UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10
1200 Sixth Avenue
Seattle, Washington

In the matter of:	DOCKET NO. CWA/SDWA-10-99-0145
BIRCH CIRCLE FARMS, INC. and GEORGE WARMINGTON, McMinnville, Oregon,	ADMINISTRATIVE COMPLAINT FOR CIVIL PENALTIES AND PROPOSED ADMINISTRATIVE ORDER
Respondents.	

I. JURISDICTION

This Administrative Complaint is issued under the authority vested in the Administrator of the U.S. Environmental Protection Agency ("EPA" or "Complainant") by Section 309(g)(2)(A) of the Clean Water Act ("CWA"), 33 U.S.C. § 1319(g)(2)(A), and Section 1423(c) of the Safe Drinking Water Act ("SDWA"), 42 U.S.C. § 300h-2(c). The Administrator has delegated these authorities to the Regional Administrator of EPA, Region 10, who in turn has redelegated them to the Director, Office of Water. Pursuant to Section 309(g)(2)(A) of the CWA and Section 1423(c) of the SDWA, and in accordance with the proposed "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties," 63 Fed. Reg. 9464-94 (February 25, 1998) ("CROP rules"), Complainant

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hereby proposes the assessment of civil penalties against Birch Circle Farms, Inc. and George Warmington for the unlawful discharge of pollutants into navigable waters in violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a), and General Permit Number 0800 issued by the Oregon Department of Environmental Quality and for the violation of the requirements of an applicable underground injection control program approved pursuant to Section 1422 of the SDWA, 42 U.S.C. § 300h-1. Pursuant to Section 1423(c) of the SDWA, 42 U.S.C. § 300h-2, Complainant also proposes issuance of the administrative order contained in Part VIII of this document.

II. GENERAL ALLEGATIONS

1. Respondent Birch Circle Farms, Inc. is a corporation duly organized under the laws of the State of Oregon. Respondent George Warmington is the corporation's President and personally participates in and directs its operations. Birch Circle Farms, Inc. and George Warmington are hereinafter collectively referred to as "Respondents."

2. Each of the Respondents is a "person" within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5), and Section 1401(12) of the SDWA, 42 U.S.C. § 300f(12).

3. Respondents own and operate a dairy farm located at 10475 NE Warmington Road, McMinnville, Oregon ("Farm") which contains a concrete-surfaced animal confinement lot ("Facility").

III. AUTHORITIES AND ALLEGATIONS RELEVANT TO CWA VIOLATIONS

4. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants into waters of the United States by any person, except, *inter alia*, as authorized by a National Pollutant

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Discharge Elimination System ("NPDES") permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

5. Section 402 of the CWA, 33 U.S.C. § 1342, provides that a state with an approved NPDES program may issue permits for the discharge of any pollutant into waters of the United States upon such specific terms and conditions as the state may prescribe.

6. The Oregon Department of Environmental Quality ("ODEQ") issues NPDES permits pursuant to an NPDES program approved by EPA.

7. On October 8, 1990, ODEQ issued General Permit Number 0800 ("Permit"). In relevant part, the Permit prohibits any "discharge or potentially harmful indirect discharge to state waters" from any "confined animal feeding operation" with coverage under the Permit.

8. At all times relevant to this Complaint, Respondents had coverage under the Permit for the Facility.

9. On December 10, 1998 and February 10, 1999, EPA conducted NPDES inspections of Respondents' Farm.

10. At the time of the December 10, 1998 and February 10, 1999 NPDES inspections, the Facility confined approximately 500 mature dairy cattle and 300 heifers. The number of cattle confined at the Facility exceeds 300 "animal units" as that term is defined in 40 C.F.R. Part 122, Appendix B.

11. The Facility stables or confines and feeds or maintains dairy cattle for a total of 45 days or more in any 12-month period.

12. Neither crops, vegetation, forage growth, nor post-harvest residues are sustained during the normal growing season over any portion of the Facility.

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13. The Facility discharges pollutants into navigable waters through a man-made ditch, flushing system, or similar man-made device.

14. The Facility is a “concentrated animal feeding operation” as that term is defined in 40 C.F.R. Part 122, Appendix B and used in Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

15. The Facility is a “confined animal feeding operation” as that term is defined in O.R.S. § 468B.205.

Count I

16. Complainant realleges and incorporates by reference Paragraphs 1 through 15.

17. At the time of the December 10, 1998 NPDES inspection, EPA observed a discharge of manure-laden wastewater which originated from the Facility enter Hawn Creek. Water in Hawn Creek flows to the Yamhill River which is a tributary of the Willamette River. The Willamette River is a tributary of the Columbia River which is subject to the ebb and flow of the tide.

