

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 2**

IN THE MATTER OF:

Scott Wilkins
Wilkins Dairy Farm, LLC
5811 Unionville Road
Bath, NY 14810

NPDES Tracking No. NYA001520

Respondent

Proceeding pursuant to Section 309(g) of the
Clean Water Act, 33 U.S.C. §1319(g).

**PROCEEDING TO ASSESS A CLASS II
CIVIL PENALTY**

DOCKET NO. CWA-02-2010-3404

U.S. ENVIRONMENTAL
PROTECTION AGENCY-REGION 2
2010 JUL 20 PM 12:28
REGIONAL HEARING
CLERK

**ADMINISTRATIVE COMPLAINT
FINDINGS OF VIOLATION, NOTICE OF PROPOSED
ASSESSMENT OF AN ADMINISTRATIVE PENALTY, AND
NOTICE OF OPPORTUNITY TO REQUEST A HEARING**

I. STATUTORY AND REGULATORY AUTHORITIES

1. This Administrative Complaint, Findings of Violation, Notice of Proposed Assessment of an Administrative Penalty, and Notice of Opportunity to Request a Hearing (“Complaint”) 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 (“Act” or “CWA”), 33 U.S.C. §1319(g)(2)(B). The Administrator has delegated this authority to the Regional Administrator of EPA, Region 2, who in turn has delegated it to the Director, Division of Enforcement and Compliance Assistance (“DECA”) of EPA, Region 2 (“Complainant”).
2. Pursuant to Section 309(g)(2)(B) of the Act, and in accordance with the “Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits” (“CROP”), 40 CFR Part 22 (2001), a copy of which is attached, Complainant hereby requests that the Regional Administrator assess a civil penalty against Wilkins Dairy Farm, LLC (“Respondent”), as a result of Complainant’s determination that the Respondent is in violation of Sections 301 and 402 of the Act, 33 U.S.C. §1311 and §1342, respectively, for the unlawful discharge of pollutants into navigable waters without authorization by a National Pollutant Discharge Elimination System (“NPDES”) permit.

3. Section 301(a) of the Clean Water Act, 33 U.S.C. §1311(a), prohibits the discharge of pollutants from a point source into waters of the United States, except in compliance with, inter alia, Section 402 of the Act, 33 U.S.C. §1342.
4. The Act and its implementing regulations contain the following definitions:
 - a) "Waters of the United States" include, but are not limited to, waters which are currently used 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 and including wetlands, rivers, streams (including intermittent streams), and tributaries thereto (40 CFR §122.2).
 - b) "Pollutant" means, but is not limited to, solid waste, dredged spoil, rock, sand, cellar dirt, sewage, sewage sludge, and industrial, municipal and agricultural waste discharged into water, pursuant to Section 502(6) of the Act, 33 U.S.C. §1362(6).
 - c) "Point source" means "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, ..." pursuant to Section 502(14) of the Act, 33 U.S.C. §1362(14).
 - d) "Discharge of a pollutant" means any addition of any pollutant to navigable waters from any point source, pursuant to Section 502(12) of the Act, 33 U.S.C. §1362(12).
 - e) "Person" means, but is not limited to, an individual, corporation, partnership or association, pursuant to Section 502(5) of the Act, 33 U.S.C. §1362(5).
 - f) "Owner or Operator," means the owner or operator of any facility or activity subject to regulation under the NPDES program (40 C.F.R. §122.2).
5. Section 308 of the Act, 33 U.S.C. §1318, provides, in relevant part, that the Administrator of EPA may require the owner or operator of any point source to, among other things: maintain such records; make such reports; install, use and monitor such equipment; sample such effluents; and provide such other information as may reasonably be required in order to carry out Section 402 of the Act, 33 U.S.C. §1342.
6. Section 402 of the Act, 33 U.S.C. §1342, provides that pollutants may be discharged only in accordance with the terms of a National Pollutant Discharge Elimination System ("NPDES") permit issued pursuant to that Section.
7. To implement Section 402 of the Act, the EPA promulgated regulations codified at 40 C.F.R. §122.
8. An "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.

