

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 5



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IN THE MATTER OF: )

Wayne Dempze Cranberry Company, LLC )  
Vesper, Wisconsin. )

Respondent )

) Docket No.: CWA-05-2016-0004

) **Consent Agreement and Final**  
) **Order**

) Pursuant to Sections 309(a) and (g) of  
) the Clean Water Act, 33 U.S.C.  
) §§1319(a) and (g).

**CONSENT AGREEMENT AND FINAL ORDER**  
**AND AGREED ORDER FOR WETLAND RESTORATION**

**I. Preliminary Statement**

1. This Consent Agreement and Final Order (CAFO) between the United States Environmental Protection Agency (“U.S. EPA”) and Wayne Dempze Cranberry Company, LLC (“Dempze” or “Respondent”) is entered pursuant to the authority of sections 309(a) and (g) of the Clean Water Act (CWA), 33 U.S.C. §1319(a) and (g).
2. This is an administrative action for a penalty pursuant to section 309(g) of the CWA, 33 U.S.C. § 1319(g), and sections 22.13(b) and 22.18(b)(2) and (3) of 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, (Consolidated Rules), 40 C.F.R. §§ 22.13(b) and 22.18(b)(2) and (3).
3. This is an administrative order on consent for restoration of a wetland agreed to between the U.S. EPA and the Respondent pursuant to section 309(a) of the CWA, 33 U.S.C. § 1319(a), (“Agreed Order on Wetland Restoration” or “Agreed Order”).

4. The Administrator has delegated her authority under sections 309(a) and (g) of the CWA, 33 U.S.C. § 1319(a) and (g) to the Regional Administrator of U.S. EPA, Region 5 who has redelegated her authority to the Director, Water Division, Region 5, U.S. EPA.
5. The Respondent is Wayne Dempze Cranberry Company, LLC doing business at 4917 County Road D, Vesper, Wood County, Wisconsin (Site). Respondent is a limited liability corporation doing business in Wisconsin.

## II. Statutory and Regulatory Basis

6. The Administrator has authority to issue compliance orders and assess civil penalties for violations of sections 1311 or 1344 of the Clean Water Act pursuant to sections 309(a)(3) and (g) of the CWA, 33 U.S.C. § 1319(a)(3) and (g).
7. Discharges of pollutants are prohibited to the waters of the United States pursuant to section 301(a) of the CWA, 33 U.S.C. § 1311(a). The terms “discharge of pollutants,” “pollutant,” “navigable waters,” “waters of the United States,” “point source,” and “wetlands” are defined in sections 502(6), (7), (12) and (14) of the CWA, 33 U.S.C. §1362(6), (7), (12) and (14) and 40 C.F.R. § 230.3(s), 40 C.F.R. § 230.3(t), 232.2.

## III. Specific Factual Allegations

8. Respondent owns approximately 187 acres of contiguous property at the Site, with wetlands abutting an unnamed tributary to Hemlock Creek (for informational purposes, see attached Exhibit 1 – *Compensatory Mitigation and Wetland Restoration Plan, with Attachments 1-13*, (“Restoration Plan” or “Exhibit 1”). From approximately 2004 – 2009 Respondent caused the discharge of dredge and fill material or both into approximately 12.90 acres of wetlands with earth moving and excavating machinery. The wetlands and unnamed tributary drain and flow to Hemlock Creek which flows to the Yellow River, a traditional navigable water.

9. The wetlands and unnamed tributary referenced in Paragraph 8 are "navigable waters," as defined at section 502(7) of the CWA, 33 U.S.C. § 1362(7).
10. Respondent is a "person" within the meaning of the definition set forth in section 502(5) of the CWA, 33 U.S.C. § 1362(5).
11. The machinery referenced in Paragraph 8 constitutes "point sources" within the meaning of the definition set forth in section 502(14) of the CWA, 33 U.S.C. § 1362(14).
12. The discharged material referenced in Paragraph 8 constitutes "pollutants" within the meaning of the definitions set forth in section 502(6) of the CWA, 33 U.S.C. § 1362(6).
13. The placement of the material in the wetlands referenced in Paragraph 8 constitutes a "discharge of pollutants" within the meaning of the definition set forth in section 502(12) of the CWA, 33 U.S.C. § 1362(12).
14. Respondent did not have a permit issued under section 404 of the CWA, 33 U.S.C. § 1344, for the discharge of pollutants referenced in Paragraph 8.
15. Each discharge of pollutants into navigable waters without a permit issued pursuant to section 404 of the CWA, 33 U.S.C. § 1344, constitutes a discrete violation of section 301(a) of the CWA, 33 U.S.C. § 1311(a).
16. Each day the discharged material remains in the wetlands without the required permit issued pursuant to section 404 of the CWA, 33 U.S.C. § 1344, constitutes a discrete violation of section 301 of the CWA, 33 U.S.C. § 1311.

#### IV. General Stipulations

17. Respondent neither admits nor denies the specific factual allegations of this CAFO and Agreed Order pursuant to 40 C.F.R. § 22.18(b)(2).
18. Respondent consents to the assessment of the civil penalty in the CAFO pursuant to 40 C.F.R. § 22.18(b)(2).