18. The wastewater described in the preceding paragraph contained “pollutants” within the meaning of Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

19. The discharge of wastewater described in Paragraph 17 was to “navigable waters” within the meaning of Section 502(7) of the CWA, 33 U.S.C. § 1362(7), and to “waters of the state” or “state waters” within the meaning of O.R.S. § 468B.005(8).

20. The discharge of wastewater described in Paragraph 17 constituted a “discharge of pollutants” within the meaning of Section 502(12) of the CWA, 33 U.S.C. § 1362(12), from a “point

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source" within the meaning of Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

21. The discharge of wastewater described in Paragraph 17 did not result from a 25-year, 24-hour storm event.

22. The discharge of wastewater described in Paragraph 17 constituted a direct discharge or potentially harmful indirect discharge to state waters and therefore violated Special Condition 1 of the Permit.

Count II

23. Complainant realleges and incorporates by reference Paragraphs 1 through 15.

24. At the time of the February 10, 1999 NPDES inspection, EPA observed a discharge of manure-laden wastewater which originated from the Facility enter the Yamhill River. The Yamhill River is a tributary of the Willamette River. The Willamette River is a tributary of the Columbia River which is subject to the ebb and flow of the tide.

25. The wastewater described in the preceding paragraph contained "pollutants" within the meaning of Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

26. The discharge of wastewater described in Paragraph 24 was to "navigable waters" within the meaning of Section 502(7) of the CWA, 33 U.S.C. § 1362(7), and to "waters of the state" or "state waters" within the meaning of O.R.S. § 468B.005(8).

27. The discharge of wastewater described in Paragraph 24 constituted a "discharge of pollutants" within the meaning of Section 502(12) of the CWA, 33 U.S.C. § 1362(12), from a "point

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source" within the meaning of Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

28. The discharge of wastewater described in Paragraph 24 did not result from a 25-year, 24-hour storm event.

29. The discharge of wastewater described in Paragraph 24 constituted a direct discharge or potentially harmful indirect discharge to state waters and therefore violated Special Condition 1 of the Permit.

IV. PROPOSED PENALTY FOR CWA VIOLATIONS

30. Pursuant to Section 309(g)(2)(A) of the CWA, 33 U.S.C. § 1319(g)(2)(A), and 40 C.F.R. Part 19, Respondents are liable for the administrative assessment of civil penalties not to exceed $11,000 per violation, up to a maximum of $27,500.

31. Based on the foregoing authority and allegations, Complainant hereby proposes issuance of a final order assessing administrative penalties against Respondent, for the CWA violations cited above, in the amount of TWENTY-TWO THOUSAND DOLLARS ($22,000).

32. The proposed penalty amount was determined by Complainant after taking into account the nature, circumstances, extent, and gravity of the violations; Respondents' ability to pay, prior history of violations, degree of culpability, and economic benefit and savings resulting from the violations; and other appropriate factors, to the extent the information is available for such determinations.

33. The nature, circumstances, extent, and gravity of the violations described above are significant. The violations

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resulted in the discharge of manure-laden dairy waste to waters of the United States. Dairy waste can contain bacterial and viral pathogens such as *Escherichia coli* (*E. coli*) and salmonella as well as parasites such as cryptosporidium. Illnesses caused by these microorganisms can result in gastroenteritis, fever, kidney failure, and even death. Dairy wastes are also typically high in nutrients which can cause decreased oxygen levels in the receiving water. These decreased oxygen levels can adversely impact many species of fish indigenous to the Pacific Northwest during their developmental stages as well as at maturity.

34. Respondents realized an economic benefit by having avoided and/or delayed implementation of waste management controls that would have ensured compliance with the applicable requirements. Based on the information available to EPA regarding Respondents' financial condition, Respondents appear able to pay the proposed penalty.

V. AUTHORITIES AND ALLEGATIONS RELEVANT TO SDWA VIOLATIONS

35. Pursuant to Section 1422 of the SDWA, 42 U.S.C. § 300h-1, and 40 C.F.R. Part 147, Subpart MM, ODEQ administers an EPA-approved Underground Injection Control ("UIC") program for all classes of wells in Oregon, except those on Indian lands. EPA approved ODEQ's UIC program on September 25, 1984, effective October 9, 1984.

