

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5**

In the Matter of:)	Docket No. CWA-05-2019-0002
)	
Windy Ridge Dairy, LLC)	Proceeding to Assess a Class II Civil
)	Penalty under Section 309(g) of the Clean
And)	Water Act, 33 U.S.C. § 1319(g)
)	
T&M Limited Partnership)	
)	
Respondents.)	



CONSENT AGREEMENT AND FINAL ORDER

Preliminary Statement

1. This is an administrative action commenced and concluded under Section 309(g) of the Clean Water Act ("CWA" or "the Act"), 33 U.S.C. § 1319(g), and Sections 22.13(b) and 22.18(b)(2)-(3) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Consolidated Rules") as codified at 40 C.F.R. §§ 22.13(b) and 22.18(b)(2)-(3).
2. The Complainant is, by lawful delegation, the Director of the Water Division, U.S. Environmental Protection Agency ("EPA"), Region 5.
3. Respondents are Windy Ridge Dairy, LLC ("Windy Ridge"), a corporation located in Fair Oaks, Indiana and T&M Limited Partnership ("T&M"), a partnership located in Fair Oaks, Indiana.
4. Where the parties agree to settle one or more causes of action before the filing of a complaint, an administrative action may be commenced and concluded simultaneously by the issuance of a Consent Agreement and Final Order ("CA/FO"). See 40 C.F.R. § 22.13(b).
5. The parties agree that settling this action without the filing of a complaint or the adjudication of any issue of fact or law is in their interest and in the public interest.
6. Respondents consent to the terms of this CA/FO, including the assessment of the civil penalty specified below.
7. In addition to signing this CA/FO, EPA and Respondents have entered into an Administrative Order on Consent ("AOC") requiring Respondents to take certain actions to prevent the recurrence of the violations described in this CA/FO.
8. The CA/FO and the AOC are the outcome of negotiations initiated by EPA's letter of April 14, 2016 inviting Respondents to settle their liability for violations alleged by EPA.

Jurisdiction and Waiver of Right to Hearing

9. Respondents admit the jurisdictional allegations in this CA/FO and neither admit nor deny the factual allegations in this CA/FO.
10. Respondents waive any and all remedies, claims for relief, and otherwise available rights to judicial or administrative review that Respondents may have with respect to any issue of fact or law set forth in this CA/FO including, but not limited to, their right to request a hearing under 40 C.F.R. § 22.15(c) and Sections 309(g)(2)(B) and (4)(C) of the CWA, 33 U.S.C. § 1319(g)(2)(B) and (4)(C); their right to appellate review under Section 309(g)(8)(B) of the CWA, 33 U.S.C. § 1319(g)(8)(B); their right to seek federal judicial review of the CA/FO pursuant to Chapter 7 of the Administrative Procedure Act, 5 U.S.C. §§ 701-06; any right to contest the allegations in this CA/FO; and their right to appeal this CA/FO. Respondents also consent to the issuance of this CA/FO without further adjudication.

Statutory and Regulatory Background

11. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants into navigable waters except in compliance with, *inter alia*, a National Pollutant Discharge Elimination System (“NPDES”) permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.
12. Section 402 of the CWA, 33 U.S.C. § 1342, establishes the NPDES program under which EPA and, upon receiving authorization from EPA, a state may permit discharges into navigable waters, subject to specific conditions. A violation of a NPDES permit is a violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a).
13. Pursuant to Section 402 of the CWA, 33 U.S.C. § 1342, the State of Indiana requested approval from EPA to administer its own permit program for discharges into navigable waters within Indiana, and such approval was granted by EPA on January 1, 1975, 40 Fed. Reg. 4,033 (Jan. 27, 1975). Therefore, pursuant to the State’s permit program, the Indiana Department of Environmental Management (“IDEM”) has issued IDEM NPDES permits.
14. Section 502(12) of the CWA defines “discharge of a pollutant,” as, *inter alia*, “any addition of any pollutant to navigable waters from any point source.” 33 U.S.C. § 1362(12).
15. Section 502(6) of the CWA defines “pollutant,” as “dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt, and industrial, municipal, and agricultural waste discharged into water.” 33 U.S.C. § 1362(6).
16. Section 502(14) of the CWA defines “point source” as “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.” 33 U.S.C. § 1362(14).
17. Section 502(7) of the CWA defines “navigable waters” as “the waters of the United States, including the territorial seas.” 33 U.S.C. § 1362(7).

18. Section 502(5) of the CWA defines a “person” as “an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body.” 33 U.S.C. § 1362(5).

