

RECEIVED

12 MAR -2 AM 7:31

BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
HEARINGS CLERK
EPA --- REGION 10

In the Matter of:)	
)	DOCKET NO. CWA-10-2012-0045
)	
River End Dairy, LLC)	
)	CONSENT AGREEMENT AND
)	FINAL ORDER
)	
Respondent.)	

I. STATUTORY AUTHORITY

1.1. This Consent Agreement and Final Order ("CA/FO") is issued under the authority vested in the Administrator of the U.S. Environmental Protection Agency ("EPA") by Section 309(g)(2)(B) of the Clean Water Act ("CWA"), 33 U.S.C. § 1319(g)(2)(B).

1.2. The Administrator has delegated the authority to issue the Final Order contained in Part V of this CA/FO to the Regional Administrator of EPA Region 10, who has redelegated this authority to the Regional Judicial Officer in EPA Region 10.

1.3. Pursuant to CWA Section 309(g)(1) and (g)(2)(B), 33 U.S.C. § 1319(g)(1) and (g)(2)(B), and in accordance with the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties," 40 C.F.R. Part 22, EPA issues, and River End Dairy, LLC, ("Respondent") agrees to issuance of, the Final Order contained in Part V of this CA/FO.

II. PRELIMINARY STATEMENT

2.1. In accordance with 40 C.F.R. §§ 22.13(b) and 22.45(b), issuance of this CA/FO commences this proceeding, which will conclude when the Final Order contained in Part V of this CA/FO becomes effective.

2.2. The Director of the Office of Compliance and Enforcement, EPA Region 10 (“Complainant”) has been delegated the authority pursuant to CWA Section 309(g), 33 U.S.C. § 1319(g), to sign consent agreements between EPA and the party against whom a Class II penalty is proposed to be assessed.

2.3. Part III of this CA/FO contains a concise statement of the factual and legal basis for the alleged violations of the CWA, together with the specific provisions of the CWA and implementing regulations that Respondent is alleged to have violated.

III. ALLEGATIONS

3.1. CWA Section 301(a), 33 U.S.C. § 1311(a), prohibits the “discharge of any pollutant by any person” except as authorized by a National Pollutant Discharge Elimination System (“NPDES”) permit issued pursuant to CWA Section 402, 33 U.S.C. § 1342. CWA Section 502(12), 33 U.S.C. § 1362(12), defines the term “discharge of a pollutant” to include “any addition of any pollutant to navigable waters from any point source.” CWA Section 502(6), 33 U.S.C. § 1362(6), defines “pollutant” to include, *inter alia*, solid waste, sewage, sewage sludge, biological materials, and industrial and municipal waste.

3.2. CWA Section 502(7), 33 U.S.C. § 1362(7) defines “navigable waters” as “the waters of the United States, including the territorial seas.” In turn, 40 C.F.R. § 122.2 defines “waters of the United States” to include: (i) 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; (ii) all interstate waters; (iii) tributaries to such waters; and (iv) wetlands adjacent to such waters or their tributaries.

3.3. CWA Section 309(g)(1), 33 U.S.C. § 1319(g)(1), authorizes EPA to assess administrative penalties against any person who has violated CWA Section 301, 33 U.S.C. § 1311. CWA Section 309(g)(1) also authorizes EPA to assess administrative penalties against

any person who has violated any permit condition or limitation in a permit issued under CWA Section 402, 33 U.S.C. § 1342.

3.4. River End Dairy, LLC (“Respondent”), operates a dairy at 14650 Tideland Rd, Nehalem, Oregon, (“Facility”). Respondent is a “person” within the meaning of Section 502(5) of the Act, 33 U.S.C. §1362(5). At all times relevant to this action, Respondent owned and operated the Facility.

3.5. Respondent’s Facility confines more than 320 mature dairy cows year round and is a “concentrated animal feeding operation” as that term is defined in 40 C.F.R. § 122.23(b)(2) and a “confined animal feeding operation” as that term is defined in State law.

