

BEFORE THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION III

1650 Arch Street
Philadelphia, Pennsylvania 19103-2079

SEP 3 3 PM 1:35
HEARING CLERK
REGION III PHILA. PA

In The Matter of:

Melvin Petersheim
260 W. Hernley Road
Manheim, PA 17545

and

Moses Petersheim
320 W. Hernley Road
Manheim, PA 17545

Respondents

Proceeding to Assess a Class II
Administrative Penalty Under
Section 309(g) of the Clean Water Act

Docket No. CWA-03-2010-0371

ADMINISTRATIVE COMPLAINT
AND NOTICE OF OPPORTUNITY
TO REQUEST A HEARING

I. STATUTORY AUTHORITY

1. This Administrative 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 ("CWA" or "Act"), 33 U.S.C. § 1319(g)(2)(B). The Administrator has delegated this authority to the Regional Administrator of EPA, Region III, who in turn has delegated it to the Director of the Water Protection Division ("Complainant").

II. ALLEGATIONS

2. Melvin Petersheim owns a parcel of land located at 320 W. Hernley Road, Manheim, PA 17545 (hereinafter "the Facility") and owns and operates chicken egg-laying and dairy operations at the Facility.
3. Moses Petersheim operates a dairy operation located at the Facility, which he leases from Respondent Melvin Petersheim, his brother.
4. On April 1, 2010, EPA representatives conducted a CWA inspection at the Facility.
5. Based upon verbal statements made by Respondent Melvin Petersheim to EPA inspectors, Respondent Melvin Petersheim stables or confines approximately 36,000

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2. Melvin Petersheim owns a parcel of land located at 320 W. Hernley Road, Manheim, PA 17545 (hereinafter "the Facility") and owns and operates chicken egg-laying and dairy operations at the Facility.
3. Moses Petersheim operates a dairy operation located at the Facility, which he leases from Respondent Melvin Petersheim, his brother.
4. On April 1, 2010, EPA representatives conducted a CWA inspection at the Facility.
5. Based upon verbal statements made by Respondent Melvin Petersheim to EPA inspectors, Respondent Melvin Petersheim stables or confines approximately 36,000

- laying hens in two poultry houses on the Facility for at least 45 days or more in any 12-month period under a contract with Risser's Poultry, Inc.
6. Crops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the Facility where the laying hens are confined.
 7. Based upon verbal statements made by Respondent Moses Petersheim, Respondent Moses Petersheim stables or confines approximately 80 mature dairy cows on the Facility under a contract with Lehigh Valley Dairies.
 8. The Facility is located at the confluence of Rife Run and an Unnamed Tributary of Rife Run.
 9. During the April 1, 2010 inspection, EPA inspectors observed:
 - a. An uncovered chicken manure (or "litter") pile with leachate pooling at the pile's base, which was located at the west end of Poultry House #1 (see Attachment A);
 - b. The uncovered chicken litter pile and leachate were located at an elevation of approximately 25 feet above sea level, based upon GPS readings taken by EPA inspectors;
 - c. The uncovered chicken litter pile and leachate were located approximately 200 feet uphill from the Unnamed Tributary to Rife Run;
 - d. The Unnamed Tributary to Rife Run is located at an elevation of approximately 10 feet above sea level, based upon GPS readings taken by EPA inspectors;
 - e. Feathers in a flow path downhill from the uncovered chicken litter pile and brown foam in standing water located at the bottom of the hill at the edge of the Unnamed Tributary of Rife Run;
 - f. An uncovered dairy manure pile on a concrete area located on the south side of the dairy barn approximately 150 feet from the Unnamed Tributary of Rife Run (see Attachment B);
 - g. Wastewater from the milkhouse (milkhouse washwater) discharging from a pipe to saturated ground adjacent to the dairy barn (see Attachment C);
 - h. Runoff from the uncovered solid dairy manure and the milkhouse washwater comingling and discharging through a ditch to the Unnamed Tributary of Rife Run, which is a water of the U.S.;
 - i. An animal confinement area surrounding the Unnamed Tributary of Rife Run;
 - j. Two large, uncovered piles of cow bones adjacent to the Unnamed Tributary of

Rife Run (see Attachment D); and,

- k. Chicken carcasses and egg waste from Respondent Melvin Petersheim's poultry operation in the liquid dairy manure lagoon used by Respondent Moses Petersheim to store dairy manure from his operation (see Attachment E).

10. Based on verbal statements made by Respondent Melvin Petersheim, the uncovered chicken litter pile was outdoors, in an uncovered manner, since the end of December 2009.