36. Pursuant to 40 C.F.R. § 147.1900(a)(2), one of the requirements set forth in ODEQ's regulations which has been incorporated by reference and made a part of the applicable UIC program for Oregon is found at Oregon Administrative Rules

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("O.A.R.") § 340-044-0050. In relevant part, this requirement states that "[u]sing a waste disposal well for agricultural drainage is prohibited."

37. On February 10, 1999, EPA conducted a UIC inspection of Respondents' Farm.

38. The milking parlor and milk house at Respondents' Farm contain three floor drains which are used to transfer agricultural drainage waste fluids to a buried leachfield for disposal. The depth of this leachfield system is greater than its largest surface dimension.

39. The leachfield system described in the preceding paragraph is a "waste disposal well" within the meaning of O.A.R. § 340-044-0005.

Count III

40. Complainant realleges and incorporates by reference Paragraphs 1 through 3 and 35 through 39.

41. At the time of the February 10, 1999 UIC inspection, EPA observed leachfield system described above being used for agricultural drainage in violation of O.A.R. § 340-044-0050.

42. Respondents have used the leachfield system for agricultural drainage each day for at least five years preceding the issuance of this administrative complaint.

43. On June 2, 1999, EPA notified the State of Oregon of EPA's determination that Respondents were in violation of a requirement of ODEQ's UIC program. More than thirty days have elapsed since EPA issued this notification, and Oregon has not commenced enforcement action against Respondents.

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VI. PROPOSED PENALTY FOR SDWA VIOLATIONS

44. Pursuant to Section 1423(c) of the SDWA, 42 U.S.C. § 300h-2(c), and 40 C.F.R. Part 19, Respondents are liable for the administrative assessment of civil penalties not to exceed $11,000 for each day of violation for any past or current violation, up to a maximum of $137,500.

45. Based on the foregoing authority and allegations, Complainant hereby proposes issuance of a final order assessing administrative penalties against Respondent, for the SDWA violations cited above, in the amount of ELEVEN THOUSAND DOLLARS ($11,000).

46. The proposed penalty amount was determined by Complainant after taking into account appropriate factors including: the seriousness of the violations; the economic benefit resulting from the violations; and Respondents' history of violations, ability to pay, and good faith efforts to comply.

47. The SDWA violations described above are serious. Respondents' SDWA violations have resulted in the injection of significant quantities of manure-laden dairy waste above and into underground sources of drinking water. As described above, dairy wastes contain a number of bacterial and viral pathogens which can threaten public health. Such waste fluids are also typically high in nitrogen compounds which are generally transformed to nitrate during percolation to ground water. When ingested at levels higher than the Maximum Contaminant Level ("MCL"), nitrates can cause blood disorders, including methemoglobinemia. Methemoglobinemia

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can result in an anemic condition which, if left untreated, may be fatal.

48. Respondents realized an economic benefit by having avoided and/or delayed implementation of waste management controls that would have ensured compliance with the applicable requirements. Based on the information available to EPA regarding Respondents' financial condition, Respondents appear able to pay the proposed penalty.

VII. TOTAL PROPOSED PENALTY

49. The total proposed penalty for the violations alleged above is THIRTY THREE THOUSAND DOLLARS ($33,000.00), calculated as follows:

CWA Penalties:	$ 22,000.00
SDWA Penalties:	+ 11,000.00
TOTAL PROPOSED PENALTY:	**$ 33,000.00**

VIII. PROPOSED ADMINISTRATIVE ORDER

50. Based upon the foregoing findings and pursuant to Section 1423(c) of the SDWA, 42 U.S.C. § 300h-2(c), Respondents are hereby ordered to cease all unauthorized underground injection activities. In particular, Respondents shall comply with the prohibition on using waste disposal wells for agricultural drainage found in O.A.R. § 340-044-0050(4). Within seven (7) days of the effective date of this order, Respondents shall provide EPA with documentation confirming that all waste disposal wells have been disconnected and/or rerouted. Such documentation shall include a photographic or video record of the improvements made to the facility to achieve compliance with the SDWA, plus an estimate

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(with any supporting documentation) of the costs expended to achieve compliance. Respondents shall submit all such documentation to:

Calvin Terada
Groundwater Protection Unit
U.S. Environmental Protection Agency, Region 10
1200 Sixth Avenue, Mail Stop OW-137
Seattle, Washington 98101
Phone: (206) 553-4141

51. In accordance with Section 1423(c)(3)(A) of the SDWA, 42 U.S.C. § 300h-2(c)(3)(A), this order will be issued thirty (30) days after you receive this written notice unless you request an administrative hearing on the order as described below.

