

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

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| UNITED STATES OF AMERICA, | |) | |
| | |) | |
| Plaintiff, | |) | |
| | |) | |
| v. | |) | Civil Action No. 20-cv-6363W |
| | |) | |
| WAFLER FARMS, INC., d/b/a WAFLER | |) | |
| NURSERY & ORCHARDS, | |) | |
| HURON ENTERPRISES, LLC, | |) | |
| PAUL E. WAFLER, and | |) | |
| SUSAN WAFLER, | |) | |
| | |) | |
| Defendants. | |) | |
| <hr/> | |) | |

**NOTICE OF LODGING OF PROPOSED CONSENT DECREE
FOR 30-DAY PUBLIC COMMENT PERIOD**

Pursuant to 28 C.F.R. § 50.7, the United States lodges with this Court the attached proposed Consent Decree for public comment. Notice of the lodging of this Consent Decree, and the opportunity to comment thereon will be published in the Federal Register. The United States will then receive public comments on the proposed Consent Decree for the requisite 30-day public comment period. During the pendency of the public comment period, no action is required of this Court. After the public comment period has expired, the United States will respond to any comments timely received and, should it appear to the United States that the settlement is in the public interest, file a motion asking the Court to sign and enter the Consent Decree.

The United States respectfully requests that the Court take no action with respect to the lodged Consent Decree until the United States moves for entry of the Consent Decree or otherwise advises the Court.

Respectfully submitted,

TRINI E. ROSS
UNITED STATES ATTORNEY

DATED: July 23, 2024

BY: /s/David M. Coriell
DAVID M. CORIELL
Assistant U.S. Attorney
Western District of New York
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

20-CV-6363EAW

v.

WAFLER FARMS, INC., doing business as
Wafler Nursery & Orchards, et al.,

Defendants.

CONSENT DECREE

WHEREAS, Plaintiff United States of America, by the authority of the Attorney General, and at the request of the Secretary of the United States Department of the Army, acting through the United States Army Corps of Engineers (“USACE”), filed the Complaint in this action on June 2, 2020 alleging that Defendants Wafler Farms, Inc., d/b/a Wafler Nursery & Orchard, Huron Enterprises, LLC, Paul E. Wafler, and Susan Wafler, violated Section 301(a) of the Clean Water Act (“CWA”), 33 U.S.C. § 1311(a);

WHEREAS, the Complaint alleges that Defendants violated CWA Section 301(a) by discharging pollutants into waters of the United States located at 10748 and 10817 Slaght Road in the Town of Wolcott, Wayne County, New York, without authorization by the USACE;

WHEREAS, the Complaint seeks (i) to enjoin the discharge of pollutants into waters of the United States without a permit in violation of the CWA Section 301(a); (ii) to require Defendants, at their own expense and at the direction of the USACE, to restore the waters of the United States and/or mitigate the damages caused by Defendants’ unlawful activities; and (iii) to require Defendants to pay civil penalties;

WHEREAS, Defendants do not admit any liability to the United States arising out of the transactions or occurrences alleged in the Complaint;

WHEREAS, this Consent Decree is intended to constitute a complete and final settlement of the United States' claims under the CWA set forth in the Complaint regarding the Wafler Property;

WHEREAS, the United States and Defendants (collectively, the "Parties") agree and recognize, and the Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith and will avoid further litigation between the Parties and that this Consent Decree is fair, reasonable, and in the public interest; and

NOW, THEREFORE, before the taking of any testimony upon the pleadings, without further adjudication or admission of any issue of fact or law except as provided in Section I of this Consent Decree, and with the consent of the Parties, IT IS HEREBY ADJUDGED, ORDERED, AND DECREED as follows:

I. JURISDICTION AND VENUE

1. This Court has subject matter jurisdiction over the claims in the Complaint, pursuant to 28 U.S.C. §§ 1331, 1345, and 1355, and Section 309(b) of the CWA, 33 U.S.C. § 1319(b), and personal jurisdiction over the Defendants.