11. At the time of the inspection neither Respondent Melvin Petersheim nor Moses Petersheim possessed any CWA National Pollutant Discharge Elimination System ("NPDES") permit for any discharge from the Facility nor had they sought NPDES permit coverage for the Facility.

III. JURISDICTIONAL FINDINGS

12. Melvin Petersheim and Moses Petersheim are individuals, and therefore, each is a "person" within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

13. The Facility includes two poultry houses that confine 36,000 laying hens for 45 days or more in any 12-month period. No crops, vegetation, forage growth, or post-harvest residues are sustained in the normal growing season over any portion of the Facility where the laying hens are confined. Therefore, the Facility is an AFO as defined by 40 C.F.R. § 122.23(b)(1).

14. Respondent Melvin Petersheim maintained poultry manure in an outdoor, uncovered stockpile for more than 15 days, which constitutes a liquid manure handling system.

15. Because Respondent Melvin Petersheim confines at least 30,000 laying hens and uses a liquid manure handling system, the Facility is a Large CAFO, as that term is defined in 40 C.F.R. § 122.23(b)(4).

16. Because the Facility is a CAFO, subject to NPDES requirements, pursuant to 40 C.F.R. § 122.23(a) all manure, litter, and process wastewater generated by, or as a result of the production of, all of the animals in confinement at the CAFO, including the dairy cows are subject to the NPDES requirements.

17. The Facility is a CAFO, and therefore, constitutes a "point source" within the meaning of Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

18. Respondent Melvin Petersheim and Respondent Moses Petersheim are each an "Owner" or an "Operator," as defined by 40 C.F.R. § 122.2, of the CAFO.

19. Rife Run and its Unnamed Tributary are waters of the United States, as defined by 40 C.F.R. § 122.2.

20. The runoff from the dry dairy cow manure pile and the milkhouse washwater that discharged to the Unnamed Tributary of Rife Run are each a "pollutant" pursuant to Section 502(6) of the Act, 33 U.S.C. § 1362(6).

IV. FINDINGS OF VIOLATION

21. The discharge of pollutants from the solid dairy cow manure pile and the milk house at the Facility to the Unnamed Tributary of Rife Run without an NPDES permit constitutes the unauthorized discharge of pollutants from a point source to waters of the United States, which is a violation of Section 301 of the CWA, 33 U.S.C. § 1311, and its implementing regulations.

V. PROPOSED CIVIL PENALTY

22. Based upon the foregoing allegations, and pursuant to the authority of Section 309(g)(2)(B) of the Act, 33 U.S.C. § 1319(g)(2)(B), Complainant hereby proposes to issue a Final Order Assessing Administrative Penalties to the Respondents, jointly and severally in the amount of **\$6,000**. This does not constitute a "demand" as that term is defined in the Equal Access to Justice Act, 28 U.S.C. § 2412.
23. The proposed penalty was determined after taking into account the nature, circumstances, extent and gravity of the violation, Respondents' prior compliance history, ability to pay the penalty, the degree of culpability for the cited violations, any economic benefit or savings to Respondents because of the violations and such other matters as justice may require, all factors identified at Section 309(g)(3) of the Act, 33 U.S.C. § 1319(g)(3). In addition, to the extent that facts or circumstances unknown to Complainant at the time of issuance of this Complaint become known after issuance of this Complaint, such facts or circumstances may also be considered as a basis for adjusting the proposed administrative penalty.
24. The Regional Administrator may issue the Final Order Assessing Administrative Penalties unless Respondents either respond to the allegations in the Complaint and request a hearing according to the terms of Section VIII., below, or pay the proposed penalty in accordance with Section VII., below.
25. Pursuant to Section 309(g)(4)(A) of the Act, 33 U.S.C. § 1319(g)(4)(A), EPA is providing public notice and an opportunity to comment on the Complaint. In addition, pursuant to Section 309(g)(1)(A) of the Act, 33 U.S.C. § 1319(g)(1)(A), EPA has consulted with the Commonwealth of Pennsylvania Department of Environmental Protection ("PADEP") regarding this action, and in addition, EPA will mail a copy of this document to the appropriate PADEP official and offer an opportunity for the PADEP to consult further with EPA on this proposed penalty assessment.

