

US EPA ARCHIVE DOCUMENT



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

NOV 14 2011

Mr. Timothy Wilkins
3101 Lower Cove Run Road
Mathias, West Virginia 26812

Re: Administrative Order (CWA-03-2012-0021DN)

Dear Mr. Williams:

Enclosed is a Finding of Violation and Order for Compliance (the "Order") issued this date pursuant to Section 309(a) of the Clean Water Act (the "Act"), as amended, 33 U.S.C. § 1319(a). This Order contains a finding that you, as the owner and operator of the poultry grow-out facility located at 3101 Lower Cove Run Road, Moorefield, West Virginia 26812, have violated the Act and its implementing regulations by discharging pollutants from a concentrated animal feeding operation (CAFO) without a National Pollutant Discharge Elimination System (NPDES) permit.

You should carefully read the contents of the enclosed Order, and communicate to each responsible official, agent, or employee of your facility what actions each person must take to ensure compliance with its terms. This Order requires you to seek NPDES permit coverage from the West Virginia Department of Environmental Protection (WVDEP), and to submit to EPA a copy of your permit application. Failure to comply with the terms of this Order constitutes a violation of Section 309 of the Act, 33 U.S.C. § 1319, and may result in further enforcement action involving civil or criminal penalties.

You may qualify as a "small business" under the Small Business Regulatory Enforcement and Fairness Act (SBREFA). Please see the Small Business Information enclosure accompanying this letter. This enclosure provides information on contacting the SBREFA Ombudsman to comment on federal enforcement and compliance activities and also provides information on compliance assistance. As noted in the enclosure, any decision to participate in such a program or to seek compliance assistance does not relieve you of your obligation to respond in a timely manner to an EPA request or other enforcement action, create any new rights or defenses under law and will not affect EPA's decision to pursue this enforcement action. To preserve your legal rights, you must comply with all rules governing the administrative enforcement process. The Ombudsman and fairness boards do not participate in the resolution of EPA's enforcement action.



Please note that, as indicated by its terms, this Order is effective upon receipt. If you require any information or assistance regarding this Order, please contact Ashley Toy of my staff at 215-814-2774.

Sincerely,

A handwritten signature in black ink, appearing to read "Jon M. Capacasa". The signature is fluid and cursive, with a large initial "J" and "M".

Jon M. Capacasa, Director
Water Protection Division

Enclosure

cc: Michael A. Zeto, DEP

BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

RECEIVED
2011 NOV 14 PM 3: 53
REGIONAL HEARING CLERK
EPA REGION III, PHILA, PA

In The Matter of: : Proceeding Under Section 309(a) of the
: Clean Water Act, 33 U.S.C. § 1319(a)
: :
: :
Mr. Timothy Wilkins : :
3101 Lower Cove Run Road : :
Mathias, WV 26812 : :
: :
: :
Respondent. : :

: :
: :
: :

Proceeding Under Section 309(a) of the
Clean Water Act, 33 U.S.C. § 1319(a)
Docket No. CWA-03-2012-0021DN
FINDING OF VIOLATION
AND
ORDER FOR COMPLIANCE

Attorney for
[Signature]

I hereby certify that the
within is a true and correct copy
of the original
filed in this matter.

I. PRELIMINARY STATEMENT

1. This Finding of Violation and Order for Compliance (the "Order") is issued under the authority vested in the Administrator of the United States Environmental Protection Agency (EPA) by Section 309(a) of the Clean Water Act (CWA or the "Act"), 33 U.S.C. § 1319(a). The Administrator has delegated this authority to the Regional Administrator of EPA Region III, who has, in turn, delegated it to the Director of the Water Protection Division.

