

**STATE OF MICHIGAN
DEPARTMENT OF ENVIRONMENTAL QUALITY
WATER RESOURCES DIVISION**

In the matter of:

ACO-000196

Date Entered:

2-9-2015

Cary Dairy Farm, Inc.
6625 Poorman Road
Battle Creek, Michigan 49017

ADMINISTRATIVE CONSENT ORDER

This document results from allegations by the Department of Environmental Quality (DEQ), Water Resources Division (WRD), that Cary Dairy Farm, Inc. (Cary Dairy) owns and operates a large concentrated animal feeding operation (CAFO) located at 6625 Poorman Road, Battle Creek, Michigan (Facility), and is currently in violation of Part 31, Water Resources Protection, of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended (NREPA), MCL 324.3101 *et seq.* and the administrative rules promulgated thereunder. Specifically, the DEQ alleges that Cary Dairy has failed to demonstrate that the waste storage structure(s) at the Facility meet the Natural Resources Conservation Service Conservation Practice Standard No. 313, Waste Storage Facility (NRCS 313), or the environmental performance equivalent to NRCS 313 through the submittal of an evaluation conducted by a licensed professional engineer as required by the National Pollutant Discharge Elimination System (NPDES) Permit No. MIG019000 issued by the WRD to Cary Dairy for the Facility. The violation of this permit is a violation of state laws set forth in detail within Section I, below. Cary Dairy is a person, as defined by Section 301 of the NREPA, and is registered with the Michigan Department of Licensing and Regulatory Affairs as able to conduct business in the State of Michigan under Identification No. 23435A. Cary Dairy and the DEQ agree to resolve the violations set forth herein through entry of this Administrative Consent Order (Consent Order).

I. STIPULATIONS

Cary Dairy and the DEQ stipulate as follows:

- 1.1 The NREPA, MCL 324.101 *et seq.*, is an act that controls pollution to protect the environment and natural resources in the state.
- 1.2 Pollution Control, Part 31, Water Resources Protection, of the NREPA (Part 31), MCL 324.3101 *et seq.*, and the rules promulgated pursuant thereto, provides for the protection, conservation, and the control of pollution of the water resources of the state.
- 1.3 Section 3106 of Part 31, MCL 324.3106, states that, “[t]he department shall issue permits that will assure compliance with state standards to regulate municipal, industrial, and commercial discharges or storage of any substance that may affect the quality of the waters of the state.”
- 1.4 A large CAFO means 700 or more mature dairy cows; or 1,000 or more cattle other than mature dairy cows; or 2,500 or more swine weighing 55 pounds or more; or 10,000 or more swine weighing less than 55 pounds, 2006 AACS, R 323.2103(g).
- 1.5 All large CAFOs in the state are required to obtain an NPDES permit. Certain large CAFOs are afforded the opportunity to operate under a general permit (MIG019000), as is the case for Cary Dairy. A Certificate of Coverage (COC) is a facility-specific certificate issued to facilities operating under an NPDES General Permit.
- 1.6 Cary Dairy was issued COC No. MIG010087 on March 4, 2011, providing coverage under MIG019000. That COC states, “On or before November 30,

2012 all large CAFO waste storage structures at the Cary Dairy Farm Inc. facility shall be constructed in accordance with NRCS standards, set forth in Conservation Practice Standard No. 313, Waste Storage Facility, dated June 2003.”

- 1.7 Specifically, the failure to demonstrate construction to NRCS 313 or the environmental performance equivalent is a violation of Part I, Section A.4.a.2b “Structural Design” of NPDES Permit No. MIG019000. The above-referenced permit condition states, in part, at (C) Existing Storage Structures at Previously-Permitted CAFOs:

“CAFOs previously permitted under General Permit No. MIG019000, issued November 2005, shall comply with the requirements for storage structures as contained in that permit, including NRCS 313 2003 and any compliance dates set forth in the previously-issued COC, unless the Department modified the compliance dates in the reissued COC. Submittals shall be as follows:

ii) For demonstrations of environmental performance equivalent to NRCS 313 2003 submit the demonstration as accomplished through an evaluation by a professional engineer to the Department, on a form provided by the Department.”

- 1.8 From 2010 to the present time, WRD staff has provided guidance on the waste storage structure evaluation requirements during on-site inspections and in written communications.
- 1.9 Cary Dairy did not submit all of the required equivalency evaluations of the Facility’s waste storage structure(s) to the DEQ by the November 30, 2012, deadline.

- 1.10 On January 4, 2013, the WRD issued Cary Dairy a Violation Notice (VN) No. VN-005469, advising Cary Dairy of the missed deadline, and to submit the waste storage structure equivalency evaluation(s) by not later than January 18, 2013; the WRD did not receive the evaluation(s) by this date.

