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HEARINGS CLERK
EPA--REGION 10

BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

6)	
7)	DOCKET NO. CWA-10-2011-0004
8)	
9)	CONSENT AGREEMENT AND
10)	FINAL ORDER
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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 re delegated this authority to the Regional Judicial Officer in EPA Region 10.

1.3. Pursuant to Section 309(g)(1) and (g)(2)(B) of the CWA, 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 Misty Meadow 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 Section 309(g) of the CWA, 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. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the “discharge of a pollutant” by any person into navigable waters of the United States, except, *inter alia*, as authorized by a National Pollutant Discharge Elimination System (“NPDES”) permit issued pursuant to Section 402 of the Act, 33 U.S.C. § 1342. Section 402(a) of the CWA, 33 U.S.C. § 1342(a), provides that a state with an approved NPDES program may issue permits for the discharge of pollutants into waters of the United States upon such specific terms and conditions as the state may prescribe.

3.2. Section 502(12) of the CWA, 33 U.S.C. § 1362(12), defines “discharge of a pollutant” to include “any addition of any pollutant to navigable waters from any point source.”

1 "Navigable waters" are defined as "waters of the United States." CWA Section 502(7);
2 33 U.S.C. § 1362(7).

3 3.3. Section 502(14) of the Clean Water Act, 33 U.S.C. § 1362(14), defines the term
4 "point source" to include any "concentrated animal feeding operation . . . from which pollutants
5 are or may be discharged."

6 3.4. EPA's regulations define "animal feeding operation" ("AFO") to include any lot
7 or facility where "(i) Animals . . . have been, are, or will be stabled or confined and fed or
8 maintained for a total of 45 days or more in any 12-month period, and (ii) Crops, vegetation
9 forage growth, or post-harvest residues are not sustained in the normal growing season over any
10 portion of the lot or facility." 40 C.F.R. § 122.23(b)(1).

11 3.5. EPA's regulations define "concentrated animal feeding operation" ("CAFO") to
12 include, *inter alia*, an AFO that is defined as a "Large CAFO." 40 C.F.R. § 122.23(b)(2). A
13 "Large CAFO" is an AFO that "stables or confines as many or more than . . . 700 mature dairy
14 cows, whether milked or dry" 40 C.F.R. § 122.23(b)(4).

15 3.6. The State of Oregon has issued a NPDES general permit to cover confined animal
16 feeding operations, the "Oregon Confined Animal Feeding Operation NPDES General Permit,"
17 Permit Number 01-2009 ("CAFO General Permit"). The Permit was effective June 29, 2009,
18 and will expire May 31, 2014. The Permit authorizes certain discharges of process wastewater
19 from those Oregon CAFOs that subject themselves to its conditions and limitations.
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21 3.7. Among the conditions and limitations contained in the CAFO General Permit is
22 a prohibition on the discharge of manure, litter, or process waste water from the CAFO's
23 production area to surface waters of the state except when "[r]ainfall events cause an overflow of
24

1 waste management and storage facilities designed, constructed, operated, and maintained to
2 contain all manure, litter, and process waste water including the contaminated runoff and direct
3 precipitation from a 25-year, 24-hour rainfall event; and . . . [t]he production area is operated in
4 accordance with the applicable inspection, maintenance, recordkeeping, and reporting
5 requirements of this permit.” CAFO General Permit at S2.B.1.

6 3.8. Also among the conditions and limitations contained in the CAFO General Permit
7 is a requirement that the “permittee must at all times properly operate and maintain all facilities
8 and systems used for process waste collection, storage and utilization, and correct any
9 deficiencies found as soon as possible.” CAFO General Permit at S2.H.

10 3.9. Section 309(g)(1) of the CWA, 33 U.S.C. § 1319(g)(1), authorizes EPA to assess
11 administrative penalties against any person who has violated Section 301 or 308 of the CWA,
12 33 U.S.C. § 1311 or 1318. Section 309(g)(1) of the CWA also authorizes EPA to assess
13 administrative penalties against any person who has violated any permit condition or limitation
14 in a permit issued under Section 402 of the CWA, 33 U.S.C. § 1342.

15 3.10. Misty Meadow Dairy, LLC (“Respondent”), operates a dairy at 2614 First Street,
16 Tillamook, Oregon, (“Facility”). Respondent is a “person” within the meaning of Section 502(5)
17 of the Act, 33 U.S.C. §1362(5).
18

19 3.11. Respondent’s Facility confines more than 1,700 cows year round and is a
20 “concentrated animal feeding operation” as that term is defined in 40 C.F.R. § 122.23(b), and a
21 “confined animal feeding operation” as that term is defined under State law and the CAFO
22 General Permit. Or. Admin. R. 603-074-0010(3) (2010); CAFO General Permit at 3. At all
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24
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1 times relevant to these allegations, the Misty Meadow Dairy had coverage under the CAFO
2 General Permit, and has been assigned NPDES permit number ORG010046.

