

Appendix B

**Administrative Compliance Order on Consent, May 7, 2024 (Docket No.
CWA-08-2024-0005)**

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8**

IN THE MATTER OF:	)	Docket No. CWA-08-2024-0005
	)	
MAHER CATTLE COMPANY, LLC,	)	
PATRICK MAHER,	)	
JAMES MAHER	)	
	)	ADMINISTRATIVE
	)	COMPLIANCE ORDER
	)	ON CONSENT
Respondents	)	



I. INTRODUCTION

1. Respondents, Maher Cattle, LLC, and Patrick Maher and James Maher, in their individual capacities, own and/or operate a concentrated animal feeding operation (CAFO) located at 13031 248th Avenue, in Timber Lake, South Dakota, on the Standing Rock Reservation (the Facility). The Facility includes the feedlot, located at approximately latitude 45.503528°N, longitude -101.161852°W and the yearling operation, located at approximately latitude 45.508319°N, longitude -101.162371°W.
2. The U.S. Environmental Protection Agency (EPA) and Respondents, having agreed settlement of this action is in the public interest, consent to the entry of this Administrative Compliance Order on Consent (Agreement) without adjudication of any issues of law or fact herein, and the Respondents agree to comply with the terms of this Agreement.
3. This Agreement is issued under the authority of section 309(a) of the Clean Water Act (Act), 33 U.S.C. § 1319(a), which authorizes the Administrator of the EPA to issue an order requiring compliance by any person found to be in violation of

section 301 of the Act. This authority has been delegated to the Regional Administrator of EPA Region 8 and redelegated to the undersigned official.

II. STATUTORY AND REGULATORY BACKGROUND

4. Section 301 of the Act, 33 U.S.C. § 1311(a), prohibits, among other things, the discharge of pollutants by any person into waters of the United States except as in compliance with section 402 of the Act, 33 U.S.C. § 1342.
5. Section 402 of the Act, 33 U.S.C. § 1342, establishes a National Pollutant Discharge Elimination System (NPDES) program, administered by EPA to permit discharges of pollutants into navigable waters, subject to specific terms and conditions.
6. Section 502(12) of the Act, 33 U.S.C. § 1362(12), defines the term “discharge of a pollutant” to include “any addition of any pollutant to navigable waters from any point source.” Pursuant to 40 C.F.R. § 122.2, “discharge” when used without qualification means the “discharge of a pollutant.”
7. “Pollutant” is defined by section 502(6) of the Act, 33 U.S.C. § 1362(6), to include, among other things, “solid waste, . . . biological materials, . . . and industrial, municipal, and agricultural waste discharged into water.”
8. “Point source” is defined by section 502(14) of the Act, 33 U.S.C. § 1362(14), 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. To implement section 402 of the Act, EPA promulgated regulations codified at 40 C.F.R. part 122. According to 40 C.F.R. § 122.23(d), a CAFO must not discharge unless the discharge is authorized by an NPDES permit.
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 12-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 in 40 C.F.R. § 122.23(b)(2) as an animal feeding operation that is defined as a Large CAFO or a Medium CAFO in accordance with 40 C.F.R. § 122.23(b), or that is designated as a CAFO in accordance with 40 C.F.R. § 122.23(c). Moreover, two or more AFOs under common ownership are a single AFO for the purposes of determining the number of animals at an operation, if they adjoin each other or if they use a common area or system for the disposal of wastes. 40 C.F.R. § 122.23(b)(2).
12. "Large CAFO" is defined at 40 C.F.R. § 122.23(b)(4) to include an animal feeding operation that stables or confines 1,000 cattle other than mature dairy cows or veal calves. Cattle includes but is not limited to heifers, steers, bulls, and cow/calf pairs.
13. The regulations define the "production area" of an animal feeding operation as the area including "the animal confinement area, the manure storage area, the raw materials storage areas, and the waste containment areas." 40 C.F.R. § 122.23(b)(8).

14. “Process wastewater” is defined in 40 C.F.R. § 122.23(b)(7) as water “directly or indirectly used in the operation of the AFO for any or all 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 cooling 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.” *Id.*
15. “Navigable waters” means the waters of the United States. 33 U.S.C. § 1362(7).
16. EPA is authorized to administer the federal NPDES program on the Standing Rock Reservation.

