

US EPA ARCHIVE DOCUMENT

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 7  
901 NORTH FIFTH STREET  
KANSAS CITY, KANSAS 66101

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
	)	CONSENT AGREEMENT
	)	AND FINAL ORDER
	)	
	)	
JOHN REIGLE d/b/a	)	
REIGLE FARMS	)	
	)	
Respondent.	)	
	)	Docket No. CWA 07-2012-0028
Proceedings under Section 309(g) of the	)	
	)	
Clean Water Act, 33 U.S.C. § 1319(g)	)	
	)	
	)	
	)	

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**CONSENT AGREEMENT AND FINAL ORDER**

The United States Environmental Protection Agency, Region 7 (EPA) and John Reigle d/b/a Reigle Farms (Respondent), have agreed to a settlement of the alleged violations set forth in this Consent Agreement and Final Order. This action is simultaneously commenced and concluded pursuant to Rules 22.13(b) and 22.18(b)(2) 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, 40 C.F.R. Part 22 (Consolidated Rules).

This Consent Agreement and Final Order completely and finally settles all civil and administrative penalty claims and causes of action set forth below for Respondent's alleged discharges of pollutants into Tracy Creek and its tributaries, waters of the United States, in Madison County, Nebraska.

## ALLEGATIONS

### Jurisdictional Allegations

1. This is an administrative action for the assessment of civil penalties, instituted pursuant to Section 309(g)(2)(B) of the Clean Water Act (CWA), 33 U.S.C. § 1319(g)(2)(B), and in accordance with the Consolidated Rules.

2. This Consent Agreement and Final Order serves as notice that the EPA has reason to believe that Respondent violated Sections 301 and 402 of the CWA, 33 U.S.C. §§ 1311 and 1342, by discharging pollutants from a concentrated animal feeding operation (CAFO) into the navigable waters of the United States in violation of its National Pollutant Discharge Elimination System (NPDES) permit(s) and failed to operate in accordance with Respondent's NPDES permit.

### Statutory and Regulatory Framework

3. Section 301(a) of the CWA, 33 U.S.C. §1311(a), prohibits the discharge of pollutants except in compliance with, *inter alia*, an NPDES permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

4. Pursuant to Section 402 of the CWA, 33 U.S.C. § 1342, EPA authorizes states to issue NPDES permits that, among other things, prescribe conditions whereby a discharge may be authorized, and establish design, construction, operation, and maintenance requirements for the permit holder.

5. Section 402 of the CWA, 33 U.S.C. § 1342, provides that pollutants may be discharged only in accordance with the terms of an NPDES permit issued pursuant to that Section.

6. Section 504(12) of the CWA, 33 U.S.C. § 1362(1), defines the term "discharge of pollutant" to include "any addition of any pollutant to navigable waters from any point source."

7. To implement Section 402 of the CWA, the EPA promulgated regulations codified at 40 C.F.R. Part 122. Pursuant to 40 C.F.R. § 122.1, a NPDES permit is required for the discharge of pollutants from any point source into waters of the United States.

8. "Pollutant" is defined by Section 502(6) of the CWA, 33 U.S.C. § 1362 to include, *inter alia*, biological materials and agricultural waste discharged to water.

9. "Point source" is defined by Section 502(14) of the CWA, 33 U.S.C. § 1362 to include "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 . . . from which pollutants are or may be discharged."

10. “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.

11. “Concentrated animal feeding operation” or “CAFO” is defined by 40 C.F.R. § 122.23(b)(2) as an animal feeding operation that is defined as a Large CAFO in accordance with 40 C.F.R. § 122.23(b)(3).

12. “Large CAFO” is defined according to 40 C.F.R. § 122.23(b)(4)(iii) as an animal feeding operation that stables or confines more than “1,000 cattle other than mature dairy cows or veal calves.”

13. “Waters of the United States” are defined in 40 C.F.R. § 122.2 to include intrastate rivers and streams, and tributaries thereto.

14. The Nebraska Department of Environmental Quality (“NDEQ”) is the agency within the state of Nebraska with the authority to administer the federal NPDES Program. The EPA maintains concurrent enforcement authority with authorized state NPDES programs for violations of the CWA.