3.6. The State of Oregon has issued an NPDES general permit to cover confined animal feeding operations, the “Oregon Confined Animal Feeding Operation NPDES General Permit,” Permit Number 01-2009 (“CAFO General Permit” or “Permit”). The Permit was effective June 29, 2009, and will expire May 31, 2014. As defined in the Permit, a confined feeding operation includes any “animal feeding operation that is subject to regulation as a concentrated animal feeding operation pursuant to 40 C.F.R. §122.23.” CAFO General Permit, definition 4. The Permit authorizes certain discharges of process wastewater from those Oregon CAFOs that subject themselves to its conditions and limitations.

3.7. EPA’s regulations define “concentrated animal feeding operation” (“CAFO”) to include any “animal feeding operation” (“AFO”) that: (a) confines more than 700 mature dairy cows (a “Large CAFO”); or (b) confines more than 200 mature dairy cows and discharges pollutants to waters of the United States through a man-made ditch, flushing system, or similar man-made device (a “Medium CAFO”). 40 C.F.R. § 122.23(b)(4) and (6). EPA’s regulations define AFO to include any lot or facility where “(i) 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

(ii) 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).

3.8. Among the conditions and limitations included in the CAFO General Permit, permit condition S2.A prohibits “a permittee ... from discharging manure, litter, or process waste water to surface waters ... of the state, except as allowed in S2.B and S2.C and provided the discharges allowed by S2.B and S2.C do not cause or contribute to a violation of state water quality standards. ... Types of discharge that are prohibited include but are not limited to: contaminated runoff from confinement or waste accumulation areas; overflow or discharges from waste storage facilities; ... discharges due to equipment failure; or leakage or seepage from facilities in the production area in excess of approved designs.” CAFO General Permit, permit condition S2.A.

3.9. Permit condition S2.B of the CAFO General Permit prohibits a permitted CAFO “from discharging manure, litter, or process waste water to surface waters of the state from [a CAFO’s] production area, except when:

- (a) Rainfall events cause an overflow of waste management and storage facilities designed, constructed, operated, and maintained to contain all manure, litter, and process waste water including the contaminated runoff and direct precipitation from a 25-year, 24-hour rainfall event; and
- (b) The production area is operated in accordance with the applicable inspection, maintenance, recordkeeping, and reporting requirements of this permit.”

CAFO General Permit, permit condition S2.B.1.

3.10. The CAFO General Permit includes a definition of the term, “process waste water,” which states that “process waste water” means “water directly or indirectly used in the operation of the CAFO 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

CAFO facilities; Process waste water ... also includes any water which comes into contact with any raw materials, products, or byproducts including manure, litter, feed, milk, eggs or bedding.” CAFO General Permit, definition 17. Process wastewater contains “pollutants,” as defined in the permit and by 40 C.F.R. 122.2, within the meaning of CWA Sections 502(6) and (12), 33 U.S.C. § 1362(6) and (12). See CAFO General Permit, definition 15.

3.11. The CAFO General Permit includes a definition of the term, “production area,” which states that “production area” means “that part of a CAFO that includes the animal confinement area, the manure storage area, the raw materials storage area, and the waste containment areas.” CAFO General Permit, definition 18. The barns, confinement pens, animal walkways and other parts of the animal confinement area of the Facility were under Respondent’s control at all times relevant to this action.

3.12. The animal confinement area at the Facility includes the “main barn,” walkways, and barn entrances. The animal confinement area drains into unnamed man-made drainage ditches. Because the Facility discharges through these man-made ditches, it meets the federal definition of a Medium CAFO. These unnamed ditches are adjacent to the facility on both the north and south ends and discharge to the Nehalem River. The Nehalem River is 600 yards from the “main barn.”

3.13. The Nehalem River flows to Nehalem Bay and then to the Pacific Ocean coast of Oregon. Nehalem Bay and the Nehalem River, where the discharge occurs, are susceptible to use in interstate commerce, and Nehalem Bay is subject to the ebb and flow of the tide. In addition, use, degradation, or destruction of the Nehalem River or Nehalem Bay would or could affect interstate or foreign commerce. Therefore, both the Nehalem River and Nehalem Bay meet the definitions of “water of the United States” as defined in 40 C.F.R. § 122.2, and “navigable waters” as defined in CWA Section 502(7), 33 U.S.C. § 1362(7).