2. Venue is proper in the Western District of New York pursuant to CWA Section 309(b), 33 U.S.C. § 1319(b), and 28 U.S.C. § 1391(b) and (c), because the subject property is in this District, the cause of action alleged herein arose in this District, and the principal place of business for Defendant Wafler Farms, Inc. and for Defendant Huron Enterprises, LLC, is in this District.

3. For purposes of this Consent Decree, or any action to enforce this Consent Decree, Defendants consent to the Court's jurisdiction over this Consent Decree and any such action and over Defendants and consent to venue in this judicial district.

4. For purposes of this Consent Decree, Defendants agree that the Complaint states claims upon which relief may be granted pursuant to Sections 301, 309, and 404 of the CWA, 33 U.S.C. §§ 1311, 1319, and 1344.

II. APPLICABILITY

5. The obligations of this Consent Decree apply to and are binding upon the United States, and upon Defendants and any successors, assigns, or other persons otherwise bound by law whether or not any such person has notice of this Consent Decree.

6. The Parties agree that Defendants' obligations under this Consent Decree are joint and several.

7. No transfer of ownership or other interest in the Wafler Property shall alter or relieve Defendants of their obligation to comply with all of the terms of the Consent Decree.

8. In any action to enforce this Consent Decree against Defendants, Defendants shall not raise as a defense the failure by any of its officers, directors, employees, agents, successors, assigns, contractors, consultants, or any person acting in concert or participation with Defendants, to take any actions necessary to comply with the provisions of this Consent Decree.

9. It is the express purpose of the Parties in entering this Consent Decree to further the objective set forth in Section 101(a) of the CWA, 33 U.S.C. § 1251(a).

III. DEFINITIONS

10. Terms used in this Consent Decree that are defined in the CWA or in regulations promulgated pursuant to the CWA shall have the meanings assigned to them in the CWA or such regulations, unless otherwise provided in this Consent Decree. Whenever the terms set forth below are used in this Consent Decree, the following definitions apply:

“Complaint” means the complaint filed by the United States in this action on June 2, 2020 and docketed in the United States District Court for the Western District of New York as 1:20-cv-06363.

“Consent Decree” or “Decree” means this Decree any and all modifications made effective in accordance with Section XIII (Modification).

“CWA” means the Clean Water Act, 33 U.S.C. §§ 1251-1388.

“Day” means a calendar day unless expressly stated to be a business day. In computing any period of time for a deadline under this Consent Decree, where the last day would fall on a Saturday, Sunday, or federal holiday, the period runs until the close of business of the next business day.

“Defendants” mean Wafler Farms, Inc., d/b/a Wafler Nursery & Orchards, Huron Enterprises, LLC, Paul E. Wafler, and Susan Wafler.

“DOJ” means the United States Department of Justice and any of its successor departments or agencies.

“EPA” means the United States Environmental Protection Agency and any of its successor departments or agencies.

“Effective Date” means the date provided in Section X (Effective Date).

“Paragraph” means a portion of this Consent Decree identified by an Arabic numeral.

“Parties” means the United States and Defendants.

“Request for Termination” means the written request presented by Defendants to the United States in accordance with Section XIII (Termination).

“Section,” when not used in conjunction with the CWA (e.g., Section 404 of the CWA), means a portion of this Decree identified by a Roman numeral.

“United States” means the United States of America, acting on behalf of the USACE.

“USACE” means the United States Army Corps of Engineers and any of its successor departments or agencies.

“Wafler Property” means the real property located at 10748 and 10817 Slaght Road in the Town of Wolcott, Wayne County, New York, which includes approximately 4.68 acres of federal jurisdictional wetlands and approximately 1,437 linear feet of an unnamed tributary.

IV. INJUNCTIVE RELIEF

11. Permanent injunction. Defendants and Defendants’ agents, successors, and assigns are enjoined from discharging any pollutant into waters of the United States, unless such discharge complies with the provisions of the CWA and regulations promulgated pursuant to the CWA.