19. The regulation at 40 C.F.R. § 122.2 (1993) defines the term “waters of the United States,” as

- a. All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
- b. All interstate waters, including interstate “wetlands;”
- c. All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, “wetlands,” sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:
 - 1) Which are or could be used by interstate or foreign travelers for recreational or other purposes;
 - 2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
 - 3) Which are used or could be used for industrial purposes by industries in interstate commerce;
- d. All impoundments of waters otherwise defined as waters of the United States under this definition;
- e. Tributaries of waters identified in paragraphs (a) through (d) of this definition;
- f. The territorial sea; and
- g. “Wetlands” adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) through (f) of this definition.

18. “Animal Feeding Operation” or “AFO” means, among other things, a lot or facility where:

- a. Animals (other than aquatic animals) have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period and,
- b. Crops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility.

40 C.F.R. § 122.23(b)(1).

19. "Concentrated Animal Feeding Operation" or "CAFO" means an AFO that is defined as, inter alia, a Large CAFO. 40 C.F.R. § 122.23(b)(2).
20. "Facility" means the Windy Ridge Dairy facility located at 1652 North County Road 1100 West, Fair Oaks, Indiana 47943.
21. "Land Application Area" means land under the control of either or both of the Respondents, whether that land is owned, rented, or leased, to which manure or process wastewater from the production area is or may be applied. 40 C.F.R. § 122.23(b)(3). The Land Application Area comprises fields A2/A3, A4, A5, A6, A9, A10, A11, Calumet, 101, 102, 103, and 104, which are identified in the Nutrient Management Plan attached to the Administrative Order on Consent entered in this matter.
22. "Large CAFO" means, among other things, an animal feeding operation that stables or confines more than 700 mature dairy cows, whether milked or dry. 40 C.F.R. § 122.23(b)(4).
23. "Production area" means that part of an AFO that includes the animal confinement area, the manure storage area, the raw materials storage area, 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. 40 C.F.R. § 122.23(b)(8).
24. Pursuant to 40 C.F.R. § 122.23(d), a CAFO must not discharge unless the discharge is authorized by an NPDES permit.
25. Pursuant to 40 C.F.R. § 122.23(e), a land application discharge is a point source discharge subject to the NPDES permit requirements, except where it is an agricultural stormwater discharge.
26. Pursuant to 40 C.F.R. § 122.23(e)(1), for unpermitted Large CAFOs, a precipitation-related discharge of manure or process wastewater from land application areas is considered an agricultural stormwater discharge only where the manure or process wastewater has been land-applied in accordance with site-specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients, as specified in 40 C.F.R. § 122.42(e)(1)(vi) through (ix).
27. Section 309(g) of the CWA, 33 U.S.C. § 1319(g), authorizes the Administrator to assess a Class II civil penalty under Section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), after consultation with the State in which the violation occurs, when the Administrator finds, on the basis of any information available, that a person has violated Section 301 of the CWA, 33 U.S.C. § 1311.

Factual Allegations and Alleged Violations

28. Respondent Windy Ridge is a corporation and therefore a “person” under Section 502(5) of the CWA, 33 U.S.C. § 1362(5).
29. Respondent T&M Limited Partnership is a partnership and therefore a “person” under Section 502(5) of the CWA, 33 U.S.C. § 1362(5).
30. At all times relevant to this Order, Respondents together owned and/or operated the Facility, a large Concentrated Animal Feeding Operation. The Facility is a production area for a dairy. Windy Ridge Dairy, LLC operates the Facility and owns the mobile equipment required to operate the Facility. T&M owns the Facility, including the land and associated buildings and the fixed equipment required for operation of the Facility. T&M also owns the Land Application Area.
31. The Facility is an Animal Feeding Operation because:
 - a. it is 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 12-month period, within the meaning of 40 C.F.R. § 122.23(b)(1)(i); and
 - b. crops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility, within the meaning of 40 C.F.R. § 122.23(b)(1)(ii).
32. The Facility is a CAFO and a Large CAFO because the production area stables or confines more than 700 mature dairy cows.
33. The Land Application Area drains to surface drainage structures and subsurface drainage pipes, which connect to outfalls that discharge to roadside ditches and tributaries that flow to the Iroquois River.
34. On October 31, 2013, June 11, 2014, and July 26-27, 2017, personnel from EPA conducted inspections at the Facility (“2013 Inspection,” “2014 Inspection,” and “2017 Inspection,” respectively).
35. On March 27, 2015, EPA issued Information Request V-W-15-308-20 to Windy Ridge Dairy, LLC. On August 5, 2015, EPA issued Information Request V-W-15-308-23 to T&M. EPA requested information on the application of manure, litter, and process wastewater to the land application areas under the control of the owner and operator of the CAFO.
36. Based on their responses to EPA’s information requests, Respondents did not have a nutrient management plan which contained the elements required by 40 C.F.R. § 122.42(e)(1)(vi) – (ix) for the land application of manure or process wastewater at the Land Application Area at the time of the 2014 Inspection.
37. At the time of the 2014 Inspection, Respondents caused manure or process wastewater to be applied to the Land Application Area in ways that did not ensure appropriate agricultural utilization of the nutrients in the manure or process wastewater.