3.14. At all times relevant to these allegations, the River End Dairy had coverage under the CAFO General Permit and was assigned the NPDES permit number ORG-01-0128.

3.15. On April 13, 2011, the Facility discharged process waste water to the Nehalem River. This discharge was not caused by a rainfall event that caused the overflow of a facility designed, constructed, operated, and maintained to contain all process-generated waste waters plus the runoff and direct precipitation from a 25-year, 24-hour rainfall event. Thus, this discharge was not allowed by permit condition S2.B. of the CAFO General Permit, and was prohibited by the CAFO General Permit, as provided in permit condition S2.A. As a result, Respondent violated the terms of the CAFO General Permit.

3.16. Under CWA Section 309(g), 33 U.S.C. § 1319(g), EPA may assess an administrative penalty when EPA finds that “any person has violated ... any permit condition or limitation ... in a permit issued” pursuant to CWA Section 402, 33 U.S.C. § 1342. Consequently, under CWA Section 309(g)(2)(B), 33 U.S.C. § 1319(g)(2)(B), and 40 C.F.R. Part 19, Respondent is liable for the administrative assessment of civil penalties for violations at the Facility in an amount not to exceed \$16,000 per day for each day during which the violation continues, up to a maximum of \$177,500.

IV. CONSENT AGREEMENT

4.1. Respondent admits the jurisdictional allegations contained in Part III of this CA/FO.

4.2. Respondent admits the specific allegations contained in Part III of this CA/FO.

4.3. As required by CWA Section 309(g)(3), 33 U.S.C. § 1319(g)(3), EPA has taken into account the nature, circumstances, extent, and gravity of the alleged violations as well as Respondent’s economic benefit of noncompliance, ability to pay, and other relevant factors. After considering all of these factors, EPA has determined and Respondent agrees that an appropriate penalty to settle this action is \$6,300.

4.4. Respondent agrees to pay the total civil penalty set forth in Paragraph 4.3 within thirty (30) days of the effective date of the Final Order.

4.5. Payment under this CA/FO must be made by cashier's check or certified check payable to the order of "Treasurer, United States of America" and delivered via United States mail to the following address:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, MO 63197-9000

Respondent must note on the check the title and docket number of this action.

4.6. Respondent must deliver via United States mail a photocopy of the check described in Paragraph 4.5 to the Regional Hearing Clerk and EPA Region 10 at the following addresses:

Regional Hearing Clerk
U.S. Environmental Protection Agency
Region 10
1200 Sixth Avenue, Suite 900, (Mail Stop ORC-158)
Seattle, Washington 98101

Attention: Steven Potokar
U.S. Environmental Protection Agency
Region 10
1200 Sixth Avenue, Suite 900, (Mail Stop OCE-133)
Seattle, Washington 98101

4.7. If Respondent fails to pay the penalty assessed by this CA/FO in full by the due date set forth in Paragraph 4.4, the entire unpaid balance of penalty and accrued interest shall become immediately due and owing. Such failure may also subject Respondent to a civil action to collect the assessed penalty under the CWA, together with interest, fees, costs, and additional

penalties described below. In any collection action, the validity, amount, and appropriateness of the penalty shall not be subject to review.

4.7.1. Interest. Pursuant to CWA Section 309(g)(9), 33 U.S.C. § 1319(g)(9), any unpaid portion of the assessed penalty shall bear interest at a rate established by the Secretary of Treasury pursuant to 31 U.S.C. § 3717(a)(1) from the effective date of the Final Order set forth in Part V, provided however, that no interest shall be payable on any portion of the assessed penalty that is paid within thirty (30) days of the effective date of the Final Order.

4.7.2. Attorneys Fees, Collection Costs, Nonpayment Penalty. Pursuant to CWA Section 309(g)(9), 33 U.S.C. § 1319(g)(9), if Respondent fails to pay on a timely basis the penalty set forth in Paragraph 4.3, Respondent shall pay (in addition to any assessed penalty and interest) attorneys fees and costs for collection proceedings and a quarterly nonpayment penalty for each quarter during which such failure to pay persists. Such nonpayment penalty shall be in an amount equal to twenty percent (20%) of the aggregate amount of Respondent's penalties and nonpayment penalties which are unpaid as of the beginning of such quarter.

