

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 7
11201 RENNER BOULEVARD
LENEXA, KANSAS**

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:)	Docket No. CWA-07-2016-0067
)	
WIEBE FARMS, INC.,)	
)	
Respondent.)	CONSENT AGREEMENT AND FINAL ORDER
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PRELIMINARY STATEMENT

The United States Environmental Protection Agency, Region 7 ("EPA"), and Wiebe Farms, Inc. ("Respondent"), have agreed to a settlement of the alleged violations set forth in this Consent Agreement/Final Order ("CA/FO") prior to the filing of a complaint. Thus this action is simultaneously commenced and concluded pursuant to Rules 22.13(b) and 22.18(b)(2) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Consolidated Rules of Practice"), 40 C.F.R. §§ 22.13(b) and 22.18(b)(2).

COMPLAINT

Jurisdiction

1. This is an administrative action for the assessment of civil penalties instituted pursuant to Section 309(g)(2)(B) of the Clean Water Act ("CWA"), 33 U.S.C. § 1319(g)(2)(B), and in accordance with the Consolidated Rules of Practice.

2. This CA/FO serves as notice that EPA has reason to believe that Respondent violated Section 301 of the CWA, 33 U.S.C. § 1311, by discharging pollutants from a concentrated animal feeding operation ("CAFO") into navigable waters of the United States without National Pollutant Discharge Elimination System ("NPDES") permit authorization.

Parties

3. Complainant, by delegation from the Administrator of EPA and re-delegation from the Regional Administrator, EPA, Region 7, is the Director of the Water, Wetlands and Pesticides Division, EPA, Region 7.

4. Respondent is Wiebe Farms, Inc., a corporation operating under the laws of the state of Kansas.

Statutory and Regulatory Background

5. Section 101(a) of the CWA, 33 U.S.C. § 1251(a), states that the objective of the CWA is to restore and maintain the chemical, physical, and biological integrity of the nation's waters.

6. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of any pollutant by any person except in compliance with, *inter alia*, a permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

7. Section 502(12) of the CWA, 33 U.S.C. § 1362(12), defines the terms "discharge of a pollutant" and "discharge of pollutants" as, *inter alia*, any addition of any pollutant to navigable waters from any point source.

8. Section 502(6) of the CWA, 33 U.S.C. § 1362(6), defines the term "pollutant" as, *inter alia*, biological materials and agricultural waste discharged into water.

9. Section 502(7) of the CWA, 33 U.S.C. § 1362(7), defines the term "navigable waters" as, *inter alia*, the "waters of the United States," as defined at 40 C.F.R. § 122.2.

10. Section 502(14) of the CWA, 33 U.S.C. § 1362(14), defines the term "point source" to include "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, [or] concentrated animal feeding operation . . . from which pollutants are or may be discharged."

11. Section 502(5) of the CWA, 33 U.S.C. § 1362(5), defines the term "person" as, *inter alia*, any corporation, partnership, or association.

12. Section 402 of the CWA, 33 U.S.C. § 1342, provides that pollutants may be discharged only in accordance with the terms of a NPDES permit issued pursuant to that section.

13. Pursuant to Section 402 of the CWA, 33 U.S.C. § 1342, EPA authorizes states to issue NPDES permits that, among other things, prescribe conditions whereby a discharge may be authorized, and establish design, construction, operation, and maintenance requirements for the permit holder.

14. To implement Section 402 of the CWA, 33 U.S.C. § 1342, EPA promulgated regulations codified at 40 C.F.R. Part 122.

15. Pursuant to 40 C.F.R. § 122.1, a NPDES permit is required for the discharge of "pollutants" from any "point source" into "waters of the United States," as those terms are defined at 40 C.F.R. § 122.2.

16. Pursuant to 40 C.F.R. § 122.23(a), “concentrated animal feeding operations,” or “CAFOs,” are point sources subject to NPDES permitting requirements.

17. “Concentrated animal feeding operation” or “CAFO” is defined by 40 C.F.R. § 122.23(b)(2) as an animal feeding operation that is defined as a Large CAFO or Medium CAFO in accordance with 40 C.F.R. § 122.23(b).

18. “Animal feeding operation” or “AFO” is defined by 40 C.F.R. § 122.23(b)(1) as a lot or facility where animals have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any twelve month period, and where crops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility.

19. “Medium CAFO” is defined, according to 40 C.F.R. § 122.23(b)(6), as an animal feeding operation that stables or confines “300 to 999 cattle other than mature dairy cows or veal calves” and where either of the following conditions are met:

- (a) Pollutants are discharged into waters of the U.S. through a man-made ditch, flushing system, or other similar man-made device; or
- (b) Pollutants are discharged directly into waters of the U.S. which originate outside of and pass over, across, or through the facility or otherwise come into direct contact with the animals confined in the operation.

20. “Waters of the United States” are defined in 40 C.F.R. § 122.2 to include intrastate rivers and streams, and tributaries thereto.