III. FINDINGS OF FACT AND VIOLATION

17. The Respondents own and/or operate the Facility.
18. The Facility is located within the exterior boundaries of the Standing Rock Reservation.
19. On July 14, 2022, representatives of the EPA inspected the Facility and observed the following:
 - a. A feedlot is located east of 248th Avenue on the south side of High Bank Creek at approximately latitude 45.503528°N, longitude -101.161852°W.
 - b. Yearlings are confined to the yearling pens located just west of 248th Avenue across from the feedlot at approximately latitude 45.508319°N, longitude -101.162371°W.

- c. High Bank Creek flows west to east through the northernmost yearling pen, which is directly west of 248th Avenue at approximately latitude 45.508750°N and longitude -101.162768°W.
 - d. The remaining yearling pens south of the north pen are sloped to the north and drain to High Bank Creek.
 - e. Manure was land applied, but the rate at which manure can be land applied at an agronomic rate was not calculated in accordance with 40 C.F.R. § 122.23(e)(1).
 - f. Feed was stored uncovered on the concrete feed pad adjacent to the feedlot near High Bank Creek.
 - g. Cattle have direct access to High Bank Creek in the grazing field west of the yearling pens.
 - h. The Facility was discharging to High Bank Creek.
20. On June 27, 2023, representatives of the EPA returned to the Facility to conduct sampling and made the following additional observations:
- a. Sampling results showed a general increasing trend for ammonia as nitrogen, phosphorous, total kjeldahl nitrogen, biochemical oxygen demand, and E. coli at each of the six sampling locations downstream of the yearling operation and feedlot operation. EPA's Water Quality Standard (WQS) Criteria was exceeded for phosphorous, total nitrogen, and E. coli.
21. High Bank Creek is a relatively permanent tributary of the Grand River, which is a relatively permanent tributary of the Missouri River.
22. The Missouri River is a traditionally navigable water.

23. High Bank Creek, the Grand River, and the Missouri River are navigable waters as defined in 33 U.S.C. § 1362(7).
24. The Facility confines and feeds or maintains cattle for a total of 45 days or more in any 12-month period.
25. Crops, vegetation, forage growth, and post-harvest residues are not sustained in the normal growing season over any portion of the Facility where animals are confined.
26. The Facility is an AFO as defined by 40 C.F.R. § 122.23(b)(1).
27. The feedlot, which is part of the Facility, was confining and feeding approximately 2,200 head of cattle at the time of the EPA inspection on July 14, 2022, and approximately 5,900 head of cattle at the time of the EPA inspection on June 27, 2023. The Facility has capacity for at least 12,000 head of cattle.
28. Because the Facility confines greater than or equal to 1,000 cattle, the Facility is a CAFO as defined in 40 C.F.R. § 122.23(b)(2) and section 502(14) of the Act, 33 U.S.C. § 1362(14), and a Large CAFO as that term is defined in 40 C.F.R. § 122.23(b)(4).
29. Respondents are “persons” within the meaning of section 502(5) of the Act, 33 U.S.C. § 1362(5).
30. Respondents have not received coverage under an NPDES section 402 permit under 40 C.F.R. § 122.23(d).
31. Respondents have discharged pollutants from the Facility to waters of the United States without an NPDES permit, in violation of section 301(a) of the Act, 33 U.S.C. § 1311(a) and 40 C.F.R. § 122.23(d)(1).

32. Respondents did not maintain land application records until at least Fall of 2022, in violation of 40 C.F.R. §§ 122.23(e)(2) and 122.42(e)(1)(ix).

IV. COMPLIANCE ORDER

Based on the foregoing Findings of Fact and Violation, and pursuant to the authority vested in the Administrator of the EPA pursuant to section 309(a) of the Act, 33 U.S.C. § 1319(a), as properly delegated to the undersigned official, it is hereby ORDERED and the Respondents AGREE as follows:

33. Respondents shall immediately cease and desist discharging pollutants into waters of the United States from the Facility unless these discharges are in accordance with a NPDES permit issued pursuant to section 402 of the Act, 33 U.S.C. § 402.
34. Respondents shall immediately conduct daily visual monitoring of all potential sources of discharges containing manure, waste silage, feed, and/or other process wastewaters to waters of the United States from the Facility. Monitoring locations shall include but are not limited by the Agreement to: areas of potential or actual discharges from fields subject to land application of wastes, confinement areas, feed storage, and waste storage lagoons.
35. Respondents shall immediately develop and maintain a written monitoring log containing the following information for each area monitored as required by the preceding paragraph: the date and time of the visual observation, an indication of whether a discharge was observed, and the initials of the person making the observation. Respondents shall maintain the monitoring records at the Facility for at least three years after this Agreement is terminated and make them available for inspection or copying upon request by any authorized representatives of EPA.