15. Section 309(g) of the CWA, 33 U.S.C. § 1319(g), authorizes the EPA to commence an action for administrative penalties against any person who violates Section 301 of the CWA, 33 U.S.C. § 1311.

16. NDEQ issued a General Permit for CAFOs confining cattle in open lots (NEG011000). This general permit became effective on April 1, 2008 and expires on March 31, 2013.

#### Factual Allegations

17. Respondent owns and operates an animal feeding operation that is located in the northwest ¼ of Section 34, Township 21 North, Range 01 West, Madison County, Nebraska (the “Facility”).

18. On or about May 26, 2011, EPA personnel conducted an aerial overflight of Respondent’s Facility and observed and photographed the Facility.

19. On or about June 9, 2011, EPA personnel conducted a compliance inspection of the Facility that consisted of a review of facility operations, required records, waste generation, and management practices, and a visual inspection of the Facility.

20. The Facility consists of approximately 150 acres of open lots with three manure and process wastewater holding ponds (holding ponds Nos. 1, 2, and 3). Each holding pond has a staff gauge to measure process wastewater levels.

21. The Facility confines and feeds approximately 8,600 head of cattle. The number of cattle confined and fed at the Facility is greater than 1,000, therefore the Facility is a large CAFO as that term is defined in 40 C.F.R. § 122.23(b)(4); and as that phrase is used in Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

22. The EPA issued an Administrative Compliance Order (ACO) on August 16, 2011, requiring the Respondent to comply with its NPDES permit and prevent unauthorized discharges from the facility. Based on information provided in accordance with the ACO, Respondent is in compliance with the ACO.

23. Respondent is a “person” as defined by Section 502(5) of the CWA, 33 U.S.C. § 1362.

24. The Facility confined and fed or maintained cattle for a total of forty-five (45) days or more in any twelve month period and at all times relevant to this Consent Agreement and Final Order.

25. Neither crops, vegetation, forage growth, nor post-harvest residues were sustained over any portion of the Facility’s feeding areas at all times relevant to this Consent Agreement and Final Order.

26. The Facility is an AFO as defined by 40 C.F.R. § 122.23(b)(1).

27. On March 3, 2008, Respondent was issued NPDES permit coverage under the General Permit and was assigned NPDES permit number NEG011040.

#### Alleged Violations

28. Paragraphs 1 through 27 are incorporated by reference as if fully set forth herein.

29. Part II(A)(1)(a)(01) of Respondent’s NPDES permit, states, in pertinent part, that cattle open lot CAFOs are not allowed to discharge manure, litter, or process wastewater pollutants into waters of the State from the production area, except when precipitation causes an overflow of manure, litter, or process wastewater. The overflow may be discharged into waters of the State provided: (1) the livestock waste control facility is designed, constructed, operated and maintained to contain all manure, litter, and process wastewater including the runoff and the direct precipitation from a 25-year, 24-hour rainfall event.

30. Tracy Creek and its tributaries are waters of the United States, as defined under 40 C.F.R. Part 122.2.

31. Based on aerial photographs taken on before the inspection and statements made by the Respondent during the inspection, the EPA determined that the Facility discharged for at least two days on or about May 26, and May 27, 2011.

32. Part II (G)(1)(b) and Part II (D)(1)(a) and (b) of Respondent's NPDES permit requires Respondent to place and maintain a staff gauge in each holding pond. The staff gauge must be maintained to measure the holding pond's liquid depth and measure accumulations of manure, litter, and process wastewater.

33. Based on EPA's inspection, the Respondent's staff gauge in holding pond No. 1, did not accurately reflect process wastewater levels.

34. Parts II (G)(2)(a)-(b) and III (F)(2) of Respondent's NPDES permit requires Respondent to begin pumping livestock wastes when the waste storage volume in a holding pond exceeds the "Must Pump" level. Pumping shall begin as soon as possible and the livestock wastes shall be land applied on all available dewatering days until adequate storage is restored. Respondent is required to dewater the holding ponds before the winter months to provide capacity indicated by the "Winter Pump Down" level.