4.8. The penalty described in Paragraph 4.3, including any additional costs incurred under Paragraph 4.7, above, represents an administrative civil penalty assessed by EPA and shall not be deductible for purposes of federal taxes.

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

4.10. Except as described in Subparagraph 4.7.2, above, each party shall bear its own fees and costs in bringing or defending this action.

4.11. Respondent expressly waives any right to contest the allegations and waives any right to appeal the Final Order set forth in Part V.

4.12. The provisions of this CA/FO shall bind Respondent and its agents, servants, employees, successors, and assigns.

4.13. The above provisions are STIPULATED AND AGREED upon by Respondent and EPA Region 10.

FOR River End Dairy, LLC:

Dated: 2/14/12


Signature

Print Name: Michael J Whalen

Title: Member/manager

FOR U.S. ENVIRONMENTAL PROTECTION AGENCY:

Dated: 2/21/2012


EDWARD J. KOWALSKI, Director
Office of Compliance and Enforcement

V. FINAL ORDER

5.1. The terms of the foregoing Parts I-IV are ratified and incorporated by reference into this Final Order. Respondent is ordered to comply with the terms of settlement.

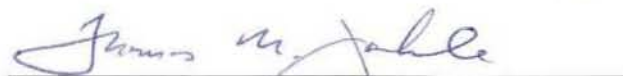
5.2. This CA/FO constitutes a settlement by EPA of all claims for civil penalties pursuant to the CWA for the violations alleged in Part III. In accordance with 40 C.F.R. § 22.31(a), nothing in this CA/FO shall affect the right of EPA or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law. This CA/FO does not waive, extinguish or otherwise affect Respondent's obligations to comply with all applicable provisions of the CWA and regulations promulgated or permits issued thereunder.

5.3. In accordance with CWA Section 309(g)(1), 33 U.S.C. § 1319(g)(1), and 40 C.F.R. § 22.38(b), the State of Alaska has been given the opportunity to consult with EPA regarding the assessment of the administrative civil penalty against Respondent.

5.4. Pursuant to CWA Section 309(g)(4)(A), 33 U.S.C. § 1319(g)(4)(A), and 40 C.F.R. § 22.45(b), EPA has issued public notice of and provided reasonable opportunity to comment on its intent to assess an administrative penalty against Respondent. More than 40 days have elapsed since issuance of this public notice and EPA has received no petition to set aside the Consent Agreement contained herein.

5.5. This Final Order shall become effective upon filing.

SO ORDERED this 28th day of February, 2012.



THOMAS M. JAHNKE
Regional Judicial Officer
U.S. Environmental Protection Agency
Region 10

CERTIFICATE OF SERVICE

The undersigned certifies that the original of the attached **CONSENT AGREEMENT AND FINAL ORDER** in **The Matter of: River End Dairy, LLC, Docket No. CWA-10-2012-0045** was filed with the Regional Hearing Clerk on March 2, 2012.

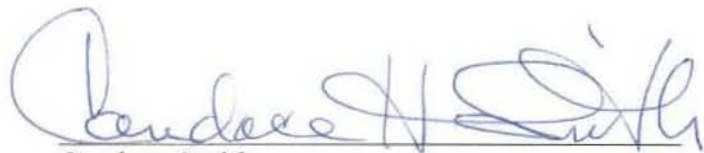
On March 2, 2012, the undersigned certifies that a true and correct copy of the document was delivered to:

R. David Allnut
Office of Regional Counsel
U.S. Environmental Protection Agency
1200 Sixth Avenue, ORC-158
Suite 900
Seattle, WA 98101

Further, the undersigned certifies that a true and correct copy of the aforementioned document was placed in the United States mail certified/return receipt on March 2, 2012, to:

Mike Whalen
River End Dairy, LLC
36950 Tohl Ranch Road
Nehalem, OR 97131

DATED this 2nd day of March 2012.



Candace Smith
Acting Regional Hearing Clerk
EPA Region 10