52. In accordance with Section 1423(c)(3)(D) of the SDWA, 42 U.S.C. § 300h-2(c)(3)(D), this order shall become effective thirty (30) days following its issuance unless an appeal is taken pursuant to Section 1423(6) of the SDWA, 42 U.S.C. § 300h-2(6).

IX. OPPORTUNITY TO REQUEST A HEARING

53. Respondents have the right to request a hearing on any material fact alleged in this Complaint or on the appropriateness of the penalty and order proposed herein. Upon request, the Presiding Officer will hold a hearing for the assessment of these civil penalties and issuance of this order, conducted in accordance with Subpart I of the CROP rules. A copy of the CROP rules accompanies this Complaint.

54. Respondents' Answer to this Complaint, including any request for hearing, must be in writing and must be filed with:

Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 10
1200 Sixth Avenue, Mail Stop ORC-158
Seattle, Washington 98101

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X. FAILURE TO FILE AN ANSWER

55. To avoid a Default Order being entered pursuant to Section 22.17 of the CROP rules, Respondents must file a written Answer to this Complaint with the Regional Hearing Clerk within thirty (30) days after service of this Complaint.

56. In accordance with Section 22.15 of the CROP rules, Respondents' Answer should clearly and directly admit, deny, or explain each of the factual allegations contained in this Complaint with regard to which Respondents have any knowledge. Respondents' Answer must also state: (1) the circumstances or arguments which are alleged to constitute the grounds of defense; (2) the facts which Respondents dispute; (3) the basis for opposing the proposed penalty and order; and (4) whether a hearing is requested. Failure to admit, deny, or explain any material factual allegation contained herein constitutes an admission of the allegation.

XI. NOTICE OF APPLICATION OF SUBPART I

57. The procedures of Subpart I of the CROP rules will govern this adjudicatory proceeding.

XII. QUICK RESOLUTION AND SETTLEMENT

58. In accordance with Section 22.18 of the CROP rules, Respondents may resolve this action at any time after ten (10) days following the close of public comment on this Complaint by mailing the proposed penalty in full to:

EPA Region 10 Hearing Clerk
P.O. Box 360903M
Pittsburgh, Pennsylvania 15251-6903

and by filing with the Regional Hearing Clerk a copy of the check.

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59. EPA encourages settlement of a proceeding at any time if the settlement is consistent with the provisions and objectives of the Act and applicable regulations. Whether or not Respondents request a hearing, Respondents may request an informal settlement conference to discuss the facts of this case, the proposed penalty, and the possibility of settling this matter. To request such a settlement conference, please contact:

David Allnutt
Assistant Regional Counsel
U.S. Environmental Protection Agency, Region 10
1200 Sixth Avenue, Mail Stop ORC-158
Seattle, Washington 98101
(206) 553-2581

60. A request for an informal settlement conference does not extend the thirty (30) day period for filing a written Answer to this Complaint.

XIII. RESERVATIONS

61. Neither assessment of an administrative civil penalty pursuant to this Complaint, nor compliance with the administrative order proposed herein, shall affect Respondents' continuing obligations to comply with: (1) the CWA, the SDWA, and all other environmental statutes; (2) the terms and conditions of all applicable NPDES permits; (3) and any Compliance Order issued to Respondents under Section 309(a) of the CWA, 33 U.S.C. § l3l9(a), concerning the violations alleged herein.

Dated this ___ day of _____, 1999

_____
Randall F. Smith, Director
Office of Water

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CERTIFICATE OF SERVICE

I certify that the foregoing "Administrative Complaint For Penalties" was sent to the following persons, in the manner specified, on the date below:

Original hand-delivered:

Mary Shillcutt, Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 10
1200 Sixth Avenue, Mail Stop ORC-158
Seattle, Washington 98101

Copy, together with a cover letter and copy of the CROP rules, by certified mail, return receipt requested:

Thomas C. Tankersley, Registered Agent
Birch Circle Farms, Inc.
701 N. Evens
McMinnville, Oregon 97128

George Warmington
10475 NE Warmington Road
McMinnville, Oregon 97128

Dated: _____

_____
Lydia Arneson
U.S. EPA Region 10

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