9. A “concentrated animal feeding operation” or “CAFO” is defined by 40 C.F.R. §122.23(b)(2) as an AFO that is, inter alia, a medium CAFO.
10. A “medium CAFO” is defined by 40 C.F.R. §122.23(b)(6)(i) as an animal feeding operation that stables or confines within the range of 200-699 mature dairy cows, whether milked or dry.
11. In New York State, the Section 402 permit program has been delegated to the State of New York, so that proponents of prohibited discharges may comply with the Act by obtaining a State Pollutant Discharge Elimination System (“SPDES”) permit from the New York State Department of Environmental Conservation (“NYSDEC”), 33 U.S.C. §1342(b).
12. 40 CFR §122.41(a) states: “The permittee must comply with all conditions of this permit. Any permit non-compliance constitutes a violation of the Clean Water Act and is grounds for enforcement action; for permit termination, revocation and reissuance, or modification; or denial of a permit renewal application.”

II. JURISDICTIONAL FINDINGS

13. The Respondent, Scott Wilkins, doing business as Wilkins Dairy Farm, LLC (“Respondent”), owns and operates an animal feeding operation located at 5811 Unionville Road in Bath, New York (“Facility”).
14. Respondent applied for coverage under the NYSDEC SPDES General Permit for Concentrated Animal Feeding Operations, GP-04-02 (“CAFO General Permit” or “Permit”) on November 27, 2007. Permit coverage was effective starting on December 2, 2007.
15. The Facility confines and feeds or maintains dairy cows for a total of forty-five (45) days or more in any twelve-month period, and neither crops, vegetation, forage growth, nor post harvest residues are sustained in the normal growing season over any portion of the lot or facility. Therefore, the Facility is an AFO as defined by 40 C.F.R. §122.23(b)(1), and as that phrase is used in Section 502(14) of the CWA, 33 U.S.C. §1362(14).
16. Inspectors from EPA and NYSDEC conducted a Compliance Evaluation Inspection (“CEI”) of the Facility on April 20, 2010.
17. At the time of the April 20, 2010 inspection, the Facility was confining approximately 287 mature dairy cows, 55 heifers and 70 calves on-site. Therefore, the Facility is a medium CAFO as that term is defined in 40 C.F.R. §122.23(b)(6)(i)(A).

III. FINDINGS OF VIOLATION

18. As described in greater detail in EPA's Compliance Evaluation Inspection report, at the inspection on April 20, 2010, EPA and NYSDEC inspectors observed the following violations of the Respondent's SPDES permit:
- a. Section VII.C.iv of the CAFO General Permit requires the Respondent to develop a Comprehensive Nutrient Management Plan ("CNMP") that includes, and fully implements, responses to high risk conditions, no later than October 1, 2008. During the inspection, EPA and NYSDEC inspectors observed that silage leachate high flow and low flow runoff control is classified as a response to high risk conditions and required additional measures to be implemented, including a high flow grass treatment strip. Therefore, Respondent failed to fully implement CNMP responses to high risk conditions, in violation of Section VII.C.iv of the CAFO General Permit.
 - b. Section VII.C.v of the CAFO General Permit requires the Respondent to have all CNMP practices fully operational by June 30, 2009. During the inspection, EPA and NYSDEC inspectors observed that barn runoff management, specifically the control of roof water, has not been fully implemented. Therefore, Respondent failed to have all CNMP practices fully operational by June 30, 2009, in violation of Section VII.C.v of the CAFO General Permit.
 - c. Section VII.E of the CAFO General Permit requires the Respondent to comply with all provisions of the CNMP. Based on the Facility's April 12, 2010 report to NYSDEC, manure was improperly applied to field C10 on April 9, 2010. During the inspection, EPA and NYSDEC inspectors observed evidence of manure in the roadside ditch adjacent to the field and south of the field, as well as downhill in the roadside ditch. Therefore, Respondent failed to comply with all provisions of the CNMP, including manure application recommendations, in violation of Section VII.E of the CAFO General Permit.
 - d. Section X.G of the CAFO General Permit requires the Respondent to at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the permittee to achieve compliance with this permit. During the inspection, EPA and NYSDEC inspectors observed improper operation and maintenance around the sides of the bunk silo, including bunk silo walls pushed out and silage that had overtopped the bunk walls and spilled over the edge. Therefore, Respondent failed to properly operate and maintain the bunk silo, in violation of Section X.G of the CAFO General Permit.
 - e. Section VI.A of the CAFO General Permit prohibits the discharge of process wastewater pollutants to the surface waters of the State except in accordance with Section VI.C of this permit. During the inspection, EPA and NYSDEC inspectors observed a discharge of process wastewater pollutants from the bunk silo to a roadside ditch that drains to a tributary of Maxwell Creek, which is both a surface water of New York State and a water of the United States. Therefore, an

unpermitted discharge was observed from the Respondent's bunk silo, in violation of Section VI.A of the CAFO General Permit.