II. STATUTORY AND REGULATORY AUTHORITY

2. Section 301(a) of the Act, 33 U.S.C. § 1311(a), prohibits the discharge of any pollutant by any person except in compliance with, *inter alia*, Section 402 of the Act, 33 U.S.C. § 1342.
3. Section 402 of the Act, 33 U.S.C. § 1342, provides for the issuance of National Pollutant Discharge Elimination System (NPDES) permits which allow the discharge of pollutants under specified conditions.
4. Section 502(5) of the Act, 33 U.S.C. § 1362(5), defines the term "person" to mean "an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body."
5. Section 502(12) of the Act, 33 U.S.C. § 1362(12), defines the term "discharge of a pollutant" or "discharge of pollutants" to include any addition of any pollutant or combination of pollutants to waters of the United States from any point source.

US EPA ARCHIVE DOCUMENT

6. Section 502(16) of the Act, 33 U.S.C. § 1362(16), defines the term “discharge” when used without qualification includes a discharge of a pollutant, and a discharge of pollutants.
7. Section 502(6) of the Act, 33 U.S.C. § 1362(6), defines the term “pollutant” to include “dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.”
8. Section 502(14) of the Act, 33 U.S.C. § 1362(14), defines the term “point source” to include “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, well, discrete fissure, container, rolling stock, concentrated animal feeding operation...from which pollutants are or may be discharged.”
9. “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.
10. “Concentrated animal feeding operation” or “CAFO” is defined by 40 C.F.R. § 122.23(b)(2) as an AFO that is defined as a Large CAFO or Medium CAFO in accordance with 40 C.F.R. § 122.23(b)(4) or (6), respectively, or that is designated as a CAFO in accordance with 40 C.F.R. § 122.23(c).
11. “Large CAFO” is defined at 40 C.F.R. § 122.23(b)(4)(x) as an AFO that stables or confines as many as or more than 125,000 chickens (other than laying hens), if the AFO uses other than a liquid manure handling system.
12. “Medium CAFO” is defined at 40 C.F.R. § 122.23(b)(6)(i)(J) as an AFO that stables or confines 37,500 to 124,999 chickens (other than laying hens), if the AFO uses other than a liquid manure handling system,” and “either one of the following conditions are met: (A) Pollutants are discharged into waters of the United States through a man-made ditch, flushing system, or other similar man-made device; or (B) Pollutants are discharged directly into waters of the United States which originate outside of and pass over, across, or through the facility or otherwise come into direct contact with the animals confined in the operation.
13. Pursuant to 40 C.F.R. § 122.23(a), “[o]nce an animal feeding operation is defined as a CAFO for at least one type of animal, the NPDES requirements for CAFOs apply with respect to all animals in confinement at the operation and all manure, litter, and process wastewater generated by those animals, regardless of type of animals.
14. “Waters of the United States” are defined by 40 C.F.R. § 122.2 to include, but not limited to, interstate waters and tributaries thereto.

15. "Manure" is defined by 40 C.F.R. § 122.23(b)(5) to include "manure, bedding, compost, and raw materials or materials commingled with manure or set aside for disposal."
16. "Process wastewater" is defined by 40 C.F.R. § 122.23(b)(7) as water "directly or indirectly used in the operation of the AFO for any of the following: spillage or overflow from animal or poultry watering systems; washing, cleaning, or flushing pens, barns, manure pits, or other AFO facilities, direct contact swimming, washing, or spray control of animals; or dust control. Process wastewater also includes any water which comes into contact with any raw materials, products, or byproducts including manure, litter, feed, milk, eggs or bedding."
17. Pursuant to 40 C.F.R. § 122.21, any person who discharges pollutants from a CAFO has a duty to submit a complete application as described in 40 C.F.R. § 122.23(d) which required permit coverage to be sought by February 27, 2009.
18. The West Virginia Department of Environmental Protection (WVDEP) is authorized by EPA to administer the NPDES Permit Program. EPA maintains concurrent enforcement authority with authorized states to address violations of the Act.