12. Mitigation. By May 20, 2029, as mitigation for impacts to approximately 4.68 acres of federal wetlands and approximately 1,437 linear feet of federally-jurisdictional unnamed tributary, Defendants shall purchase a total of 7.02 credits (the “credits”) from Ducks Unlimited, Inc., the New York in lieu fee Program, Irondequoit-Ninemile Service Area (“Ducks Unlimited”). As of the entry of this Decree, Defendants have purchased 3.68 credits out of the required 7.02 credits. Defendants shall purchase 1 additional credit on or

before May 20, 2025; Defendants shall purchase .585 additional credit on or before May 20, 2026; Defendants shall purchase .585 additional credit on or before May 20, 2027; Defendants shall purchase .585 additional credit on or before May 20, 2028; Defendants shall purchase .585 additional credit on or before May 20, 2029. Within 30 Days after each such purchase, Defendants shall provide written notice to the United States at the addresses specified in Section IX (Notices).

a. Should Ducks Unlimited be unable to provide the credits or any portion thereof, Defendants are not relieved of their mitigation requirements. Within fourteen (14) days of learning of Ducks Unlimited’s inability to provide credits, Defendants shall provide written notice of the unavailability of credits to the United States in accordance with Section IX (Notices). The parties shall work in good faith to identify and implement replacement mitigation options.

V. STIPULATED PENALTIES

13. Defendants shall be liable for stipulated penalties to the United States for violations of this Consent Decree as specified below. A violation includes failing to perform any obligation required by the terms of this Consent Decree, according to all applicable requirements of this Consent Decree and within the specified time schedules established by or approved under this Consent Decree.

14. Non-compliance with injunctive relief. The following stipulated penalties shall accrue per violation per Day for each violation of the various prohibitions and obligations set forth in Section IV (Injunctive Relief):

| Period of Noncompliance | Penalty Per Violation Per Day |
|--------------------------------|--------------------------------------|
| 1st through 30th Day | \$1,000 |
| 31st through 60th Day | \$2,000 |
| 60th Day and beyond | \$3,000 |

15. Stipulated penalties under this Section shall begin to accrue on the Day a violation occurs and shall continue to accrue until the violation ceases. Stipulated penalties shall accrue simultaneously for separate violations of this Consent Decree.

16. Defendants shall pay any stipulated penalty within 30 Days after receiving the United States' written demand.

17. The United States may in the unreviewable exercise of its discretion, reduce or waive stipulated penalties otherwise due it under this Consent Decree.

18. Stipulated penalties shall continue to accrue during any Dispute Resolution, but need not be paid until the following:

a. If the dispute is resolved by agreement of the Parties or by a decision of the United States or the USACE that is not appealed to the Court, Defendants shall pay accrued penalties determined to be owing, together with interest, to the United States within 30 Days after the effective date of the agreement or the receipt of the United States' or the USACE's decision.

b. If the dispute is appealed to the Court and the United States prevails in whole or in part, Defendants shall pay all accrued penalties determined by the Court to be owing, together with interest, within 60 Days after receiving the Court's decision or order, except as provided in subparagraph c, below.

c. If any Party appeals the District Court's decision, Defendants shall pay all accrued penalties determined to be owing, together with interest, within 15 Days after receiving the final appellate court decision.

19. Defendants shall pay stipulated penalties owing to the United States by FedWire Electronic Funds Transfer (“EFT”) to the DOJ account, in accordance with Instructions provided to Defendants by the Financial Litigation Unit (“FLU”) of the United States Attorney’s Office for the Western District of New York. At the time of payment, Defendants shall send notice that payment has been made to the USACE and the United States via email in accordance with Section IX (Notices). Such notice shall state that the payment is for stipulated penalties and shall state for which violation(s) the penalties are being paid pursuant to the Consent Decree in *United States v. Wafler Farms, et al.*, 20-cv-06363 and shall reference the civil action number, CDCS Number, and DOJ case number 2019V01814.

20. If Defendants fail to pay stipulated penalties according to the terms of this Consent Decree, Defendants shall be liable for interest on such penalties, as provided for in 28 U.S.C. § 1961, accruing as of the date payment became due. Nothing in this Paragraph shall be construed to limit the United States from seeking any remedy otherwise provided by law for Defendants’ failure to pay any stipulated penalties.