21. “Process wastewater” is defined by 40 C.F.R. § 122.23(b)(7) as water “directly or indirectly used in the operation of the AFO for any or all of the following: spillage or overflow from animal or poultry watering systems; washing, cleaning, or flushing pens, barns, manure pits, or other AFO facilities; direct contact swimming, washing, or spray cooling of animals; or dust control. Process wastewater also includes any water which comes into contact with any raw materials, products, or byproducts including manure, litter, feed, milk, eggs or bedding.”

22. “Production area” is defined by 40 C.F.R. § 122.23 and means that part of an AFO that includes the animal confinement area, the manure storage area, the raw materials storage areas, and the waste containment areas. The animal confinement area includes, but is not limited to, open lots, housed lots, feedlots, confinement houses, stall barns, free stall barns, milkrooms, milking centers, cowyards, barnyards, medication pens, walkers, animal walkways, and stables. The manure storage area includes, but is not limited to, lagoons, runoff ponds, storage sheds, stockpiles, under house or pit storages, liquid impoundments, static piles, and composting piles. The raw materials storage area includes, but is not limited to, feed silos, silage bunkers, and bedding materials. The waste containment area includes, but is not limited to, settling basins, and areas within berms and diversions which separate uncontaminated storm water. Also included in

the definition of production area is any egg washing or egg processing facility, and any area used in the storage, handling, treatment, or disposal of mortalities.

23. The Kansas Department of Health and Environment (“KDHE”) is the state agency authorized to administer the federal NPDES program in the state of Kansas pursuant to Section 402 of the CWA, 33 U.S.C. § 1342. EPA maintains concurrent enforcement authority with authorized states for violations of the CWA.

24. Section 309(g) of the CWA, 33 U.S.C. § 1319(g), authorizes EPA to commence an action for administrative penalties against any person who violates Section 301 or 402 of the CWA, 33 U.S.C. §§ 1311 and 1342.

Factual Allegations

25. Respondent owns or operates an animal feeding operation that is located in Section 28 of Township 23 South, Range 3 East, in Butler County, Kansas, and has a street address of 13232 NW Prairie Creek Road, Whitewater, Kansas 67154 (“the Facility”).

26. Respondent is a “person” within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

27. On or about July 22, 2015, EPA personnel conducted a compliance evaluation inspection of the Facility (“the EPA inspection”).

28. Based on information gathered by EPA and contained in the EPA inspection report, Respondent routinely confines between 300 and 999 head of beef cattle at the Facility.

29. Neither crops, vegetation, forage growth, nor post-harvest residues were sustained over any portion of the Facility’s confinement areas at times relevant to this Complaint.

30. The Facility confined and fed or maintained cattle for a total of 45 days or more in any twelve month period relevant to this Complaint.

31. The EPA inspector observed that the Facility lacks engineered livestock waste control structures to prevent discharges of manure and process wastewater. Analysis of samples obtained by the EPA inspector during the inspection documented that feedlot-related pollutants discharge into Dry Creek and its tributaries.

32. The EPA inspector observed that culverts facilitate the discharge of manure and process wastewater from production areas of Respondent’s Facility into Dry Creek and its tributaries. The culverts are man-made ditches, flushing systems, or similar man-made devices.

33. Manure and process wastewater discharged from the Facility are “pollutants” within the meaning of Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

34. Dry Creek and its tributaries are “waters of the United States” within the meaning of 40 C.F.R. § 122.2 and, therefore, “navigable waters” pursuant to Section 502(7) of the CWA, 33 U.S.C. § 1362(7).

35. The Facility is an “animal feeding operation” or “AFO” within the meaning of 40 C.F.R. § 122.23(b)(1).

36. At all times relevant to this CA/FO, the Facility was a “Medium CAFO” within the meaning of 40 C.F.R. § 122.23(b)(6).

37. The Facility is a “concentrated animal feeding operation” or “CAFO” within the meaning of 40 C.F.R. § 122.23(b)(2).

38. The Facility is a “point source” within the meaning of 40 C.F.R. § 122.23(a) and Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

39. Respondent did not have a NPDES permit authorizing the discharge of pollutants from the Facility.

Allegations of Violation

40. The allegations set forth in Paragraphs 25 through 39 are herein incorporated.

41. The EPA inspection revealed that the Facility’s production areas lack runoff controls necessary to contain precipitation-related runoff. The lack of adequate runoff controls at the Facility resulted in the discharge of manure and/or process wastewater through a culvert or other similar man-made device into Dry Creek and its tributaries. Respondent did not have a NPDES permit authorizing the discharge of pollutants from the Facility.

42. Respondent’s discharge of pollutants into navigable waters without a NPDES permit is a violation of Section 301 of the CWA, 33 U.S.C. § 1311, and implementing regulations.

CONSENT AGREEMENT

43. Respondent admits the jurisdictional allegations set forth in this CA/FO for purposes of this proceeding only and agrees not to contest EPA’s jurisdiction in this proceeding or in any subsequent proceeding to enforce the terms of the Final Order portion of this CA/FO.

