

STATEMENT OF BASIS

NPDES #:	NC0054992
PERMITTEE:	C.R. Brown Enterprises, Inc. 235 Milton Mashburn Drive Andrews NC 28901
FACILITY:	Cherokee Trout Farm 10285 Big Cove Road Cherokee NC 28719 Eastern Band of Cherokee Indian Tribal Land
FACILITY TYPE:	Concentrated Aquatic Animal Production (SIC code 0273)
OUTFALL(S):	001 (Latitude 35 34' 32" North; Longitude 83 15' 30" East)
RECEIVING WATER:	Raven Fork River

1. Facility Description

Cherokee Trout Farm is an existing source concentrated aquatic animal production (CAAP) “flow-through” facility that grows Rainbow Trout (*Oncorhynchus Mykiss*).¹ The operation includes thirty-four (34) raceways and six (6) settling ponds that are in-series. The maximum reported daily discharge flow rate through the one permitted outfall is 10.5 million gallons. The maximum reported production of Rainbow Trout from this farm is approximately 880,000 pounds annually. The maximum reported amount of feed is 120,000 pounds per month. The intake water source for the facility is the Raven Fork River. The facility is located within the Eastern Band of Cherokee Indian (EBCI) Tribal boundary.

	<u>Current Permit</u>	<u>Proposed Permit</u>
Maximum daily discharge flow rate	9.0 MGD	10.5 MGD
Maximum fish production	725,000 pounds annually	880,000 pounds annually
Maximum amount of feed	114,000 pounds per month	120,000 pounds per month

2. Receiving Water Body Description

The effluent discharges to the Raven Fork River thence approximately 7.5 miles to the Oconaluftee River. The Raven Fork River has the following designated uses: recreation, ceremonial, public water supply, and cold-water aquatic habitat Class 1 (trout waters).

3. Rationale for the Permit Conditions and Requirements

The current NPDES permit authorizing the facility to discharge pollutants into the Raven Fork River was effective on June 10, 2017 and expired on June 9, 2022. The current permit remains effective due to administrative

¹ A new source is defined as a facility from which there is a discharge of pollutants for which the construction commenced after the promulgation of standards of performance under CWA Section 306 (in accordance with 40 CFR § 122.2 and 40 CFR § 122.29). The facility originally obtained a NPDES permit from the EPA in 1987. The effluent limitations guidelines for the CAAP industry became effective on September 22, 2004. Therefore, the facility is considered an existing source.

continuation (40 Code of Federal Regulations (CFR) § 122.6). The permit conditions are consistent with the Clean Water Act (CWA) § 308, § 312, § 402, and 40 CFR § 125. The permit conditions are based on the CAAP regulations (40 CFR § 122.24 and 40 CFR Part 451). The limits and conditions are further clarified in the CAAP effluent limit development document² and the CAAP Compliance Guide.³

The rationale for each part of the permit is summarized below:

Part I – Effluent Limitations and Monitoring Requirements

The monitoring conditions and/or effluent limitations are based upon the previous NPDES permit and the EBCI Water Quality Standards Administrative Rules (effective March 28, 2019)⁴ and to protect the North Carolina waters downstream from the facility's discharge. The monitoring requirements are consistent with the CWA § 308(a).

This permit includes a requirement to develop and implement an In-Stream Biological Monitoring Plan (IBMP) to address EBCI's flow criteria, which states, "Natural daily, seasonal, annual, and inter-annual fluctuations of flow shall be maintained to support the naturally balanced indigenous biological community including those species most sensitive to alterations in flow, including trout and all life stages of trout."⁴

Part II – Aquaculture Specific Requirements

This permit section outlines the specific reporting requirements for aquaculture facilities as mandated by the effluent guidelines for the CAAP Point Source Category (40 CFR Part 451).

Part III – Reporting, Monitoring, and Record Requirements

This permit section provides the electronic reporting requirements and general monitoring provisions in accordance with the CWA and its implementing regulations.

Part IV – Best Management Practices (BMP) Plan

The permit requires the implementation of a BMP plan to minimize the effects of the facility's discharges on the water quality of the receiving water body. The BMP plan is required in accordance with the effluent limitation guideline for the CAAP point source category and 40 CFR § 122.44(k).

Part V – Quality Assurance Plan (QAP)

This permit requires the implementation of a QAP to ensure that the effluent and water quality data collected by the permittee is reliable. The permittee is required to submit and follow the QAP which prescribes the procedures for the collection and analysis of all effluent and in-stream sampling. The QAP requirement is

² U.S. Environmental Protection Agency. 2004. Technical Development Document for the Final Effluent Limitations Guidelines and New Source Performance Standards for the Concentrated Aquatic Animal Production Point Source Category (Revised August 2004). EPA-821-R-04-012. U.S. Environmental Protection Agency, Office of Water, Washington, DC.

< www.epa.gov/sites/default/files/2015-11/documents/caadfp-aquaculture_tdd_2004.pdf >

³ U.S. Environmental Protection Agency. 2006. Compliance Guide for the Concentrated Aquatic Animal Production Point Source Category. EPA-821-B-05-001. U.S. Environmental Protection Agency, Office of Water, Washington, DC.

< www.epa.gov/sites/default/files/2015-11/documents/caap-aquaculture_compliance-guide_2006.pdf >

⁴ Eastern Band of Cherokee Indians. 2018. Eastern Band of Cherokee Indians (EBCI) Administrative Regulations Title 15, Subchapter B: Surface Water Quality Standards.

< www.epa.gov/sites/default/files/2019-04/documents/ebsci_wqs_0001_081518.pdf >

based upon the BPJ of the permit writer.