21. The payment of penalties and interest, if any, shall not alter in any way Defendants’ obligation to complete the performance of the requirements of this Consent Decree.

22. Non-Exclusivity of Remedy. Stipulated penalties are not the United States’ exclusive remedy for violations of this Consent Decree. Subject to the provisions of Section VII (Scope and Effect/Reservation of Rights), the United States expressly reserves the right to seek any other relief it deems appropriate for Defendants’ violation of this Decree or applicable law, including but not limited to an action against Defendants for statutory penalties, additional injunctive relief, mitigation or offset measures, and/or contempt.

However, the amount of any statutory penalty assessed for a violation of this Consent Decree shall be reduced by an amount equal to the amount of any stipulated penalty assessed and paid pursuant to this Consent Decree.

VI. DISPUTE RESOLUTION

23. Unless otherwise expressly provided for in this Consent Decree, the dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes arising under or with respect to this Consent Decree. Defendants' failure to seek resolution of a dispute under this Section shall preclude Defendants from raising any such issue as a defense to an action by the United States to enforce any obligation of Defendants arising under this Decree.

24. Any dispute that arises with respect to the meaning or requirements of this Consent Decree shall be, in the first instance, the subject of informal negotiations between the United States and Defendants affected by the dispute to attempt to resolve such dispute. The period for informal negotiations shall not extend beyond thirty (30) days beginning with written notice by one party to the other affected party or parties that a dispute exists, unless agreed to in writing by those parties. If a dispute between the United States and the Defendants cannot be resolved by informal negotiations, then the position advanced by the United States shall be considered binding unless, within fourteen (14) days after the end of the informal negotiations period, the Defendants file a motion with the Court seeking resolution of the dispute. The motion shall set forth the nature of the dispute and a proposal for its resolution. The United States shall have thirty (30) days to respond to the motion and propose an alternate.

25. If the United States believes that a dispute is not a good faith dispute, or that a delay would pose or increase a threat of harm to the public or the environment, it may move the Court for a resolution of the dispute prior to the expiration of the thirty (30) day period for informal negotiations. The Defendants shall have fourteen (14) days to respond to the motion and propose an alternate resolution. In resolving any such dispute, the Defendants shall bear the burden of proving by a preponderance of the evidence that the United States' position is not in accordance with the objectives of this Consent Decree, and that the Defendants' position will achieve compliance with the terms and conditions of this Consent Decree and the CWA.

26. The filing of a motion asking the Court to resolve a dispute shall not extend or postpone any obligation of the Defendants under this Consent Decree, except as provided in Section IV (Stipulated Penalties) regarding payment of stipulated penalties.

VII. SCOPE AND EFFECT/RESERVATION OF RIGHTS

32. This Consent Decree resolves and shall constitute a complete and final settlement of the civil claims of the United States alleged in the Complaint, subject to Defendants' compliance with this Consent Decree.

33. The United States reserves all legal and equitable remedies available to enforce the provisions of this Consent Decree and applicable law. This Consent Decree shall not be construed to limit the rights of the United States to obtain penalties or injunctive relief under the CWA or implementing regulations, or under other federal laws, regulations, or permit conditions, except as expressly specified in this Agreement.

34. This Consent Decree is not a permit, or a modification of any permit, under any federal, State, or local laws or regulations. Defendants are responsible for achieving and

maintaining complete compliance with all applicable federal, State, and local laws, regulations, and permits; and Defendants' compliance with this Consent Decree shall be no defense to any action commenced pursuant to any such laws, regulations, or permits, except as set forth herein. The United States does not, by its consent to the entry of this Consent Decree, warrant or aver in any manner that Defendants' compliance with any aspect of this Consent Decree will result in compliance with any provisions of federal, State, or local laws, regulations, or permits.

35. Nothing in this Consent Decree shall limit the ability of the USACE to issue, modify, suspend, revoke, or deny any individual permit or any nationwide or regional permit, nor shall this Consent Decree limit EPA's ability to exercise its authority pursuant to Section 404(c) of the CWA, 33 U.S.C. § 1344(c).