36. Respondents shall immediately conduct daily monitoring of precipitation at the Facility, using a rain gauge. Respondents shall record and maintain daily records of precipitation amounts with the monitoring records required by this Agreement.
37. For each observed discharge of any agricultural waste or other pollutant(s) from the Facility into a water of the United States, Respondents shall:
- a. Within thirty (30) minutes of the initial discharge, collect a minimum of one grab sample in accordance with the methods specified in 40 C.F.R. part 136, and submit the sample to a laboratory to be analyzed in accordance with the sample holding times and methods of analysis specified in 40 C.F.R. part 136 for total nitrogen, nitrate nitrogen, ammonia nitrogen, total phosphorous, E. coli bacteria, five-day biochemical oxygen demand, total suspended solids, pH, and temperature.
 - b. Submit to EPA within 15 calendar days of the discharge a written report containing:
 - i. Date and time of the discharge,
 - ii. Location of the discharge,
 - iii. Origin of the discharge,
 - iv. Estimated volume of the discharge,
 - v. Daily rainfall measurements for the 30 days prior to the discharge event,
 - vi. Sample analysis results of the discharge, and
 - vii. Steps taken to prevent recurrence of the discharge.

Timely reporting of an unpermitted discharge does not authorize any discharge or preclude further enforcement.

38. Within 90 calendar days of the Effective Date of this Agreement, Respondents shall remove the northernmost yearling pen through which High Bank Creeks flows, located at latitude 45.508750°N and longitude -101.162768°W. Respondents shall remove all manure from the pen, regrade to ensure bank stabilization, and seed with native vegetation to achieve 80% vegetative cover. Respondent shall follow all applicable conservation practice standards recommended by the Natural Resources Conservation Service (NRCS) in performing this work, including but not limited to the Critical Area Planting Conservation Practice Standard (Code 342).
39. Within 240 calendar days of receipt of this Agreement, Respondents shall construct adequate containment and storage structures that are designed, constructed, operated, and maintained to contain all manure, litter, and process wastewater including the runoff and direct precipitation from a 25-year, 24-hour rainfall event from all yearling pens.
40. Within 180 calendar days of receipt of this Agreement, Respondents should consider implementing all applicable conservation practice standards recommended by the NRCS for prescribed grazing in order to improve and maintain surface water quality, including but not limited to the Prescribed Grazing Conservation Practice Standard (Code 528).
41. Respondents shall store feed and bedding in a manner that ensures all runoff that comes into contact with stored feed and bedding flows into holding ponds.

42. Within 10 calendar days of receipt of this Agreement, Respondents shall submit to EPA written notice of their intent to comply with the requirements of this Order.
43. Respondents shall submit to EPA quarterly reports of its efforts to achieve compliance with this Agreement, emailed by the 10th day of every third month, until EPA notifies the Respondents, via email, that it no longer requires such reports. Each report shall include an update of the progress of the action items required by paragraphs 387 to 411 of this Agreement, local rainfall amounts for the previous month, as well as copies of all monitoring logs and records required by this Agreement.
44. Respondents shall provide each notification or report required by this Agreement via e-mail to the following:
- Stephanie Meyers
U.S. Environmental Protection Agency, Region 8
Meyers.Stephanie@epa.gov
Phone: (303) 312-6938
45. All submittals required by this Agreement shall include the following certification statement, signed and dated by either the Respondents or a duly authorized representative of the Respondents:
- I hereby certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine or imprisonment for knowing violations.
46. Respondents shall allow access to the Facility by any authorized representatives of EPA, including but not limited to any of the Agency's contractors, upon proper

presentation of credentials, to the Facility and to records relevant to this Agreement for the following purposes:

- a. To inspect and monitor progress of the activities required by this Agreement;
- b. To inspect and monitor compliance with this Agreement; and
- c. To verify and evaluate data and other information submitted to EPA.