44. Respondent neither admits nor denies the factual allegations stated in this CA/FO.

45. Respondent waives its right to contest the allegations set forth in this CA/FO and its right to appeal the Final Order portion of this CA/FO.

46. Nothing contained in this CA/FO shall alter or otherwise affect Respondent's obligation to comply with all applicable federal, state, and local environmental statutes and regulations and applicable permits.

47. The undersigned representative of Respondent certifies that he or she is fully authorized to enter into the terms and conditions of this CA/FO and to execute and legally bind Respondent to this CA/FO.

48. Respondent certifies by the signing of this CA/FO that, to the best of its knowledge, Respondent is in compliance with all of the requirements of Sections 301 and 402 of the CWA, 33 U.S.C. §§ 1311 and 1342.

Effect of Settlement

49. Payment of the entire civil penalty shall resolve Respondent's liability for Federal civil penalties for the violations alleged in the Allegations of Violation.

50. The effect of settlement described in Paragraph 49 above is conditioned upon the accuracy of Respondent's representations to EPA, as memorialized in Paragraph 48 above.

Reservation of Rights

51. EPA reserves the right to enforce the terms of this CA/FO by initiating a judicial or administrative action pursuant to Section 309 of the CWA, 33 U.S.C. § 1319.

52. With respect to matters not addressed in this CA/FO, EPA reserves the right to take any enforcement action pursuant to the CWA, or any other available legal authority, including, without limitation, the right to seek injunctive relief, monetary penalties and punitive damages.

Payment of Penalty

53. Respondent agrees that in settlement of the claims alleged in this CA/FO, Respondent shall pay a civil penalty of Thirty-Five Thousand Dollars (\$35,000.00) within thirty (30) days of the effective date of this CA/FO and as directed in paragraphs 54 and 55 below.

54. Respondent shall pay the penalty by cashier's or certified check, by wire transfer, or online. The payment shall reference the Docket Number on the check or wire transfer. If made by cashier's or certified check, the check shall be made payable to "United States Treasury" and remitted to:

United States Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
Post Office Box 979077

St. Louis, Missouri 63197-9000.

Wire transfers shall be directed to the Federal Reserve Bank of New York as follows:

Federal Reserve Bank of New York
ABA = 021030004
Account = 68010727
SWIFT address = FRNYUS33
33 Liberty Street
New York, New York 10045
Field Tag 4200 of the Fedwire message should read
"D 68010727 Environmental Protection Agency"

On-line payments are available through the Department of Treasury:

www.pay.gov
Enter "sfo 1.1" in the search field.
Open the form and complete required files.

55. A copy of the check, transfer, or online payment confirmation shall be sent simultaneously to the following:

Regional Hearing Clerk
United States Environmental Protection Agency, Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219;

and to:

Jared Pessetto
Assistant Regional Counsel
United States Environmental Protection Agency, Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219.

General Provisions

56. No portion of the civil penalty or interest paid by Respondent pursuant to the requirements of this CA/FO shall be claimed by Respondent as a deduction for federal, state, or local income tax purposes.

57. Respondent consents to the issuance of the Final Order hereinafter recited.

58. Respondent and Complainant shall bear their own costs and attorneys' fees incurred as a result of this matter.

59. Should the civil penalty not be paid as provided above, interest will be assessed at the annual rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717. The interest will be assessed on the overdue amount from the due date through the date of payment.

60. This CA/FO shall apply to and be binding upon Respondent, its agents, successors, and assigns. Respondent shall ensure that any directors, officers, employees, contractors, consultants, firms or other persons or entities acting under or for him with respect to matters included herein, comply with the terms of this CA/FO.

61. The effective date of this CA/FO shall be the date on which it is filed by the Regional Hearing Clerk for EPA, Region 7.

**RESPONDENT:
WIEBE FARMS, INC.**

Date: 1-9-17

Wiebe Farms Inc. By Doug Wiebe
Signature

Wiebe Farms Inc. By Doug Wiebe
Name

V.P. Wiebe Farms Inc.
Title

**COMPLAINANT:
U.S. ENVIRONMENTAL PROTECTION AGENCY**

Date: _____

Karen A. Flournoy
Director
Water, Wetlands and Pesticides Division
U.S. Environmental Protection Agency, Region 7

Date: _____

Jared Pessetto
Assistant Regional Counsel
U.S. Environmental Protection Agency, Region 7

FINAL ORDER

Pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), and the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. Part 22, the foregoing Consent Agreement resolving this matter is hereby ratified and incorporated by reference into this Final Order.

The Respondent is ORDERED to comply with all of the terms of the Consent Agreement. In accordance with 40 C.F.R. § 22.31(b), the effective date of the foregoing Consent Agreement and this Final Order is the date on which this Final Order is filed with the Regional Hearing Clerk.

IT IS SO ORDERED.

Date: _____

Signature

Name

Title