- 1.11 During the negotiation of this Consent Order, Cary Dairy provided further information detailing the composition of the waste storage structure for which equivalency had not been demonstrated as documented by Wilcox Professional Services on January 8, 2013. On August 26, 2013, Engineering & Environmental Solutions, LLC (E & E Solutions) provided documentation that the structure in question, Earthen Waste Storage Pond, was acceptable and met environmental performance equivalent to NRCS 313 2003. Prior to accepting this second evaluation, WRD requested an on-site inspection to observe the unusual compacted soil and manure liner. On August 25, 2014, WRD staff completed this inspection with Mr. Stephen Cary and agreed to accept the evaluation by E & E Solutions as meeting the intent of NRCS 313 2003 and the permit requirement.

- 1.12 Cary Dairy consents to the issuance and entry of this Consent Order and stipulates that the entry of this Consent Order constitutes a final order of the DEQ and is enforceable as such under Section 3112(4) of Part 31, MCL 324.3112(4). Cary Dairy agrees not to contest the issuance of this Consent Order, and that the resolution of this matter by the entry of this Consent Order is appropriate and acceptable. It is also agreed that this Consent Order shall become effective on the date it is signed by the chief of the WRD, delegate of the director, pursuant to Section 301(b) of the NREPA, MCL 324.301(b).

- 1.13 Cary Dairy and the DEQ agree that the signing of this Consent Order is for

settlement purposes only and does not constitute an admission by Cary Dairy that the law has been violated.

- 1.14 The Signatory to this Consent Order on behalf of Cary Dairy agrees and attests that he is fully authorized to assure that Cary Dairy will comply with all requirements under this Consent Order.
- 1.15 Cary Dairy shall achieve compliance with the aforementioned regulations in accordance with the requirements contained in Section II, Compliance Program, of this Consent Order.

II. COMPLIANCE PROGRAM

It is therefore agreed and ordered that Cary Dairy shall take the following actions to comply with Part 31:

- 2.1 Cary Dairy shall maintain compliance with the terms of the applicable permit and law, including constructing any future waste storage structures consistent with permit-required design standards.
- 2.2 Cary Dairy shall submit all reports, work plans, specifications, schedules, or any other writing required by this section to the WRD Kalamazoo District Supervisor, 7953 Adobe Road, Kalamazoo, Michigan 49009. The cover letter with each submittal shall identify the specific paragraph and requirement of this Consent Order that the submittal is intended to satisfy.

III. REPORTING

- 3.1 Cary Dairy shall verbally report any violation(s) of the terms and conditions of this

Consent Order to the WRD Kalamazoo District Supervisor by no later than the close of the next business day following detection of such violation(s) and shall follow such notification with a written report within five business days following detection of such violation(s). The written report shall include a detailed description of the violation(s), as well as a description of any actions proposed or taken to correct the violations(s). Cary Dairy shall report any anticipated violation(s) of this Consent Order to the above-referenced individual in advance of the relevant deadlines whenever possible.

IV. RETENTION OF RECORDS

- 4.1 Upon request by an authorized representative of the DEQ, Cary Dairy shall make available to the DEQ all records, plans, logs, and other documents required to be maintained under this Consent Order or pursuant to Part 31 or its rules. All such documents shall be retained by Cary Dairy for at least a period of five years from the date of generation of the record unless a longer period of record retention is required by Part 31 or its rules.

V. RIGHT OF ENTRY

- 5.1 Cary Dairy shall allow any authorized representative or contractor of the DEQ, upon presentation of proper credentials, to enter upon premises of the Facility at all reasonable times for the purpose of monitoring compliance with the provisions of this Consent Order. This paragraph in no way limits the authority of the DEQ to conduct tests and inspections pursuant to the NREPA and the rules promulgated thereunder, or any other applicable statutory provision.

VI. PENALTIES

- 6.1 Cary Dairy agrees to pay to the State of Michigan **\$4,000.00** in resolution of this matter. Payment shall be made within **30 days** of the effective date of this Consent Order.
- 6.2 For each failure to comply with a provision of Section II or Section III of this Consent Order, Cary Dairy shall pay stipulated penalties of **\$100.00** per violation per day for 1 to 7 days of violation, **\$250.00** per violation per day for 8 to 14 days of violation, and **\$500.00** per violation per day for each day of violation thereafter.
- 6.3 To ensure timely payment of the above civil fine and stipulated penalties, Cary Dairy shall pay an interest penalty to the General Fund of the State of Michigan each time it fails to make a complete or timely payment. This interest penalty shall be based on the rate set forth at MCL 600.6013(8), using the full increment of amount due as principal, and calculated from the due date for the payment until the delinquent payment is finally made in full.
- 6.4 Cary Dairy agrees to pay all funds due pursuant to this agreement by check made payable to the State of Michigan and delivered to Accounting Services Division, Cashier's Office for the DEQ, P.O. Box 30657, Lansing, Michigan 48909-8157, or hand delivered to the Accounting Services Division, Cashier's Office for the DEQ, 425 W. Ottawa Street, Lansing, Michigan 48933. To ensure proper credit, all payments made pursuant to this Consent Order must include the **Payment Identification No. WRD40034**.
- 6.5 Cary Dairy agrees not to contest the legality of the civil fine or costs paid pursuant to paragraph 8.1 above. Cary Dairy further agrees not to contest the legality of any stipulated penalties or interest penalties assessed pursuant to