III. FACTUAL BACKGROUND

19. Timothy Wilkins (Respondent) is the owner and an operator of the poultry grow-out operation located at 3101 Lower Cove Run Road, Mathias, WV 26812 (hereinafter referred to as "the Facility"). Coordinates at the entrance to the Facility are 38° 54' 50.91" N, 78° 47' 20.86" W.
20. On November 9, 2010 and June 15, 2011, EPA representatives conducted an aerial reconnaissance and an on-site CWA inspection, respectively, at the Facility.
21. Respondent raises chickens, specifically broilers, under contract with Pilgrim's Pride.
22. The Facility includes, but is not limited to, six poultry houses (Houses 1-6) which house 186,000 broilers and two manure sheds. Grow-out operations rotate flocks in a manner that exceeds 45 days of confinement over any twelve-month period.
23. Poultry houses by design are enclosed, roofed structures where no crops, vegetation, forage growth, or post-harvest residues are sustained in the normal growing season over any portion.
24. The Respondent also raises and maintains cattle in a cattle barn year round. At the time of the inspection, there were approximately 31 head of cattle in the cattle barn. The cattle barn is a roofed structure with open side walls where no crops, vegetation, forage growth, or post-harvest residues are sustained in the normal growing season over any portion.

25. Houses (1-2) were built in 1991, Houses (3-4) were built in 1992, and Houses (5-6) were built in 2002 or 2003.
26. During the inspection, EPA representatives observed man-made ditches between the poultry houses and elsewhere on the property. The poultry houses were positioned between two waterways which are discrete conveyances for stormwater runoff.
27. Houses (1-4) are equipped with sidewall exhaust fans and Houses (5-6) are equipped with tunnel exhaust fans. EPA representatives observed that both sidewall exhaust fans and tunnel exhaust fans are in close proximity to man-made ditches. Dust from the ventilation systems settles on the ground. Dust includes feathers and fine particulates of dander and manure which would therefore contain pollutants. The manure was exposed in a manner so that it would come into contact with precipitation during rain events and generate process wastewater that is carried into the nearby man-made ditches.
28. Respondent dumped small piles of wet manure along the edge of the waterway. During the inspection, remnants of the piles of manure were observed.
29. During the inspection, EPA representatives observed spilled poultry feed on a concrete pad under the feed bins. The feed bins were located in close proximity to a man-made ditch. The feed was exposed in a manner so that it would come into contact with precipitation during rain events and generate process wastewater that is carried into the nearby man-made ditch.
30. During the aerial reconnaissance inspection, EPA representatives observed an uncovered stockpile of material identified by the Respondent as feed for the cattle. On the day of the inspection, the feed had been removed, except for remnants. The residual feed was exposed in a manner so that it would come into contact with precipitation during rain events and generate process wastewater that is carried into the nearby man-made ditch.
31. The man-made ditches connect to a waterway on the eastern end of the poultry houses through a series of culverts that run underneath access lanes.
32. Along the edge of the eastern waterway, remnants of the piles of manure were observed. Respondent said that wet manure from inside one of the poultry houses, caused by a leaking drinking water line, was from removed and deposited next to the waterway.
33. During the inspection, EPA representatives observed access lanes with 36 inch culverts built across the waterway on the western side of the Facility to each of the two manure shed. Manure was observed on the access lanes. The manure was exposed in a manner so that it would come into contact with precipitation during rain events and generate process wastewater that is carried into the nearby waterway.
34. In rain events, both waterways drain into culverts located at the Lower Cove Run Road and subsequently flow to Lower Cove Run.

35. The Lower Cove Run is mapped as a perennial stream. The Lower Cove Run flows into Lost River which flows into the Trout Run. The Trout Run flows into the Cacapon River which flows into the Potomac River. The Potomac River is interstate waters.
36. According to the Southeast Regional Climate Center (<http://www.sercc.com/>), Mathias Weather Station, West Virginia, located 5.3 miles southwest of the Facility, receives an annual average precipitation of 35.41 inches.
37. At the time of the inspection, Respondent neither possessed nor had applied for an NPDES permit for the Facility.
38. In a correspondence document dated July 7, 2011 from Lori Devereux of WVDEP to the Respondent, WVDEP acknowledged receipt of a permit application for a West Virginia NPDES Individual CAFO Permit (No. WV0116611). The permit application was deemed administratively incomplete. WVDEP required the most recent nutrient management plan (NMP) for the CAFO to be submitted within twenty (20) days.
39. At the time of issuance this Order, the NMP has not been received by WVDEP.