- f. Section IX.F of the CAFO General Permit requires the Respondent to retain copies of all records and reports required by this permit for a period of at least 5 years from the date reported. During the inspection, EPA and NYSDEC inspectors observed that rainfall records were only available for January 2009 until March 2010 and that manure application records were only available from January 2009 on. The facility has been permitted since December 2007. Therefore, the Respondent failed to retain copies of all records and reports required by this permit for a period of at least 5 years from the date reported, in violation of Section IX.F of the CAFO General Permit.

19. Based on the Findings above, Respondent violated Sections 301 and 402 of the Act, 33 U.S.C. §1311 and §1342, by failing to comply with the terms of NYSDEC SPDES General Permit for Concentrated Animal Feeding Operations, GP-04-02.

IV. NOTICE OF PROPOSED ORDER ASSESSING A CIVIL PENALTY

Based on the foregoing Findings of Violation, and pursuant to the authority of Section 309(g) of the Act, 33 U.S.C. §1319(g), and the Debt Collection Improvement Act of 1996, EPA, Region 2 hereby proposes to issue a Final Order Assessing Administrative Penalties (Final Order) to Respondent assessing a penalty of **\$65,000.00**. EPA determined the proposed penalty after taking into account the applicable factors identified at Section 309(g)(3) of the Act, 33 U.S.C. §1319(g)(3). EPA has taken account of the nature, circumstances, extent and gravity of the violation (or violations), and Respondent's prior compliance history, degree of culpability, economic benefit or savings accruing to Respondent by virtue of the violations, and Respondent's ability to pay the proposed penalty. EPA may issue the Final Order Assessing Administrative Penalties thirty (30) days after Respondent's receipt of this Notice, unless Respondent within that time files an Answer to the Complaint and requests a Hearing on this Notice pursuant to the following section.

V. PROCEDURES GOVERNING THIS ADMINISTRATIVE ACTION

The rules of procedure governing this civil administrative litigation have been set forth in the CROP, 40 CFR Part 22. A copy of these rules accompanies this Complaint.

A. Answering The Complaint

Where Respondent intends to contest any material fact upon which the Complaint is based, to contend that the proposed penalty is inappropriate or to contend that Respondent is entitled to judgment as a matter of law, Respondent must file with the Regional Hearing Clerk of EPA, Region 2, both an original and one copy of a written Answer to the Complaint, and such Answer must be filed within thirty (30) days after service of the Complaint. 40 CFR §22.15(a). The address of the Regional Hearing Clerk of EPA, Region 2, is:

**Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 2
290 Broadway, 16th floor
New York, NY 10007-1866**

Respondent shall also then serve one copy of the Answer to the Complaint upon Complainant and any other party to the action. 40 CFR §22.15(a). Respondent's Answer to the Complaint must clearly and directly admit, deny, or explain each of the factual allegations that are contained in the Complaint and with regard to which the Respondent has any knowledge. 40 CFR §22.15(b). Where Respondent lacks knowledge of a particular factual allegation and so states in the Answer, the allegation is deemed denied. 40 CFR §22.15(b). The Answer shall also set forth: (1) the circumstances or arguments that are alleged to constitute the grounds of defense, (2) the facts that Respondent disputes (and thus intend to place at issue in the proceeding), (3) the basis for opposing the proposed relief and (4) whether Respondent requests a Hearing. 40 CFR §22.15(b).

Respondent's failure affirmatively to raise in the Answer facts that constitute or that might constitute the grounds of a defense may preclude Respondent, at a subsequent stage in this proceeding, from raising such facts and/or from having such facts admitted into evidence at a Hearing.

B. Opportunity To Request A Hearing

If requested by Respondent in its Answer, a Hearing upon the issues raised by the Complaint and Answer may be held. 40 CFR §22.15(c). If, however, Respondent does not request a Hearing, the Presiding Officer (as defined in 40 CFR §22.3) may hold a Hearing if the Answer raises issues appropriate for adjudication. 40 CFR §22.15(c).