35. Based on Respondent's holding pond records and the inspector's observations made during EPA's June 9, 2011, inspection, Respondent failed to maintain the process wastewater levels in Holding Pond No. 1 below "Must Pump" and "Winter Pump Down" levels. The failure to properly maintain the holding ponds contributed to the unauthorized discharge described in Paragraph 31, above.

36. Part II (B)(1)-(2) of Respondent's NPDES permit requires that the Respondent verbally notify the Department within 24 hours of a discharge, and submit a discharge notification form within five days of a discharge.

37. According to information provided by Respondent, Respondent failed to provide the mandated verbal and written notification of the discharges from holding pond No. 1 occurring on or about May 26 and May 27, 2011.

38. At all times relevant to this Consent Agreement and Final Order, Respondent's Facility was a Large CAFO as that term is defined in 40 C.F.R. §122.23(b) and as that phrase is used in Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

39. At all times pertinent to this Consent Agreement and Final Order, the discharge of wastewater from Respondent's Facility to the Tracy Creek and its tributaries, the failure to properly maintain and operate the holding ponds and staff gauges, and the failure to report the unauthorized discharge to the State, are violations of Respondent's NPDES permit and Sections 301 and 402 of the CWA, 33 U.S.C. §§ 1311 and 1342, and implementing regulations.

### **CONSENT AGREEMENT**

40. Respondent admits the jurisdictional allegations in this Consent Agreement and Final Order and agrees not to contest the EPA's jurisdiction in this proceeding or any subsequent proceeding to enforce the terms of this Consent Agreement and Final Order.

41. Respondent neither admits nor denies the factual allegations contained in this

Consent Agreement and Final Order.

42. Respondent waives any right to contest the allegations as well as its right to appeal the Final Order accompanying this Consent Agreement.

43. Respondent and Complainant each agree to bear their own costs and attorney's fees.

44. Nothing in this Consent Agreement and Final Order shall alter or otherwise effect Respondent's obligation to comply with all applicable federal, state, and local environmental statutes and regulations and applicable permits.

45. This Consent Agreement and Final Order addresses all civil and administrative claims for the CWA violations identified above. Complainant reserves the right to take any enforcement action with respect to any other violations of the CWA or any other applicable law.

46. Respondent certifies by the signing of this Consent Agreement and Final Order that to the best of its knowledge, Respondent is in compliance with Sections 301 and 402 of the CWA, 33 U.S.C. §§ 1311 and 1342, with respect to the facility located in the northwest ¼ of Section 34, Township 21 North, Range 01 West, Madison County, Nebraska.

47. The effect of settlement described in paragraph 45, above, is conditional upon the accuracy of the Respondent's representations to the EPA, as memorialized in paragraph 46 of this Consent Agreement and Final Order.

48. Respondent agrees that, in settlement of the claims alleged in this Consent Agreement and Final Order, Respondent shall pay a penalty of Forty-Five Thousand Dollars and No Cents (\$45,000.00) as set forth in Paragraph 1 of the Final Order.

49. Respondent understands that failure to pay any portion of the civil penalty on the date the same is due may result in the commencement of a civil action in Federal District Court to collect said penalty, along with interest thereon at the applicable statutory rate.

## **FINAL ORDER**

### **Payment Procedures**

Pursuant to the authority of Section 309(g) of the CWA, 33 U.S.C. § 1319(g), and according to terms of this Consent Agreement and Final Order, IT IS HEREBY ORDERED THAT:

1. Respondent shall pay a civil penalty of Forty-Five Thousand Dollars and No Cents (\$45,000.00) plus interest of Seventy-Four Dollars and Ninety-Seven Cents (\$74.97), over a period of six months for a total payment (\$45,074.97) in accordance with the payment plan set forth herein. Within thirty (30) days of the effective date of this Consent Agreement and Final

Order, Respondent shall make the first payment of \$15,024.99. No later than ninety (90) days from the effective date of this Consent Agreement and Final Order, Respondent shall make the second payment of \$15,024.99. No later than one hundred and twenty days (120) from the effective date of this Consent Agreement and Final Order, Respondent shall make the final payment of \$15,024.99.