IV. CONCLUSIONS OF LAW AND FINDINGS OF VIOLATION

40. Respondent is an individual and thus is a “person.”
41. The Facility is an AFO as defined by 40 C.F.R. § 122.23(b)(1) that meets the definition of a Medium CAFO as defined by 40 C.F.R. § 122.23(b)(6)(i)(J), and, after 2003, a Large CAFO as defined by 40 C.F.R. § 122.23(b)(4)(x) and thus is a “point source.”
42. Since the Facility is a Large CAFO, subject to NPDES requirements, pursuant to 40 C.F.R. § 122.23(a), all confined animals at the Facility and all associated manure, litter, and process wastewater are likewise subject to NPDES permitting.
43. The Lower Cove Run is a “water of the U.S.”
44. Respondent owns and operates a point source that is designed, constructed, operated, and maintained in a manner that has discharged pollutants from a man-made ditch to the Lower Cove Run Road during rain events generating runoff without having obtained an NPDES permit.
45. Respondent is in violation of Section 301 of the Act and its implementing regulations at 40 C.F.R. § 122.21.

V. ORDER FOR COMPLIANCE

Therefore, this 14th day of November, 2011, Respondent is hereby ORDERED, pursuant to Section 309(a) of the Clean Water Act, 33 U.S.C. § 1319(a), to conduct the following activities:

46. **Within ninety (90) days** upon receipt of this Order, Respondent shall submit a complete permit application, specifically a site-specific Nutrient Management Plan (NMP), to WVDEP for NPDES permit coverage. A copy of all submitted documents shall also be sent to EPA.
47. A copy of the permit and any correspondences regarding NPDES permit coverage for the Facility from WVDEP shall be submitted to EPA **within ten (10) days** upon Respondent receipt of such documents.
48. Any information or correspondence submitted by Respondent to EPA under this shall be addressed to the following:

Ashley K. Toy
U.S. EPA Region III
1650 Arch Street (3 WP42)
Philadelphia, PA 19103-2029

VI. NOTICE OF INTENT TO COMPLY

49. **Within ten (10) business days** of the effective date of this Order, Respondent shall submit to EPA a written notice indicating whether Respondent will comply with the Order.

VII. GENERAL PROVISIONS

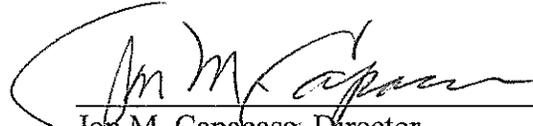
50. Issuance of this Order shall not be deemed an election by EPA to forego any administrative, civil or criminal action to seek penalties, fines or any other appropriate relief under the Act for the violations cited herein. EPA reserves the right to seek any remedy available under the law that it deems appropriate for the violations cited. Failure to comply with this Order or the Act can result in a civil judicial action initiated by the U.S. Department of Justice. If EPA initiates such an action, Respondent will be subject to civil penalties of up to \$37,500 per day of violation pursuant to Section 309(g) of the Act, 33 U.S.C. § 1319(g).
51. If a criminal judicial action is initiated, and Respondent is convicted of a criminal offense under Section 309(c) of the Act, 33 U.S.C. § 1319(c), Respondent may be subject to a monetary fine and/or imprisonment and may become ineligible for certain contracts, grants or loans under Section 508 of the Act, 33 U.S.C. § 1368.

52. This Order does not constitute a waiver or modification of the terms or conditions of any NPDES permit. Compliance with the terms and conditions of this Order does not relieve the Respondent of his/her obligations to comply with any applicable federal, state, or local law or regulations.

VIII. EFFECTIVE DATE

53. The Order shall be effective upon receipt by Respondent.

Date: 11/14/2011



Jon M. Capacasa, Director
Water Protection Division