¹ From November 18, 2000 until October 21, 2005, 25 Pa. Code § 92.1 defined a concentrated animal operation (“CAO”) as “an agricultural operation where the animal density exceeds 2 AEU’s per acre, as defined in section 3 of the Nutrient Management Act.” Since October 22, 2005, Section 92.1 defines a CAO as “an agricultural operation that meets the criteria established by the State Conservation Commission in regulations under the authority of 3 Pa.C.S. Chapter 5 (relating to nutrient management and odor management) in Chapter 83, Subchapter D (relating to nutrient management).” In practicality, these regulatory definitions are identical, with the prior definition integrating the language from the Nutrient Management Act and the latter definition merely referencing the new statutory language by citation.

² An animal equivalent unit (“AEU”) is defined in 25 Pa. Code § 92.1 as one thousand pounds live weight of livestock or poultry animals. Agronomy Facts 54 – Table 1 lists the standard weights used to calculate AEU’s for CAOs in Pennsylvania. This table indicates that the standard weight for foals is 325 pounds, yearlings is 750 pounds, mature nondraft breeds is 1,000 pounds, and mature draft breeds is 1,700 pounds.

PennFuture reserves the right to include in its complaint allegations of any additional violations of the Clean Streams Law, or any rule or regulations promulgated thereunder, not heretofore included in this letter. Furthermore, this letter is not intended nor shall it be construed to limit the rights of PennFuture to sue for violations under any other statute, or to sue for any other violations of the Clean Streams Law or for relief under the common law not described above.

IV. Parties Giving Notice and Contact Information for Legal Counsel

The full names, addresses, and telephone numbers of the persons giving this notice are:

Citizens for Pennsylvania's Future (PennFuture)
610 North Third Street
Harrisburg, PA 17101
(717) 214-7920

I serve as legal counsel for PennFuture. All communications to the above named parties concerning the matters addressed in this notice should be directed to me. If you would like to discuss these matters, you may contact me by telephone at (717-214-7920), or by mail at Citizens for Pennsylvania's Future, 610 North Third Street, Harrisburg, PA 17101.

Sincerely,

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