3 3.12. The barns, confinement pens and other production area facilities of the Facility
4 were under Respondent's control at all times relevant to this action. The production areas of the
5 Facility include, but are not limited to, the main confinement area, which includes the feed
6 loading area; and the north dry cow facility.

7 3.13. The main confinement area includes several stormwater drains. A drain in the
8 feed loading area discharges through a pipe into a ditch that discharges to Hoquarten Slough.
9

10 3.14. Dougherty Slough is adjacent to the north dry cow facility.

11 3.15. Hoquarten Slough flows into Dougherty Slough. Hoquarten and Dougherty
12 Sloughs flow into the Trask River, which empties into Tillamook Bay on the Pacific Ocean coast
13 of Oregon. Tillamook Bay, the Trask River, and Hoquarten and Dougherty Sloughs are
14 susceptible to use in interstate commerce and are subject to the ebb and flow of the tide. In
15 addition, use, degradation, or destruction of Hoquarten or Dougherty Sloughs would or could
16 affect interstate or foreign commerce. Therefore, Hoquarten and Dougherty Sloughs are "waters
17 of the United States" as defined in 40 C.F.R. § 122.2, and "navigable waters" as defined in
18 Section 502(7) of the CWA, 33 U.S.C. § 1362(7).

19 3.16. On January 12 and 13, 2010, EPA and the Oregon State Department of
20 Agriculture conducted an inspection of the Misty Meadow Dairy to determine compliance with
21 the CAFO General Permit and the CWA.
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23 3.17. On January 12 and 13, 2010, the production area of the Misty Meadow Dairy (the
24 north dry cow facility) discharged manure-contaminated process waste water to Dougherty
25

1 Slough. This discharge was not caused by a rainfall event that caused the overflow of a facility
2 designed, constructed, operated, and maintained to contain all process-generated waste waters
3 plus the runoff and direct precipitation from a 25-year, 24-hour rainfall event. This discharge
4 was therefore not authorized by the CAFO General Permit and violated the CWA.

5 3.18. On January 12, 2010, the production area of the Misty Meadow Dairy (the feed
6 loading area of the main confinement area) discharged process waste water to Hoquarten Slough.
7 This discharge was not caused by a rainfall event that caused the overflow of waste management
8 and storage facilities designed, constructed, operated, and maintained to contain all manure,
9 litter, and process waste water including the contaminated runoff and direct precipitation from a
10 25-year, 24-hour rainfall event. This discharge was therefore not authorized by the CAFO
11 General Permit and violated the CWA.
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13 3.19. Process waste water is defined in 40 C.F.R. § 122.23(b)(7) and contains
14 pollutants within the meaning of Section 502(6) and (12) of the Act, 33 U.S.C. § 1362(6)
15 and (12).

16 3.20. The discharges of pollutants described in Paragraphs 3.17 and 3.18 constitute
17 two days of violation of a permit issued under Section 402 of the Act, 33 U.S.C. § 1342.

18 3.21. Section 309(g) of the Act, 33 U.S.C. § 1319(g), provides, in pertinent part,
19 “[w]henever on the basis of any information available . . . the Administrator finds that any
20 person has violated . . . any permit condition or limitation implementing any such sections in a
21 permit issued under section 402 of this Act by the Administrator . . . the Administrator may . . .
22 assess a . . . class II civil penalty”
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1 Respondent must note on the check the title and docket number of this action.

2 4.6. Respondent must deliver via United States mail a photocopy of the check
3 described in Paragraph 4.5 to the Regional Hearing Clerk and EPA Region 10 at the following
4 addresses:

5 Regional Hearing Clerk
6 U.S. Environmental Protection Agency
7 Region 10, Mail Stop ORC-158
8 1200 Sixth Avenue, Suite 900
9 Seattle, WA 98101

10 Steven Potokar
11 U.S. Environmental Protection Agency
12 Region 10, Mail Stop OCE-133
13 1200 Sixth Avenue, Suite 900
14 Seattle, WA 98101

15 4.7. If Respondent fails to pay the penalty assessed by this CA/FO in full by the due
16 date set forth in Paragraph 4.4, the entire unpaid balance of penalty and accrued interest shall
17 become immediately due and owing. Such failure may also subject Respondent to a civil action
18 to collect the assessed penalty under the CWA, together with interest, fees, costs, and additional
19 penalties described below. In any collection action, the validity, amount, and appropriateness of
20 the penalty shall not be subject to review.