36. This Consent Decree does not limit or affect the rights of Defendants or of the United States against any third parties, not party to this Consent Decree, nor does it limit the rights of third parties, not party to this Consent Decree, against Defendants, except as otherwise provided by law.

37. This Consent Decree shall not be construed to create rights in, or grant any cause of action to, any third party not party to this Consent Decree.

VIII. COSTS

38. The Parties shall bear their own costs of this action, including attorneys' fees, except that, should Defendants subsequently be determined by the Court to have violated any provision of this Consent Decree, the United States shall be entitled to collect the costs, including attorneys' fees, incurred by the United States in any action against Defendants for noncompliance with or enforcement of this Consent Decree.

IX. NOTICES

39. Unless otherwise specified herein, whenever notifications, submissions, or communications are required by this Consent Decree, they shall be made in writing and sent by mail and email addressed as follows:

As to DOJ:

U.S. Attorney's Office, Western District of New York
Affirmative Civil Enforcement Unit
138 Delaware Avenue
Buffalo, NY 14202

David M. Coriell, Assistant U.S. Attorney
U.S. Attorney's Office, Western District of New York
138 Delaware Avenue
Buffalo, NY 14202
David.Coriell@usdoj.gov

As to the USACE:

Colin R. Ozanne, District Counsel
U.S. Army Corps of Engineers
Buffalo District
478 Main Street
Buffalo, NY 14202
Colin.R.Ozanne@usace.army.mil

Harold T. Keppner, Chief of Monitoring and Enforcement
Regulatory Branch
U.S. Army Corps of Engineers
Buffalo District
478 Main Street
Buffalo, NY 14202
Harold.T.Keppner@usace.army.mil

As to Defendants:

Matthew Piston
EVANS FOX LLP
100 Meridian Centre Blvd., Suite 300
Rochester, NY 14618
mpiston@evansfox.com

Paul Wafler
10817 Salght Road
Wolcott, NY 14590

40. Any Party may, by written notice to the other Parties, change its designated notice recipient or notice address provided above.

41. Notices submitted pursuant to this Section shall be deemed submitted upon mailing or transmission by email, unless otherwise provided in this Consent Decree or by mutual agreement of the Parties in writing.

X. EFFECTIVE DATE

42. The Effective Date of this Consent Decree shall be the date upon which this Consent Decree is entered by the Court or a motion to enter the Consent Decree is granted, whichever occurs first, as recorded on the Court's docket.

XI. RETENTION OF JURISDICTION

43. The Court retains jurisdiction over this case for the purpose of resolving disputes arising under this Consent Decree, entering orders modifying this Consent Decree pursuant to Sections XII and XIII, or effectuating or enforcing compliance with the terms of this Consent Decree.

XII. MODIFICATION

44. The terms of this Consent Decree may be modified only by a subsequent written agreement signed by all the Parties. Where the modification constitutes a material change to this Consent Decree, it shall be effective only upon approval by the Court.

45. Any disputes concerning modification of this Consent Decree shall be resolved pursuant to Section VI (Dispute Resolution), provided, however, that the party seeking the

modification bears the burden of demonstrating that it is entitled to the requested modification in accordance with Federal Rule of Civil Procedure 60(b).

XIII. TERMINATION

46. This Consent Decree may be terminated by either of the following:
- a. Defendants and the United States may at any time make a joint motion to the Court for termination of this Consent Decree or any portion of it; or
 - b. Defendants may make a unilateral motion to the Court to terminate this Consent Decree after each of the following has occurred:
 - i. Defendants have obtained and maintained compliance with all provisions of this Consent Decree and the CWA for twelve (12) consecutive months;
 - ii. Defendants have paid all penalties and other monetary obligations hereunder and no penalties or other monetary obligations are outstanding or owed to the United States;
 - iii. Defendants have certified compliance pursuant to subparagraphs i and ii above to the Court and all Parties; and
 - iv. Within forty-five (45) days of receiving such certification from Defendant, the USACE has not contested in writing that such compliance has been achieved. If the USACE disputes Defendants' full compliance, this Consent Decree shall remain in effect pending resolution of the dispute by the Parties or the Court.