19. Respondent consents to the wetland restoration activity required by the Agreed Order pursuant to section 309(a) of the CWA, 33 U.S.C. § 1319(a).
20. Respondent waives its rights to request a hearing as provided in 40 C.F.R. § 22.15(c) and any right to contest the allegations of this CAFO and Agreed Order. Respondent waives any right to appeal of the Final Order or the Agreed Order.
21. This CAFO constitutes a complete and full settlement of, and resolves Respondent's, its owner's, and its affiliates' civil liability for penalties, with prejudice, for the violations alleged in this CAFO.
22. The CAFO and Agreed Order do not affect the right of U.S. EPA or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law.
23. The CAFO and Agreed Order do not affect Respondent's responsibility to comply with the CWA and other applicable federal, state and local, laws and regulations.
24. The CAFO is a "Final Order" in resolution of the complaint filed in this case and pursuant to 40 C.F.R. §§ 22.18 and 22.31. The terms of this CAFO and Agreed Order bind U.S. EPA and Respondent and its successors and assigns.
25. Each person signing the CAFO and Agreed Order certifies that he or she has the authority to sign this CAFO and the Agreed Order for the party he or she represents and to bind that party to its terms.
26. Each party agrees to bear its own costs and fees, including attorney fees, related to this action.
27. The CAFO and the Agreed Order constitute the entire agreement between the parties.

28. No modification shall be made to the CAFO or the Agreed Order without written notification to, and written approval of, all parties hereto. No oral modification of the CAFO or the Agreed Order shall be effective.
29. Any and all obligations of Respondent under the CAFO and the Agreed Order terminate upon Respondent's payment of the civil penalty and satisfactory and timely completion of the work required by section VI below.
30. EPA has consulted with the Wisconsin Department of Natural Resources (WDNR) as required by section 309(g)(1) of the CWA, 33 U.S.C. §1319(g)(1), and has provided public notice of the CAFO as required by section 309(g)(4) of the CWA, 33 U.S.C. §1319(g)(4) of the CWA and 40 C.F.R. §22.45.
31. Pursuant to 40 C.F.R. part 2, subpart B, Respondent is entitled to assert a claim of business confidentiality regarding any portion of the information submitted in response to the CAFO or the Agreed Order, except effluent data, as defined at 40 C.F.R. § 2.302(a)(2). Failure to assert a claim of business confidentiality renders all submitted information available to the public without further notice. Information which is subject to a claim of business confidentiality may be available to the public only to the extent provided in 40 C.F.R. part 2, subpart B.
32. During business hours, and upon verbal or written notice to Respondent, Respondent must allow U.S. EPA, WDNR or the U.S. Army Corps of Engineers ("Corps") representatives access to the Site to determine compliance with the Agreed Order and the CWA.
33. Respondent must certify all submittals required by sections V and VI to be true, accurate and complete and submit them under authorized signature to the following:

Gregory Carlson, Enforcement Officer  
Watersheds and Wetlands Branch  
U.S. Environmental Protection Agency (WW-16J)  
77 West Jackson Boulevard  
Chicago, Illinois 60604,

Richard J. Clarizio, Associate Regional Counsel  
U.S. Environmental Protection Agency (C-14J)  
77 West Jackson Boulevard  
Chicago, Illinois 60604

and

Kyle Zibung, Project Manager  
U.S. Army Corps of Engineers, St. Paul District  
1314 Contractor Blvd.  
Plover, Wisconsin 54467.

U.S. EPA may use the information requested herein in an administrative, civil, or criminal action. This information is not subject to the Paperwork Reduction Act because it is for use in an active enforcement action.

34. Violation of the terms of the CAFO or the Agreed Order may result in further enforcement action under section 309(b) of the CWA, 33 U.S.C. § 1319(b). Specifically, U.S. EPA may seek civil judicial penalties of up to \$37,500 for violations occurring after January 12, 2009. Furthermore, EPA may seek criminal sanctions, including fines and imprisonment, for negligent or knowing violations of the CWA under section 309(c) of the CWA, 33 U.S.C. § 1319(c).

#### V. Civil Penalties

35. Respondent submitted financial and other information on October 17, 2012, and August 18, 2014. Respondent, to the best of its ability, certifies that this information is true and accurate. EPA considers this financial information, the facts of the case, the requirements of this CAFO and Agreed Order and section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3)

when it proposes to issue a final order assessing an administrative penalty in the amount of \$20,000.

36. Respondent agrees to pay a civil penalty of \$20,000, with interest. Respondent shall pay the civil penalty in four installments as follows:

- a. First installment – within 30 days of the effective date of this CAFO - \$5,016.67.
- b. Second installment – within 140 days of the effective date of this CAFO - \$5,045.83.
- c. Third installment – within 250 days of the effective date of this CAFO - \$5,030.56.
- d. Fourth installment – within 360 days of the effective date of this CAFO - \$5,015.28.