21 4.7.1. Interest. Pursuant to Section 309(g)(9) of the CWA, 33 U.S.C.
22 1319(g)(9), any unpaid portion of the assessed penalty shall bear interest at a rate
23 established by the Secretary of Treasury pursuant to 31 U.S.C. § 3717(a)(1) from the
24 effective date of the Final Order set forth in Part V, provided however, that no interest
25 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.

1 4.7.2. Attorneys Fees, Collection Costs, Nonpayment Penalty. Pursuant to
2 Section 309(g)(9) of the CWA, 33 U.S.C. § 1319(g)(9), if Respondent fails to pay on a
3 timely basis the penalty set forth in Paragraph 4.3, Respondent shall pay (in addition to
4 any assessed penalty and interest) attorneys fees and costs for collection proceedings and
5 a quarterly nonpayment penalty for each quarter during which such failure to pay persists.
6 Such nonpayment penalty shall be in an amount equal to twenty percent (20%) of the
7 aggregate amount of Respondent's penalties and nonpayment penalties which are unpaid
8 as of the beginning of such quarter.

9 4.8. The penalty described in Paragraph 4.3, including any additional costs incurred
10 under Paragraph 4.7, above, represents an administrative civil penalty assessed by EPA and shall
11 not be deductible for purposes of federal taxes.

12 4.9. The undersigned representative of Respondent certifies that he or she is
13 authorized to enter into the terms and conditions of this CA/FO and to bind Respondent to this
14 document.

15 4.10. Except as described in Subparagraph 4.7.2, above, each party shall bear its own
16 fees and costs in bringing or defending this action.

17 4.11. Respondent expressly waives any right to contest the allegations and waives any
18 right to appeal the Final Order set forth in Part V.

19 4.12. The provisions of this CA/FO shall bind Respondent and its agents, servants,
20 employees, successors, and assigns.

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

DATED:

FOR RESPONDENT:

10-10-10



Signature

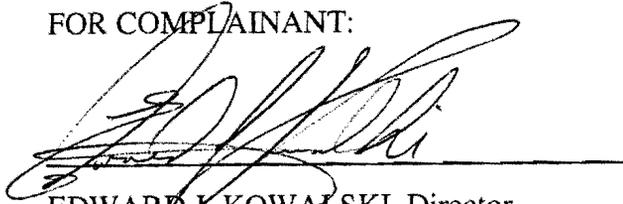
Print Name: Dave Hogan

Title: owner

DATED:

FOR COMPLAINANT:

10/26/2010



EDWARD J. KOWALSKI, Director
Office of Compliance and Enforcement

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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.

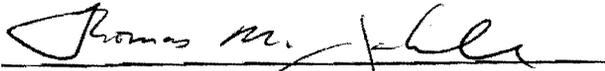
5.2. This CA/FO constitutes a settlement by EPA of all claims for civil penalties pursuant to the CWA for the violations alleged in Part III. In accordance with 40 C.F.R. § 22.31(a), nothing in this CA/FO shall affect the right of EPA or the United States to pursue appropriate injunctive or other equitable 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 Section 309(g)(1) of the CWA, 33 U.S.C. § 1319(g)(1), and 40 C.F.R. § 22.38(b), the Oregon Department of Agriculture and the Oregon Department of Environmental Quality have been given the opportunity to consult with EPA regarding the assessment of the administrative civil penalty against Respondent.

5.4. Pursuant to Section 309(g)(4)(A) of the CWA, 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.

1 5.5. This Final Order shall become effective upon filing.

2 SO ORDERED this 10th day of December, 2010.

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5 THOMAS M. JAHNKE
6 Regional Judicial Officer
7 U.S. Environmental Protection Agency
8 Region 10
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CERTIFICATE OF SERVICE

The undersigned certifies that the original of the attached **CONSENT AGREEMENT AND FINAL ORDER** in **In the Matter of: Misty Meadow Dairy, LLC, DOCKET NO.: CWA-10-2011-0004** was filed with the Regional Hearing Clerk on December 10, 2010.

On December 10, 2010, the undersigned certifies that a true and correct copy of the document was delivered to:

Jessica Barkas
U.S. EPA
1200 Sixth Avenue, 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 December 10, 2010, to:

Misty Meadows Dairy
Dave Hogan, Owner
2614 First Street
Tillamook, OR 97141

DATED this 10th day of December 2010.



Carol Kennedy
Regional Hearing Clerk
EPA Region 10