XIV. PUBLIC COMMENT

47. The Parties acknowledge that this Consent Decree shall be lodged with the Court for a period of not less than 30 Days to allow for public notice and comment in accordance with 28 C.F.R. § 50.7. The United States reserves the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations indicating that the Consent Decree is inappropriate, improper, or inadequate. Defendants consent to entry of this Consent Decree without further notice and agrees not to withdraw from or oppose entry of this Consent Decree by the Court or to challenge any provision of the Consent Decree, unless the United States has notified Defendants in writing that it no longer supports entry of the Consent Decree.

XV. SIGNATORIES/SERVICE

48. Each undersigned representative of Defendants and the U.S. Department of Justice certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind the party he or she represents to this document.

49. This Consent Decree may be signed in counterparts, and its validity shall not be challenged on that basis. Defendants agree to accept service of process by mail and/or email with respect to all matters arising under or relating to this Consent Decree and to waive the formal service requirements set forth in Rules 4 and 5 of the Federal Rules of Civil Procedure and any applicable Local Rules of this Court including, but not limited to, service of a summons.

XVI. INTEGRATION

50. This Consent Decree constitutes the entire agreement among the Parties regarding the subject matter of the Consent Decree and supersedes all prior representations, agreements and understandings, whether oral or written, concerning the subject matter of the Consent Decree herein.

XVII. 26 U.S.C. § 162(f)(2)(A)(ii) IDENTIFICATION

51. For purposes of the identification requirement in Section 162(f)(2)(A)(ii) of the Internal Revenue Code, 26 U.S.C. § 162(f)(2)(A)(ii), and 26 C.F.R. § 1.162-21(b)(2), performance of Section IV (Injunctive Relief) is restitution, remediation, or required to come into compliance with law.

XVIII. HEADINGS

52. Headings to the Sections, Paragraphs, or other provisions of this Consent Decree are provided for convenience and do not affect the meaning or interpretation of the provisions of this Consent Decree.

XIX. FINAL JUDGMENT

53. Upon approval and entry of this Consent Decree by the Court, as recorded on the Court's docket, this Consent Decree shall constitute and have the force and effect of a final judgment of the Court as to the United States and Defendants.

IT IS SO ORDERED.

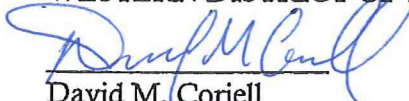
Dated and entered this _____ day of _____.

HONORABLE ELIZABETH J. WOLFORD
UNITED STATES DISTRICT JUDGE

THE UNITED STATES OF AMERICA

TRINI E. ROSS
UNITED STATES ATTORNEY
WESTERN DISTRICT OF NEW YORK

DATE: 7/23/24

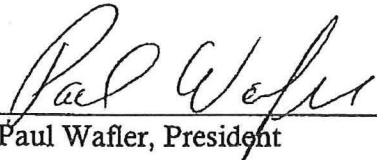


David M. Coriell
Assistant United States Attorney

DEFENDANTS

DATE: 7/11/2024

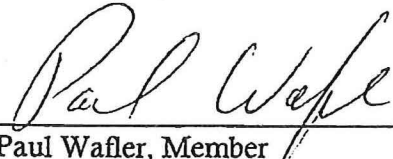
Wafler Farms, Inc.

By: 

Paul Wafler, President

DATE: 7/11/2024

Huron Enterprises, LLC

By: 

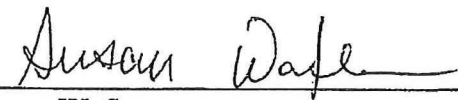
Paul Wafler, Member

DATE: 7/11/2024



Paul Wafler

DATE: 7/11/2024



Susan Wafler

DATE: 7/23/24



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Farms, Inc., d/b/a Wafler Nursery &
Orchard, and Huron Enterprises, LLC*