

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

In the matter of:

ACO-000202

Date Entered: 10-31-2013

Benthem Brothers., Inc.
7927 West Stoney Corners Road
McBain, Michigan 49657

ADMINISTRATIVE CONSENT ORDER

This document results from allegations by the Department of Environmental Quality (DEQ), Water Resources Division (WRD), that Benthem Brothers., Inc. (Benthem) owns and operates a large concentrated animal feeding operation (CAFO) located at 7927 West Stoney Corners Road, McBain, Michigan 49657 (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 Benthem 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 Benthem for the Facility. The violation of this permit is a violation of state laws set forth in detail within Section I, below. Benthem 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. 46195G. Benthem and the DEQ agree to resolve the violations set forth herein through entry of this Administrative Consent Order (Consent Order).

I. STIPULATIONS

Bentham 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 AACR, 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 Bentham. A Certificate of Coverage (COC) is a facility-specific certificate issued to facilities operating under an NPDES General Permit.
- 1.6 Bentham was issued COC No. MIG010191 on May 10, 2012, providing coverage under MIG019000. That COC states, “On or before November 30, 2012 all large

CAFO waste storage structures at the Benthem Brothers LLC facility shall be constructed in accordance with NRCS standards, set forth in Conservation Practice Standard No. 313, Waste Storage Facility, dated June 2005.”

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 (B) Existing Storage Structures at Newly-Permitted CAFOs:

i) “In a permit for coverage under this permit, the applicant shall either:

1) For each existing storage structure document through an evaluation by a professional engineer that each structure is constructed in accordance with NRCS 313 2005...or

2) For each storage structure, on a form provided by the Department and submitted to the Department, demonstrate environmental performance equivalent to NRCS 313 2005.

The demonstration shall be accomplished through an evaluation by a professional engineer.”

1.8 Benthem 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.

1.9 On January 8, 2013, the WRD issued Benthem a Violation Notice (VN) No. VN-005489, advising Benthem 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.

- 1.10 On August 29, 2013, Benthem submitted engineering designs for the waste storage structure commonly known as "Josh's Earthen Manure Storage" to the WRD. "Josh's Earthen Manure Storage" is the final waste storage structure at the Facility which required reconstruction to meet NRCS 313. The WRD determined thereafter that the designs meet NRCS 313.
- 1.11 Benthem 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). Benthem 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).
- 1.12 Benthem and the DEQ agree that the signing of this Consent Order is for settlement purposes only and does not constitute an admission by Benthem that the law has been violated.
- 1.13 The Signatory to this Consent Order on behalf of Benthem agrees and attests that he is fully authorized to assure that Benthem will comply with all requirements under this Consent Order.
- 1.14 Benthem 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 Benthem shall take the following actions to comply with Part 31:

- 2.1 Benthem shall complete reconstruction of the waste storage structure commonly referred to as "Josh's Earthen Manure Storage" in accordance with the Natural Resources Conservation Service Conservation Practice Standard No. 313 of 2005 (NRCS 313 of 2005) by not later than **November 30, 2013**.
- 2.2 By not later than **December 30, 2013**, Benthem shall obtain as-built drawings detailing all construction actions completed, and which confirms that the waste storage structure, referenced in paragraph 2.1, has been constructed to meet NRCS 313 of 2005. Benthem shall submit a copy to the Grand Rapids District Supervisor not later than **10 days** after Benthem receives the as-built drawings.
- 2.3 Benthem shall submit all reports, work plans, specifications, schedules, or any other writing required by this section to the WRD Cadillac District Supervisor, 120 West Chapin Street, Cadillac, Michigan 49601. 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. DEQ APPROVAL OF SUBMITTALS

- 3.1 For any work plan, proposal, or other document, excluding applications for permits or licenses, that are required by this Consent Order to be submitted to the DEQ by Benthem, the following process and terms of approval shall apply.
- 3.2 All work plans, proposals, and other documents required to be submitted by this

Consent Order shall include all of the information required by the applicable statute and/or rule, and all of the information required by the applicable paragraph(s) of this Consent Order.