paragraphs 8.2 or 8.3, above, but reserves the right to dispute the factual basis upon which a demand by the DEQ for stipulated penalties or interest penalties is made.

VII. GENERAL PROVISIONS

- 7.1 With respect to any violations not specifically addressed and resolved by this Consent Order, the DEQ reserves the right to pursue any other remedies to which it is entitled for any failure on the part of Cary Dairy to comply with the requirements of NREPA and its rules. Further, the WRD reserves its right to pursue appropriate action, including injunctive relief, to enforce the provisions of this Consent Order.
- 7.2 The DEQ and Cary Dairy consent to enforcement of this Consent Order in the same manner and by the same procedures for all final orders entered pursuant to Part 31, MCL 324.3101 *et seq.* and enforcement pursuant to Part 17, Michigan Environmental Protection Act, of the NREPA, MCL 324.1701 *et seq.*
- 7.3 This Consent Order in no way affects Cary Dairy's responsibility to comply with any other applicable state, federal, or local laws or regulations.
- 7.4 The DEQ reserves its right to pursue appropriate action, including injunctive relief to enforce the provisions of this Consent Order, and at its discretion, may also seek stipulated fines or statutory fines for any violation of this Consent Order. However, the DEQ is precluded from seeking both a stipulated fine under this Consent Order and a statutory fine for the same violation.
- 7.5 Nothing in this Consent Order is or shall be considered to affect any liability Cary Dairy may have for natural resource damages caused by Cary Dairy's ownership

and/or operation of the Facility. The State of Michigan does not waive any rights to bring an appropriate action to recover such damages to the natural resources.

- 7.6 In the event Cary Dairy sells or transfers the Facility, it shall advise any purchaser or transferee of the existence of this Consent Order in connection with such sale or transfer. Within 30 calendar days, Cary Dairy shall also notify the WRD Kalamazoo District Supervisor, in writing, of such sale or transfer, the identity and address of any purchaser or transferee, and confirm the fact that notice of this Consent Order has been given to the purchaser and/or transferee. As a condition of the sale or transfer, Cary Dairy shall obtain the consent of the purchaser and/or transferee, in writing, to assume all of the obligations of this Consent Order. A copy of that agreement shall be forwarded to the WRD Kalamazoo District Supervisor within 30 days of assuming the obligations of this Consent Order.
- 7.7 The provisions of this Consent Order shall apply to and be binding upon the parties to this action, and their successors and assigns.
- 7.8 This Consent Order constitutes a civil settlement and satisfaction as to the resolution of the violations specifically addressed herein; however, it does not resolve any criminal action that may result from these same violations.

VIII. TERMINATION

- 8.1 This Consent Order shall remain in full force and effect until terminated by a written Termination Notice (TN) issued by the DEQ. Prior to issuance of a written TN, Cary Dairy shall submit a request consisting of a written certification that Cary Dairy has fully complied with the requirements of this Consent Order and has made payment of any fines, including interest penalties, required in this

Consent Order. Specifically, this certification shall include:

- a. The date of compliance with the provision of the compliance program in Section II, and the date any fines or penalties were paid.
- b. A statement that all required information has been reported to the WRD District Supervisor.
- c. Confirmation that all records required to be maintained pursuant to this Consent Order are being maintained at the Facility.

The DEQ may also request additional relevant information. The DEQ shall not unreasonably withhold issuance of a TN.

SIGNATORIES

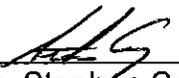
The undersigned CERTIFY they are fully authorized by the party they represent to enter into this Consent Order to comply by consent and to EXECUTE and LEGALLY BIND that party to it.

DEPARTMENT OF ENVIRONMENTAL QUALITY


William Creal, Chief
Water Resources Division

February 9, 2015
Date

CARY DAIRY FARM, INC.


By: Stephen Cary

Pres
Title: Owner

1-19-15
Date

APPROVED AS TO FORM:


By: Neil D. Gordon, Assistant Attorney General
For: S. Peter Manning, Chief
Environment, Natural Resources, and Agriculture Division
Michigan Department of Attorney General

Feb. 3, 2015
Date