Any Hearing in this proceeding will be held at a location determined in accordance with 40 CFR §22.21(d). A Hearing of this matter will be conducted in accordance with the applicable provisions of the Administrative Procedure Act, 5 U.S.C. §§551-59, and the procedures set forth in Subpart D of 40 CFR Part 22.

Should Respondent request a Hearing on this proposed penalty assessment, members of the public, to whom EPA is obligated to give notice of this proposed action, will have a right under Section 309(g)(4)(B) of the Act, 33 U.S.C. §1319(g)(4)(B), to be heard and to present evidence on the appropriateness of the penalty assessment. Should Respondent not request a Hearing, EPA will issue a Final Order, and only members of the public who submit timely comment on this proposal will have an additional thirty (30) days to petition EPA to set aside the Final Order and to hold a Hearing thereon. EPA will grant the petition and will hold a Hearing only if the petitioner's evidence is material and was not considered by EPA in the issuance of the Final Order.

C. Failure To Answer

If Respondent fails in any Answer to admit, deny, or explain any material factual allegation contained in the Complaint, such failure constitutes an admission of the allegation. 40 CFR §22.15(d). If Respondent fails to file a timely [*i.e.* in accordance with the 30-day period set forth in 40 CFR §22.15(a)] an Answer to the Complaint, Respondent may be found in default upon

motion. 40 CFR §22.17(a). Default by Respondent constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the Complaint and a waiver of Respondent's right to contest such factual allegations. 40 CFR §22.17(a). Following a default by Respondent for a failure to timely file an Answer to the Complaint, any order issued therefore shall be issued pursuant to 40 CFR §22.17(c).

Any penalty assessed in the default order shall become due and payable by Respondent without further proceedings thirty (30) days after the Default Order becomes final pursuant to 40 CFR §22.27(c). 40 CFR §22.17(d). If necessary, EPA may then seek to enforce such Final Order of Default against Respondent, and to collect the assessed penalty amount, in Federal court.

VI. INFORMAL SETTLEMENT CONFERENCE

Whether or not Respondent requests a formal Hearing, EPA encourages settlement of this proceeding consistent with the provisions of the Act and its applicable regulations. 40 CFR §22.18(b). At an informal conference with a representative(s) of Complainant, Respondent may comment on the charges made in this Complaint and Respondent may also provide whatever additional information is believed to be relevant to the disposition of this matter, including: (1) actions Respondent has taken to correct any or all of the violations herein alleged, (2) any information relevant to Complainant's calculation of the proposed penalty, (3) the effect the proposed penalty would have on Respondent's ability to continue in business and/or (4) any other special facts or circumstances Respondent wishes to raise.

Complainant has the authority to modify the amount of the proposed penalty, where appropriate, to reflect any settlement agreement reached with Respondent, to reflect any relevant information previously not known to Complainant or to dismiss any or all of the charges, if Respondent can demonstrate that the relevant allegations are without merit and that no cause of action as herein alleged exists. Respondent is referred to 40 CFR §22.18.

Any request for an informal conference or any questions that Respondent may have regarding this Complaint should be directed to:

Justine Modigliani, Team Leader
NPDES Team
Water Compliance Branch
Division of Enforcement and Compliance Assistance
290 Broadway, 20th Floor
New York, NY 10007-1866
Telephone (212) 637-4268

If Respondent is represented by counsel, Respondent may instead contact:

Chris Saporita, Esq.
Assistant Regional Counsel
Water and General Law Branch
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 2
290 Broadway, 16th Floor

New York, NY 10007-1866
Telephone (212) 637-3203

The parties may engage in settlement discussions irrespective of whether Respondent has requested a Hearing. 40 CFR §22.18(b)(1). Respondent's requesting a formal Hearing does not prevent Respondent from also requesting an informal settlement conference; the informal conference procedure may be pursued simultaneously with the formal adjudicatory hearing procedure. A request for an informal settlement conference constitutes neither an admission nor a denial of any of the matters alleged in the Complaint. Complainant does not deem a request for an informal settlement conference as a request for a Hearing as specified in 40 CFR §22.15(c).

A request for an informal settlement conference does not affect Respondent's obligation to file a timely Answer to the Complaint pursuant to 40 CFR §22.15. No penalty reduction, however, will be made simply because an informal settlement conference is held.