- 3.3 In the event the DEQ disapproves a work plan, proposal, or other document, it will notify Benthem, in writing, specifying the reasons for such disapproval. Benthem shall submit, after 30 days of receipt of such disapproval, a revised work plan, proposal, or other document which adequately addresses the reasons for the DEQ's disapproval. If the revised work plan, proposal, or other document is still not acceptable to the DEQ, the DEQ will notify Benthem of this disapproval.
- 3.4 In the event the DEQ approves with specific modifications a work plan, proposal, or other document, it will notify Benthem, in writing, specifying the modifications required to be made to such work plan, proposal, or other document prior to its implementation and the specific reasons for such modifications. The DEQ may require Benthem to submit, prior to implementation and after 30 days of receipt of such approval with specific modifications, a revised work plan, proposal, or other document which adequately addresses such modifications. If the revised work plan, proposal, or other document is still not acceptable to the DEQ, the DEQ will notify Benthem of this disapproval.
- 3.5 Upon DEQ approval, or approval with modifications, of a work plan, proposal, or other document, such work plan, proposal, or other document shall be incorporated by reference into this Consent Order and shall be enforceable in accordance with the provisions of this Consent Order.
- 3.6 Failure by Benthem to submit an approvable work plan, proposal, or other document, within the applicable time periods specified above, constitutes a

violation of this Consent Order and shall subject Benthem to the enforcement provisions of this Consent Order, including the stipulated penalty provisions specified in paragraphs 8.2 and 8.3 below.

- 3.7 Any delays caused by Benthem's failure to submit an approvable work plan, proposal, or other document when due shall in no way affect or alter Benthem's responsibility to comply with any other deadline(s) specified in this Consent Order.
- 3.8 No informal advice, guidance, suggestions, or comments by the DEQ regarding reports, work plans, specifications, schedules or any other writing submitted by Benthem will be construed as relieving Benthem of its obligation to obtain written approval, if and when required by this Consent Order.

IV. EXTENSIONS

- 4.1 Benthem and the DEQ agree that the DEQ may grant Benthem a reasonable extension of the specified deadlines set forth in this Consent Order. Any extension shall be preceded by a written request in duplicate to the DEQ, WRD, Enforcement Unit Chief, Constitution Hall, 525 West Allegan Street, Lansing, Michigan 48909-7773, and the WRD Cadillac District Supervisor no later than ten business days prior to the pertinent deadline, and shall include:
- a. Identification of the specific deadline(s) of this Consent Order that will not be met.
 - b. A detailed description of the circumstances that will prevent Benthem from meeting the deadline(s).
 - c. A description of the measures Benthem has taken and/or intends to take to meet the required deadline.

- d. The length of the extension requested and the specific date on which the obligation will be met.

The WRD Cadillac District supervisor, in consultation with the Enforcement Unit Chief, shall respond in writing to such requests. No change or modification to this Consent Order shall be valid unless in writing from the DEQ, and if applicable, signed by both parties.

V. REPORTING

- 5.1 Benthem shall verbally report any violation(s) of the terms and conditions of this Consent Order to the WRD Cadillac 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). Benthem shall report any anticipated violation(s) of this Consent Order to the above-referenced individual in advance of the relevant deadlines whenever possible.

VI. RETENTION OF RECORDS

- 6.1 Upon request by an authorized representative of the DEQ, Benthem 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 Benthem 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.

VII. RIGHT OF ENTRY

- 7.1 Benthem 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.

VIII. PENALTIES

- 8.1 Benthem agrees to pay to the State of Michigan **\$2,000.00** in resolution of this matter. Payment shall be made within **30 days** of the effective date of this Consent Order.
- 8.2 For each failure to comply with a provision of Section II or Section III of this Consent Order, Benthem 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.
- 8.3 To ensure timely payment of the above civil fine and stipulated penalties, Benthem 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.
- 8.4 Benthem 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 St., Lansing, Michigan 48933. To ensure proper credit, all payments made pursuant to this Consent Order must include the **Payment Identification No. WRD40039**.