38. During the 2014 Inspection, EPA personnel observed runoff from several locations of the Land Application Area, including at Field Points A, B, F, G, H, and J (as identified in the 2014 Inspection Report), which flowed through surface drainage structures and subsurface drainage pipes, discharging from outfalls to roadside ditches and tributaries that flowed to the Iroquois River.
39. During the 2014 Inspection, EPA personnel sampled runoff being discharged from the Land Application Area at several locations, for pollutants found in manure, including Fecal Coliform, Biochemical Oxygen Demand (BOD), Total Kjeldahl Nitrogen (TKN), Nitrate-Nitrite Nitrogen, Ammonia Nitrogen, Total Phosphorus, Total Dissolved Solids (TDS), and Total Suspended Solids (TSS).
40. The sample results from the 2014 Inspection showed that all samples of the discharges described in Paragraphs 38 and 39 contained “pollutants” as defined in Section 502(6) of the CWA, 33 U.S.C. § 1362(6).
41. The discharges described in Paragraph 38 are not agricultural stormwater discharges, because Respondents had not applied manure, litter, and process wastewater in accordance with site-specific nutrient management practices that ensure appropriate agricultural utilization of nutrients in the manure or process wastewater.
42. The Iroquois River is a traditionally navigable water and a “navigable water” as defined at Section 502(7) of the CWA, 33 U.S.C. § 1362(7), and “waters of the United States” as defined at 40 C.F.R. § 122.2 (1993).

Counts 1-6: Unlawful Discharges of Pollutants into The Iroquois River

43. The statements in Paragraphs 1 through 42 are hereby incorporated by reference as if set forth in full.
44. On June 11, 2014, Respondents discharged manure and process wastewater from six locations at the Land Application area as a result of the application of that manure and process wastewater to the Land Application Area. These discharges, which contained pollutants, flowed into the ditches adjacent to the farm, an unnamed tributary to Curtis Creek, and then into Curtis Creek and the Iroquois River.
45. At no time relevant to these six discharges did Respondents have or apply for a permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342, for the discharges described herein.
46. Because Respondents did not apply manure and process wastewater in accordance with site-specific practices that ensured appropriate agricultural utilization of the nutrients in the manure and process wastewater, the six discharges on June 11, 2014 are discharges subject to NPDES requirements and are not excepted as agricultural storm water. 40 C.F.R. § 122.23(e).
47. The six discharges on June 11, 2014 were each a discharge of pollutants from a point source to navigable waters within the meaning of Section 502(7) of the CWA, 33 U.S.C. § 1362(7). These six discharges were not authorized by a NPDES Permit, and each discharge is a violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

Civil Penalty

48. The CWA includes provisions for administrative penalties, for civil injunctive relief and penalties, and for criminal penalties for violations of the CWA. Specifically, EPA may assess civil administrative penalties under 33 U.S.C. § 1319(g)(2)(B) and 40 C.F.R. Part 19 of up to \$16,000 per day for each day during which the violation continues up to a total of \$187,500, for violations of Section 301 of the CWA that occurred after December 6, 2013 through November 2, 2015.
49. Based on the facts alleged in this CA/FO, and upon the nature, circumstances, extent and gravity of the violations alleged, as well as Respondents' ability to pay, prior history of such violations, degree of culpability, economic benefit or savings (if any) resulting from the violations, and such other matters as justice may require, U.S. EPA has determined that an appropriate civil penalty to settle this action is \$25,000.
50. Within 30 days after the effective date of this CA/FO, Respondents must pay the \$25,000 civil penalty by ACH electronic funds transfer, payable to "Treasurer, United States of America," and sent to:

US Treasury REX/Cashlink ACH Receiver
ABA: 051036706
Account Number: 310006, Environmental Protection Agency
CTX Format Transaction Code 22-checking

In the comment area of the electronic funds transfer, state Respondents' names and the docket number of this CA/FO.

51. This civil penalty is not deductible for federal tax purposes.
52. If Respondents do not timely pay the civil penalty, Complainant may request the United States Department of Justice bring a civil action to collect any unpaid portion of the penalty with interest, handling charges, nonpayment penalties, and the United States' enforcement expenses for the collection action. Respondents acknowledge that the validity, amount, and appropriateness of the civil penalty are not reviewable in a collection action.
53. Respondents must pay the following on any amount overdue under this CA/FO. Interest will accrue on any overdue amount from the date payment was due at a rate established pursuant to 26 U.S.C. § 6621(a)(2); 31 U.S.C. § 3717. In addition to the assessed penalty and interest, Respondents must pay the United States' attorney's fees and costs for collection proceedings, and Respondents must pay a nonpayment penalty each quarter during which the assessed penalty is overdue. This nonpayment penalty will be 20 percent of the aggregate amount of the outstanding penalties and nonpayment penalties accrued from the beginning of the quarter. See 33 U.S.C. § 1319(g)(9).