Any settlement that may be reached as a result of an informal settlement conference shall be embodied in a written Consent Agreement. 40 CFR §22.18(b)(2). In accepting the Consent Agreement, Respondent waives any right to contest the allegations in the Complaint and waive any right to appeal the Final Order that is to accompany the Consent Agreement. 40 CFR §22.18(b)(2). In order to conclude the proceeding, a Final Order ratifying the parties' agreement to settle will be executed. 40 CFR §22.18(b)(3).

Entering into a settlement through the signing of such Consent Agreement and complying with the terms and conditions set forth in such Consent Agreement and Final Order terminates this administrative litigation and these civil proceedings against Respondent (note that a new enforcement action may be initiated based on continued non-compliance). Entering into a settlement agreement does not extinguish, waive, satisfy or otherwise affect Respondent's obligation and responsibility to comply with all applicable statutory and regulatory requirements, and to maintain such compliance.

VII. RESOLUTION OF THIS PROCEEDING WITHOUT HEARING OR CONFERENCE

Instead of filing an Answer, Respondent may choose to pay the total amount of the proposed penalty (\$65,000) within 30 days after receipt of the Complaint, provided that Respondent files with the Regional Hearing Clerk, Region 2 (at the address noted above), a copy of the check or other instrument of payment. 40 CFR §22.18(a). A copy of the check or other instrument of payment should be provided to the EPA Attorney identified in Section VI above. Payment of the penalty assessed should be made by sending a cashier's or certified check payable to the "Treasurer, United States of America", in the full amount of the penalty assessed in this complaint to the following addressee:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
PO Box 979077
St. Louis, MO 63197-9000
Docket No. CWA-02-2010-3404

Wire transfers should 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, NY 10045

Field Tag 4200 of the Fedwire message should read "D 68010727 Environmental Protection Agency"

Pursuant to 40 CFR §22.18(a)(3), if Respondent elects to pay the full amount of the penalty proposed in the Complaint within thirty (30) days of receiving the Complaint, then, upon EPA's receipt of such payment, the Regional Administrator of EPA, Region 2 (or, if designated, the Regional Judicial Officer), shall issue a Final Order in accordance with 40 CFR §22.18(a)(3). In accordance with 40 CFR §22.45(c)(3), no Final Order shall issue until at least ten (10) days after the close of the comment period on this Complaint. Issuance of a Final Order terminates this administrative litigation and the civil proceedings arising out of the allegations made in the Complaint (note that a new enforcement action may be initiated based on continued non-compliance). Further, pursuant to 40 CFR §22.18(a)(3), the making of such payment by Respondent shall constitute a waiver of Respondent's right both to contest the allegations made in the Complaint and to appeal said Final Order to Federal court. Such payment does not extinguish, waive, satisfy or otherwise affect Respondent's obligation and responsibility to comply with all applicable statutory and regulatory requirements, and to maintain such compliance.

VIII. FILING OF DOCUMENTS

The Answer and any Hearing Request and all subsequent documents filed in this action should be sent to:

Regional Hearing Clerk
U.S. Environmental Protection Agency
290 Broadway, 16th Floor
New York, NY 10007-1866

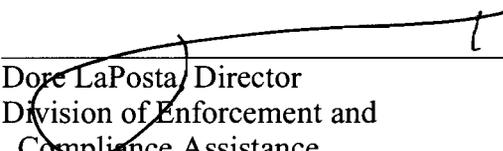
A copy of the Answer, any Hearing Request and all subsequent documents filed in this action shall be sent to:

Christopher Saporita, Esq.
Assistant Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 2
290 Broadway, 16th Floor
New York, NY 10007-1866
Telephone: (212) 637-3203
Fax: (212) 637-3199

IX. GENERAL PROVISIONS

1. Respondent has a right to be represented by an attorney at any stage of these proceedings.
2. This Complaint does not constitute a waiver, suspension or modification of the requirements of the Act, regulations promulgated thereunder, or any applicable permit.
3. Neither assessment nor payment of an administrative civil penalty pursuant to Section 309(g) of the Act will affect Respondent's continuing obligation to comply with the Act, and with any separate Compliance Order issued under Section 309(a) of the Act, 33 U.S.C. §1319(a), for the violations alleged herein.

ISSUED THIS 15th DAY OF JULY, 2010.



Dore LaPosta, Director
Division of Enforcement and
Compliance Assistance
U. S. Environmental Protection Agency - Region 2
290 Broadway
New York, New York 10007