Respondent agrees to pay the penalty by sending a cashier's or certified check, payable to the order of the U.S. Treasury, to:

U.S. Environmental Protection Agency  
Fines and Penalties  
Cincinnati Finance Center  
P.O. Box 970977  
St. Louis, Missouri 63197-9000

37. Respondent must include with its cashier's or certified check a transmittal letter stating the name of this action, Respondent's complete address, the Docket No. of this action and the Billing Document No. of this action. Respondent must send copies of each check and transmittal letter to:

LaDawn Whitehead  
Regional Hearing Clerk  
Region 5  
U.S. Environmental Protection Agency  
77 West Jackson Boulevard (E-19J)  
Chicago, Illinois 60604-3511

Gregory Carlson  
Watersheds and Wetlands Branch  
U.S. Environmental Protection Agency  
77 West Jackson Boulevard (WW-16J)  
Chicago, Illinois 60604-3511

Richard J. Clarizio  
Office of Regional Counsel  
U.S. Environmental Protection Agency  
77 West Jackson Boulevard (C-14J)  
Chicago, Illinois 60604-3511

38. This civil penalty is not deductible for federal tax purposes.
39. If Respondent fails to timely pay the civil penalty, Complainant may bring an action to collect any unpaid portion of the penalty with interest, handling charges, nonpayment penalties and Complainant's enforcement expenses for the collection action.
40. Interest will accrue on any amount overdue from the date the payment was due at a rate established pursuant to 31 U.S.C. § 3717. Respondent must pay a \$15.00 handling charge each month that any portion of the penalty due is more than thirty (30) days past due. U.S. EPA will assess a six percent (6%) per year penalty on any principal amount not paid timely pursuant to this CAFO.

#### **VI. Agreed Order for Wetland Restoration**

The Agreed Order is issued pursuant to section 309(a)(3) of the Clean Water Act, 33 U.S.C. § 1319(a)(3), and is as follows. The effective date of the Agreed Order is the date U.S. EPA files this document with the Regional Hearing Clerk.

41. Respondent will refrain from further discharges of dredge or fill material into wetlands, streams or other waterways on the Site, except in compliance with a permit issued pursuant to section 404 of the CWA, 33 U.S.C. § 1344, and the CWA, 33 U.S.C. §§ 1251 - 1387.
42. Respondent shall restore 6.19 acres of forested and wet meadow wetland, identified as Wetlands Restoration Areas 1 and 2 in accordance with the Restoration Plan attached as Exhibit 1. Additionally, the Respondent shall provide mitigation as set forth in Exhibit 1 and as approved by the Corps and WDNR.



43. The restoration of Areas 1 and 2 will be completed and as-built plans submitted by no later than December 15, 2015 and December 15, 2016, respectively. Respondent shall restore and provide mitigation as set forth in Exhibit 1 and in accordance with after-the-fact permits issued by the Corps and the WDNR. See Attachment 3, sections 6.1 and 6.2 for the restoration-related areas and sections 6.2-6.7 for the mitigation-related areas. Note, Section 6.2 contains both restoration and mitigation areas. Respondent shall conduct monitoring and reporting for all areas in accordance with Exhibit 1.

44. Within 30 days of completion of earthen grading activities identified in the Restoration Plan Respondent shall submit to U.S. EPA written certification that Respondent has complied with the Restoration Plan and has restored these areas in accordance with the conditions and contours of the Restoration Plan, Timeline and Map (Exhibits 1). Such certification must include photographs and/or videotape and an "as built" vertical survey drawings providing one foot contour topographic information documenting the completed restoration activities throughout the Site. After tree and shrub planting is completed, their locations will be added to the "as-built" vertical survey drawing.

45. The Respondent is to submit a copy of the issued WDNR and Corps after-the-fact permits and reports required by the after-the-fact permits to:

Gregory Carlson, Enforcement Officer  
Watersheds and Wetlands Branch  
U.S. Environmental Protection Agency (WW-16J)  
77 West Jackson Boulevard  
Chicago, Illinois 60604

Richard J. Clarizio, Associate Regional Counsel  
Office of Regional Counsel  
U.S. Environmental Protection Agency (C-14J)  
77 West Jackson Boulevard  
Chicago, Illinois 60604

In the Matter of: Wayne Dempze Cranberry Company, LLC  
Docket No. CWA-05-2016-0004  
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RESPONDENT  
Wayne Dempze Cranberry Company, LLC  
Vesper, Wisconsin

Date 11-4-15

  
\_\_\_\_\_  
Scott Dempze, Managing Member  
Wayne Dempze Cranberry Company, LLC

On behalf of EPA for issuance of the Consent Agreement and Agreed Order:

Date: \_\_\_\_\_

\_\_\_\_\_  
Tinka G. Hyde  
Director, Water Division  
U.S. Environmental Protection Agency  
Region 5  
77 West Jackson Boulevard  
Chicago, Illinois 60604-3590

**In the Matter of: Wayne Dempze Cranberry Company, LLC**  
**Docket No. CWA-05-2016-0004**  
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**FINAL ORDER**

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

Date: \_\_\_\_\_

\_\_\_\_\_  
Susan Hedman  
Regional Administrator  
U.S. Environmental Protection Agency  
Region 5  
77 West Jackson Boulevard  
Chicago, Illinois 60604-3590