General Provisions

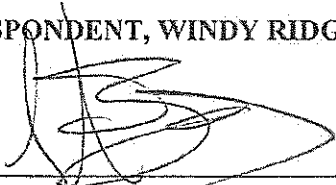
54. Pursuant to 40 C.F.R. § 22.5, the parties consent to service of this CA/FO by email at the following email addresses: Grubb.Christopher@epa.gov (for Complainant) and jvankley@vankleywalker.com (for Respondents). See 40 C.F.R. §§ 22.5-6.
55. Full payment of the penalty as described in Paragraphs 49 through 53 and full compliance with this CA/FO shall not in any case affect the right of the U.S. EPA or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law and facts.
56. Full payment of the penalty as described in Paragraphs 49 through 53 and full compliance with this CA/FO shall only resolve Respondents' liability for federal civil penalties for the violations and facts alleged in this CA/FO.
57. This CA/FO does not affect Respondents' responsibility to comply with the CWA and other applicable federal, state, or local laws and permits.
58. Respondents certify that they are complying with Section 301(a) of the CWA, 33 U.S.C. § 1311(a).
59. This CA/FO is a "final order" for purposes of 40 C.F.R. § 22.31 and the EPA's Interim Clean Water Act Settlement Penalty Policy (Mar. 1995).
60. The terms of this CA/FO bind Respondents and their successors and assigns.
61. Each person signing this CA/FO certifies that he or she has the authority to sign for the party whom he or she represents and to bind that party to the terms of this CA/FO.
62. Each party agrees to bear its own costs and attorney's fees in this action.
63. This CA/FO constitutes the entire agreement between the parties.
64. The effective date for this CA/FO is the date it is filed with the Regional Hearing Clerk, which is after completion of the notice and comment requirements of Sections 309(g)(4)(C) and 309(g)(5) of the CWA, 33 U.S.C. §§ 1319(g)(4)(C), (5) and 40 C.F.R. §§ 22.38, 22.45, and which shall be at least 30 days after the CA/FO has been signed by the Regional Judicial Officer or Regional Administrator.

In the Matter of:

Windy Ridge Dairy, LLC and T&M Limited Partners

Docket No. CWA-05-2019-0002

FOR RESPONDENT, WINDY RIDGE DAIRY, LLC:



Steven Bos, Member
Windy Ridge Dairy, LLC

4-5-19

Date

FOR RESPONDENT, T&M LIMITED PARTNERSHIP:



Dirk Eggleston, Controller
T&M Limited Partnership

4-5-2019

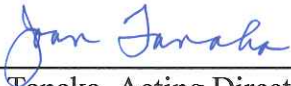
Date

In the Matter of:

Windy Ridge Dairy, LLC and T&M Limited Partners

Docket No. CWA-05-2019-0002

FOR THE U.S. ENVIRONMENTAL PROTECTION AGENCY, COMPLAINANT



Joan Tanaka, Acting Director
Water Division
United States Environmental Protection Agency
Region 5
Chicago, Illinois

4.8.19

Date

In the Matter of:

Windy Ridge Dairy, LLC and T&M Limited Partners

Docket No. CWA-05-2019-0002

Final Order

This Consent Agreement and Final Order, as agreed to by the parties, shall become effective immediately upon filing with the Regional Hearing Clerk. This Final Order concludes this proceeding pursuant to 40 C.F.R. §§ 22.18 and 22.31. IT IS SO ORDERED.

By: _____ Date: _____
Ann L. Coyle
Regional Judicial Officer
U.S. Environmental Protection Agency
Region 5

In the Matter of:

Windy Ridge Dairy, LLC and T&M Limited Partners

Docket No. CWA-05-2019-0002

CERTIFICATE OF SERVICE

I certify that I served a true and correct copy of the foregoing **Consent Agreement and Final Order**, which was filed on _____, in the following manner to the following addressees:

Copy by E-mail to

Attorney for Respondent:

Jack VanKley

jvankley@vankleywalker.com

Copy by E-mail to

Attorney for Complainant:

Christopher Grubb

grubb.christopher@epa.gov

Copy by E-mail to

Regional Judicial Officer:

Ann Coyle

coyle.ann@epa.gov

Dated: _____

LaDawn Whitehead

Regional Hearing Clerk

U.S. Environmental Protection Agency, Region 5