47. This Agreement shall in no way limit or otherwise affect EPA's authority, or the authority of any other governmental agency, to enter the Facility, conduct inspections, have access to records, issues notices and orders for enforcement, compliance, or abatement purposes, or monitor compliance pursuant to any statute, regulation, permit, or court order.
48. Compliance with the terms and conditions of this Agreement shall not be construed to relieve Respondents of its obligation to comply with any applicable Federal, state, or local law or regulation.
49. This Agreement is not a permit or an authorization to place or discharge dredged or fill material in waters of the United States. Respondents shall consult with the U.S. Army Corps of Engineers (Corps) if any work to be performed pursuant to this Agreement requires a permit from the Corps under section 404 of the CWA.
50. At the EPA's sole discretion, the EPA may extend deadlines required by this Agreement with written notice to Respondents.

V. OTHER TERMS AND CONDITIONS

51. The FINDINGS in Section III of this Agreement are made solely by the EPA. In signing this Agreement, Respondents neither admit nor deny any of the FINDINGS. Without any admission of liability, Respondents consent to issuance of this Consent

Agreement and agree to abide by its terms. Respondents waive all claims for relief and otherwise available rights or remedies to judicial or administrative review Respondents may have with respect to any issue of fact or law set forth in this Agreement including, but not limited to, any right of judicial review under the Administrative Procedure Act, 5 U.S.C. §§ 701-706, providing for judicial review of final agency action. Respondents further agree not to challenge the jurisdiction of the EPA or the FINDINGS below in any proceeding to enforce this Agreement or in any action taken pursuant to this Agreement.

52. This Agreement shall apply to and be binding upon the EPA and upon Respondents and Respondents' agents, successors, and assigns. The undersigned representative of Respondents certifies that they are fully authorized to enter into the terms and conditions of this Agreement and to bind Respondents to the terms and conditions of this Agreement. No change in the ownership or operation of the Facility or of Respondents shall alter the Respondents' responsibilities under this Agreement unless the EPA, Respondents, and the transferee agree in writing to allow the transferee to assume such responsibilities. Additionally, no later than 30 calendar days prior to such transfer, Respondents shall notify the EPA of the transfer at the address specified in paragraph 44 of this Agreement.
53. Any failure by the Respondents to implement all requirements of this Agreement in full and in the manner and time period required shall be deemed a violation of this Agreement.

54. Nothing in this Agreement constitutes a waiver, suspension, or modification of the requirements of the Act or the rules and regulations promulgated thereunder, which remain in full force and effect.
55. Issuance of this Agreement shall not be deemed an election by the United States to forgo any civil or criminal action to seek penalties, fines, or other appropriate relief under the Act for violations giving rise to this Agreement.
56. Section 309(d) of the Act, 33 U.S.C. § 1319(d), as adjusted for inflation by 40 C.F.R. Part 19, authorizes civil penalties of up to \$66,712 per day for each violation of section 301 of the Act, 33 U.S.C. § 1311, or of any order issued by EPA under section 309(a) of the Act, 33 U.S.C. § 1319(a), including this Agreement, which occurred after November 2, 2015, and for which penalties are assessed on or after December 27, 2023. Additionally, section 309(g) of the Act, 33 U.S.C. § 1319(g), authorizes EPA to impose administrative penalties for violation of the Act.
57. The EPA and Respondents consent to service of the Agreement by e-mail at the following valid email addresses: dean.abigail@epa.gov (Complainant), and Patrick_maher20@hotmail.com (for Respondents).

VI. EFFECTIVE DATE

58. This Agreement shall be effective on the date it is filed with the Office of the Regional Hearing Clerk for EPA Region 8.

VII. TERMINATION

59. Upon completion of all requirements of this Agreement, Respondents may submit a request for termination to the EPA, together with all necessary supporting documentation. Upon request from Respondents, EPA will confer with Respondents

within 60 days of receiving Respondents request to terminate. If the EPA finds it is appropriate to terminate this Agreement, the EPA may do so unilaterally.

**UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, REGION 8**

Date 5/7/2024

By: Colleen Rathbone
Colleen Rathbone, Manager
Water Enforcement Branch
Enforcement and Compliance Assurance Division

FOR RESPONDENTS

Date: May 3 - 2024

By: Patrick Maher