2. Pursuant to 40 C.F.R. § 13.18, failure to make any payment according to the schedule set forth in Paragraph 1 of the Final Order, will automatically accelerate the debt which will become due and owing in full immediately. Interest on any late payment will be assessed at the annual rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717. The interest will be assessed on any overdue amount from the due date through the date of payment. Failure to pay the civil penalty when due may result in the commencement of a civil action in Federal District Court to collect said penalty, together with costs and interest.

3. Payment of the penalty shall be by cashier or certified check made payable to the "United States Treasury" and remitted to:

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

This payment shall reference docket number CWA-07-2012-0028.

Copies of the check shall be mailed to:

Sara Hertz Wu  
Assistant Regional Counsel  
U.S. Environmental Protection Agency – Region 7  
901 North 5th Street  
Kansas City, Kansas 66101;

and to  
Kathy Robinson  
Regional Hearing Clerk  
U.S. Environmental Protection Agency - Region 7  
901 North 5th Street  
Kansas City, Kansas 66101.

4. No portion of the civil penalty or interest paid by Respondent pursuant to the requirements of this Consent Agreement and Final Order shall be claimed by Respondent as a deduction for federal, state, or local income tax purposes.

#### **Parties Bound**

5. This Final Order portion of this Consent Agreement and Final Order shall apply to and be binding upon Respondent and Respondent's agents, successors, and/or assigns. Respondent shall ensure that all contractors, employees, consultants, firms or other persons or entities acting for Respondent with respect to matters included herein comply with the terms of this Consent Agreement and Final Order.

### **General Provisions**

6. Notwithstanding any other provision of this Consent Agreement and Final Order, the EPA reserves the right to enforce the terms of the Final Order portion of this Consent Agreement and Final Order by initiating a judicial or administrative action pursuant to Section 309 of the CWA, 33 U.S.C. § 1319, and to seek penalties against Respondent or to seek any other remedy allowed by law.

7. Complainant reserves the right to take enforcement action against Respondent for any future violations of the CWA and its implementing regulations and to enforce the terms and conditions of this Consent Agreement and Final Order.

8. This Order shall be entered and become effective only after the conclusion of the period of public notice and comment required pursuant to Section 309(g)(4) of the CWA, 33 U.S.C. § 1319(g)(4), and 40 C.F.R. § 22.45. The effective date shall be the date it is signed by the Regional Judicial Officer.

9. Respondent and Complainant shall bear their respective costs and attorney's fees.

10. The headings in this Consent Agreement and Final Order are for convenience of reference only and shall not affect interpretation of this Consent Agreement and Final Order.

COMPLAINANT:  
U.S. ENVIRONMENTAL PROTECTION AGENCY

\_\_\_\_\_  
Date

\_\_\_\_\_  
Karen A. Flourney  
Director  
Water, Wetlands and Pesticides Division

\_\_\_\_\_  
Sara S. Hertz Wu  
Assistant Regional Counsel

RESPONDENT:  
JOHN REIGLE D/B/A REIGLE FARMS

\_\_\_\_\_  
Date

\_\_\_\_\_

Name (Print) \_\_\_\_\_

Title \_\_\_\_\_

IT IS SO ORDERED. This Final Order shall become effective immediately.

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Robert Patrick  
Regional Judicial Officer

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Date

CERTIFICATE OF SERVICE

I certify that on the date noted below I hand delivered the original and one true copy of this Consent Agreement and Final Order to the Regional Hearing Clerk, United States Environmental Protection Agency, 901 North Fifth Street, Kansas City, Kansas 66101.

I further certify that on the date noted below I sent a copy of the foregoing Consent Agreement and Final Order by first class certified mail, return receipt requested, to:

Mr. John Reigle  
John Reigle d/b/a Reigle Farms  
55510 823<sup>rd</sup> Road  
Madison, Nebraska 68748

Mr. Stephen Mossman  
Mattson Ricketts Davies Stewart & Calkins  
134 South 13<sup>th</sup> Street, Suite 1200  
Lincoln, Nebraska 68508

Mr. Dennis Heitmann  
Agricultural Section  
Water Quality Division  
Nebraska Department of Environmental Quality  
1200 N Street, Suite 400  
Lincoln, Nebraska 68509

\_\_\_\_\_

Date