VI. SETTLEMENT CONFERENCE

26. EPA encourages settlement of proceedings at any time after issuance of a Complaint if

such settlement is consistent with the provisions and objectives of the Act. Whether or not a hearing is requested, Respondents may request a settlement conference with Complainant to discuss the allegations of the Complaint and the amount of the proposed civil penalty. **However, a request for a settlement conference does not relieve the Respondents of the responsibility to file a timely Answer to the Complaint.**

27. In the event settlement is reached, its terms shall be expressed in a written Consent Agreement prepared by Complainant, signed by the parties, and incorporated into a Final Order signed by the Regional Administrator or his designee. The execution of such a Consent Agreement shall constitute a waiver of Respondents' right to contest the allegations of the Complaint or to appeal the Final Order accompanying the Consent Agreement.
28. If you wish to arrange a settlement conference, or if you have any questions related to this proceeding, please contact Andrew Duchovnay, Sr. Assistant Regional Counsel, U.S. Environmental Protection Agency, Region III, at (215) 814-2484 before the expiration of the thirty (30) day period following your receipt of this Complaint. If you are represented by legal counsel, you must have your counsel contact Mr. Duchovnay on your behalf. Once again, however, such a **request for a settlement conference does not relieve the Respondents of the responsibility to file an Answer within thirty (30) days following Respondents' receipt of this Complaint.**

VII. QUICK RESOLUTION

29. In accordance with 40 C.F.R. § 22.18(a), and subject to the limitations in 40 C.F.R. § 22.45, Respondents may resolve this proceeding at any time by paying the specific penalty proposed in this Complaint. If Respondents pay the specific penalty proposed in this Complaint within thirty (30) days of receiving this Complaint, then, pursuant to 40 C.F.R. § 22.18(a)(1), no Answer need be filed.
30. If Respondents wish to resolve this proceeding by paying the penalty proposed in this Complaint instead of filing an Answer, but need additional time to pay the penalty, pursuant to 40 C.F.R. § 22.18(a)(2), Respondents may file a written statement with the Regional Hearing Clerk within thirty (30) days after receiving this Complaint stating that Respondents agree to pay the proposed penalty in accordance with 40 C.F.R. § 22.18(a)(1). Such written statement need not contain any response to, or admission of, the allegations in the Complaint. Such statement shall be filed with the:

Regional Hearing Clerk (3RC00)
S. Environmental Protection Agency, Region III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

and a copy shall be provided to:

Andrew Duchovnay (3RC20)
Sr. Asst. Regional Counsel
U.S. Environmental Protection Agency, Region III
1650 Arch Street
Philadelphia, PA 19103-2029

Within sixty (60) days of receiving the Complaint, Respondents shall pay the full amount of the proposed penalty. Failure to make such payment within sixty (60) days of receipt of the Complaint may subject the Respondents to default pursuant to 40 C.F.R. § 22.17.

31. Upon receipt of payment in full, in accordance with 40 C.F.R. § 22.18(a)(3), the Regional Administrator shall issue a final order. Payment by Respondents shall constitute a waiver of Respondents' rights to contest the allegations and to appeal the final order.
32. Payment of the penalty shall be made by sending a certified or cashier's check made payable to the Treasurer of the United States of America by regular U.S. Postal Service Mail to:

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

By Federal Express or other Private Commercial Overnight Delivery to:

U.S. Environmental Protection Agency
Fines and Penalties
U.S. Bank
1005 Convention Plaza
Mail Station SL-MO-C2GL
St. Louis, MO 63101

Payment by Electronic Funds Transfer (EFT) to:

Wire Transfers

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 wire transfer message should read:
"D 68010727 Environmental Protection Agency")

Automated Clearing House (ACH) Transfers for receiving U.S. currency (also known as REX or remittance express) to:

PNC Bank
ABA = 051036706
Environmental Protection Agency
Account 310006
CTX Format
Transaction Code 22 - checking
808 17th Street, NW
Washington, DC 20074

Copies of the check or documentation of payment shall be mailed at the same time payment is made to:

Regional Hearing Clerk (3RC00)
U.S. Environmental Protection Agency, Region III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

and to:

Andrew Duchovnay (3RC20)
Sr. Asst. Regional Counsel
U.S. Environmental Protection Agency, Region III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

VIII. OPPORTUNITY TO REQUEST HEARING

33. Pursuant to Section 309(g)(2)(B) of the Act, 33 U.S.C. § 1319(g)(2)(B) and 40 C.F.R. 22.15, Respondents may request a hearing on the proposed civil penalty in the Answer, which must be filed within thirty (30) days of receiving this Complaint.
34. At the hearing, Respondents may contest any material fact contained in the allegations listed in Section II, above, and the appropriateness of the penalty amount in Section V, above.
35. Hearing procedures are described in 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,*" 40 C.F.R. Part 22, and a copy of the procedures is enclosed.
36. A Request for Hearing and the Answer to this Complaint must be filed within thirty (30) days of receiving this Complaint with the following:

Regional Hearing Clerk (3RC00)
U.S. Environmental Protection Agency, Region III
1650 Arch Street
Philadelphia, PA 19103-2029

37. Copies of the Request for Hearing and the Answer along with other documents filed in this action should also be sent to the following:

Andrew Duchovnay (3RC20)
Sr. Asst. Regional Counsel
U.S. Environmental Protection Agency, Region III
1650 Arch Street
Philadelphia, PA 19103-2029

Failure to file an Answer may result in entry of a default judgment against Respondents. Upon issuance of a default judgment, the civil penalty proposed herein shall become due and payable. Respondents' failure to fully pay the entire penalty, assessed by the Default Order, by its due date will result in a civil action to collect the assessed penalty, plus interest, attorney's fees, costs, and an additional quarterly nonpayment penalty pursuant to Section 309(g)(9) of the Act, 33 U.S.C. § 1319(g)(9).

In addition, the default penalty is subject to the provisions relating to imposition of interest, penalty and handling charges set forth in the Federal Claims Collection Act at the rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717.

38. The Answer must clearly and directly admit, deny, or explain each of the factual allegations contained in the Complaint with regard to which the Respondents have any knowledge, or clearly state the Respondents have no knowledge as to particular factual allegations in the Complaint. The Answer shall also state the following:
- a. the specific factual and legal circumstances or arguments which are alleged to constitute any grounds of defense;
 - b. the facts which Respondents dispute;
 - c. the basis for opposing any proposed relief; and,
 - d. whether a hearing is requested.

Failure to admit, deny or explain any of the factual allegations in the Complaint constitutes admission of the undenied allegations.

39. If Respondents request a hearing on this proposed penalty assessment, members of the public – to whom EPA is obligated to give notice of and a reasonable opportunity to comment on this proposed penalty assessment pursuant to Section 309(g)(4)(A) of the Act, 33 U.S.C. § 1319(g)(4)(A) – who have commented upon the proposed penalty

assessment, will have an opportunity, pursuant to 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. If Respondents do not request a hearing, EPA will issue a Final Order Assessing Administrative Penalties, and only members of the public who submit timely comments on this proposal will have an additional thirty (30) days to petition EPA to set aside the Final Order Assessing Administrative Penalties and to hold a hearing thereon. 33 U.S.C. § 1319(g)(4)(C). EPA will grant the petition and will hold a hearing if the petitioner's evidence is material and was not considered by EPA in the issuance of the Final Order Assessing Administrative Penalties.

40. Please be advised that the rules governing these proceedings prohibit any unilateral discussion of the merits of a case with, among others, the Administrator, the members of the Environmental Appeals Board, the Presiding Officer, the Regional Administrator, or the Regional Judicial Officer after issuance of a Complaint.
41. Neither assessment nor payment of an administrative civil penalty pursuant to Section 309 of the Act, 33 U.S.C. § 1319, shall affect Respondents' continuing obligation to comply with the CWA, any other Federal or State laws, and with any separate Compliance Orders issued under Section 309(a) of the Act, 33 U.S.C. § 1319(a), for the violations alleged herein.

Date:

4/13/10



Jon Capacasa, Director
Water Protection Division
U.S. Environmental Protection Agency, Region III

CERTIFICATE OF SERVICE

I certify that on this date I caused to be sent by certified mail, return receipt requested, a copy of this "Administrative Complaint, Notice of Proposed Order Assessing a Civil Penalty and Notice of Opportunity to Request a Hearing" and a copy of the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits*, 40 C.F.R. Part 22, to the following persons:

Melvin Petersheim
260 W. Hernley Road
Manheim, PA 17545

and

Moses Petersheim
320 W. Hernley Road
Manheim, PA 17545

with copies to:

John Hanger, Secretary
Pennsylvania Department of Environmental Protection
Rachel Carson State Office Building
400 Market Street
Harrisburg, PA 17101

and a copy delivered by hand to:

Regional Hearing Clerk (3RC00)
U.S. Environmental Protection Agency, Region III
1650 Arch Street
Philadelphia, PA 19103-2029

Date:

9/13/10



Andrew Duchovnay
Sr. Asst. Regional Counsel

U.S. Environmental Protection Agency, Region III