- 8.5 Benthem agrees not to contest the legality of the civil fine or costs paid pursuant to paragraph 8.1 above. Benthem 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.

IX. FORCE MAJEURE

- 9.1 Benthem shall perform the requirements of this Consent Order within the time limits established herein, unless performance is prevented or delayed by events that constitute a "Force Majeure." Any delay in the performance attributable to a "Force Majeure" shall not be deemed a violation of Benthem's obligations under this Consent Order in accordance with this section.
- 9.2 For the purpose of this Consent Order, "Force Majeure" means an occurrence or nonoccurrence arising from causes not foreseeable, beyond the control of, and without the fault of Benthem, such as: an Act of God, untimely review of permit applications or submissions by the DEQ or other applicable authority, and acts or omissions of third parties that could not have been avoided or overcome by Benthem's diligence and that delay the performance of an obligation under this Consent Order. "Force Majeure" does not include, among other things, unanticipated or increased costs, changed financial circumstances, or failure to obtain a permit or license as a result of Benthem's actions or omissions.

- 9.3 Benthem shall notify the DEQ, by telephone, within 48 hours of discovering any event that causes a delay in its compliance with any provision of this Consent Order. Verbal notice shall be followed by written notice within ten calendar days and shall describe, in detail, the anticipated length of delay, the precise cause or causes of delay, the measures taken by Benthem to prevent or minimize the delay, and the timetable by which those measures shall be implemented. Benthem shall adopt all reasonable measures to avoid or minimize any such delay.
- 9.4 Failure of Benthem to comply with the notice requirements and time provisions under paragraph 9.3 shall render this Section IX void and of no force and effect as to the particular incident involved. The DEQ may, at its sole discretion and in appropriate circumstances, waive in writing the notice requirements of paragraph 9.3 above.
- 9.5 If the parties agree that the delay or anticipated delay was beyond the control of Benthem, this may be so stipulated, and the parties to this Consent Order may agree upon an appropriate modification of this Consent Order. However, the DEQ is the final decision-maker on whether or not the matter at issue constitutes a force majeure. The parties to this Consent Order understand and agree that the final decision by the DEQ regarding a force majeure claim is not subject to judicial review. The burden of proving that any delay was beyond the reasonable control of Benthem, and that all the requirements of this Section IX have been met by Benthem, rests with Benthem.
- 9.6 An extension of one compliance date based upon a particular incident does not necessarily mean that Benthem qualifies for an extension of subsequent compliance date without providing proof regarding each incremental step or other

requirement for which an extension is sought.

X. GENERAL PROVISIONS

- 10.1 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 Benthem 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.
- 10.2 The DEQ and Benthem 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.*
- 10.3 This Consent Order in no way affects Benthem's responsibility to comply with any other applicable state, federal, or local laws or regulations.
- 10.4 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.
- 10.5 Nothing in this Consent Order is or shall be considered to affect any liability Benthem may have for natural resource damages caused by Benthem'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.

- 10.6 In the event Benthem 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, Benthem shall also notify the WRD Cadillac 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, Benthem 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 Cadillac District Supervisor within 30 days of assuming the obligations of this Consent Order.
- 10.7 The provisions of this Consent Order shall apply to and be binding upon the parties to this action, and their successors and assigns.
- 10.8 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.

XI. TERMINATION

- 11.1 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, Benthem shall submit a request consisting of a written certification that Benthem 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

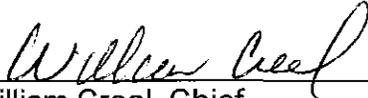
- Section II, and the date any fines or penalties were paid.
- b. A statement that all required information has been reported to the WRD District Supervisor.
 - c. Confirmation that all records required to be maintained pursuant to this Consent Order are being maintained at the Facility.

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.

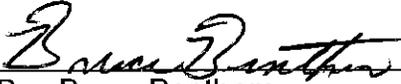
DEPARTMENT OF ENVIRONMENTAL QUALITY



William Creal, Chief
Water Resources Division

10-31-13
Date

Bentham Brothers, Inc.



By: Bruce Bentham



Title: Owner

10-9-13
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

10/21/13
Date