Part VI – Standard Conditions

This section contains the general conditions and definitions applicable to NPDES permits issued by the EPA.

4. Effective Date of Effluent Limits, Permit Conditions, and Compliance Schedule

The permittee shall achieve compliance with all effluent limitations, monitoring conditions, and permit requirements immediately upon the effective date of the permit. A compliance schedule is not included in this permit.

5. Antidegradation Review

The facility is increasing the maximum feed amount, fish production, effluent flow rate, and quantity of raceways. These facility changes are considered expansions and require an antidegradation analysis pursuant to EBCI Water Quality Standards Section 6. The EBCI have reported that the receiving water has an antidegradation status of Tier 2. The Antidegradation Policy and Implementation methods within EBCI Water Quality Standards Administrative Rules require “existing in-stream water uses and the level of water quality and quantity necessary to protect the existing uses shall be maintained and protected.”⁵ An Antidegradation Review Report is required for all proposed new or expanding discharges into Tier 2 waters. The antidegradation policy is implemented by EBCI’s Department of Agricultural and Natural Resources (DANR). The EBCI’s DANR has conducted an antidegradation analysis in accordance with its implementation methods, including the public participation component of its implementation methods.

The antidegradation analysis created by the EBCI determined that no additional assimilative capacity would be used for pollutants of concern. The increased effluent flow would provide assimilative capacity for the additional pollutant loading. The EBCI concluded that the proposed expansion is in the Tribe’s interest and there are no alternatives to the proposed increased stream withdrawal and facility expansion. As stated in the CWA § 401 certification, the EBCI requires the permit to contain a provision for annual instream biomonitoring to assure that in-stream flow is not being altered in a way that affects aquatic life in Raven Fork between the intake and the discharge. As biomonitoring data is collected during the permit term, the EPA will evaluate impacts to aquatic life to determine whether the permit will be modified to include conditions for in-stream flow.

6. CWA § 401 Certification Requirements

A CWA § 401 certification is not required from the North Carolina Department of Environmental Quality because the permitted activity is not in State waters; however, a CWA § 401 certification from the EBCI is required because the permitted activity discharges to EBCI waters. The EBCI Water Quality Office submitted their CWA § 401 certification to the EPA on July 18, 2022, concluding that special conditions are required to include flow measurements and annual biomonitoring during the first two years of the NPDES permit to generate data to inform the need for any further special conditions to comply with EBCI Water Quality Standards for the remainder of the permit. The proposed permit includes the requirement for flow measurements and annual biomonitoring throughout the full permit term. The EBCI also included general conditions that were withdrawn on August 23, 2022, due to non-applicability to NPDES requirements.

⁵ Eastern Band of Cherokee Indians. 2018. Eastern Band of Cherokee Indians (EBCI) Administrative Regulations Title 15, Subchapter B: Surface Water Quality Standards.
< www.epa.gov/sites/default/files/2019-04/documents/ebsci_wqs_0001_081518.pdf >

7. National Historic Preservation Act (NHPA) Compliance

Section 106 of the National Historic Preservation Act (NHPA), and implementing regulations 36 CFR Part 800 require the EPA, before issuing a license (permit), to identify the area of potential effect of a permitted discharge and, if historic or cultural resources within that area would be adversely affected by the discharge, to adopt measures when feasible to mitigate potential adverse effects of the licensed activity and properties listed or eligible for listing in the National Register of Historic Places. The EBCI are responsible for administering the NHPA within tribal boundaries. The NHPA review conducted by the EBCI determined that this discharge will not impact any archaeological resources nor have a negative impact on historic properties.

8. Endangered Species Act (ESA) Compliance

In accordance with 40 CFR § 122.49(c) the EPA is required to ensure, in consultation with the U.S. Fish and Wildlife Service (USFWS), that “any action authorized by EPA is not likely to jeopardize the continued existence of any endangered or threatened species or adversely affect its critical habitat.” The EPA, in consultation with the USFWS, determined that the re-issuance of this permit will have no effect on any federally listed, proposed threatened or endangered species, or designated habitat for aquatic species in the action area.

9. National Environmental Policy Act (NEPA) Compliance

Under NEPA, an analysis is required when an action is deemed a major federal action significantly affecting the quality of the human environment. CWA § 511(c) lists the only actions of the Administrator under the CWA that require any NEPA analysis. Section 511(c)(1) of the CWA states: “Except for the provision of Federal financial assistance for the purpose of assisting the construction of publicly owned treatment works as authorized by Section 1281 of this title, and the issuance of a permit under Section 402 of this title for the discharge on any pollutant by a new source identified in Section 1316 of this title, no action of the Administrator taken pursuant to this chapter [the CWA] shall be deemed a major federal action significantly affecting the quality of the human environment within the meaning of NEPA.” This same limiting language is reflected in 40 CFR § 6.101(a).

Because the CWA and implementing regulations are specifically inclusive as to what actions require NEPA and is limited to those two annotated situations, existing sources are exempt from NEPA since they are not “deemed a major federal action significantly affecting the quality of the human environment within the meaning of NEPA.” The discharges associated with this CAAP facility are from an existing source.¹ Therefore, a NEPA analysis is not required because the EPA is required to comply with the requirements of the NEPA for EPA-issued NPDES permits only for new sources.

10. Fish and Wildlife Coordination Act (FWCA) Compliance

The Fish and Wildlife Coordination Act (FWCA) requires that Federal agencies consult with the USFWS for activities that affect, control, or modify waters of any stream or bodies of water, in order to minimize the adverse impacts of such actions on fish and wildlife resources and habitat. In accordance with 40 CFR § 122.49(e), the EPA is required to consult with the USFWS to conserve those resources, before issuing a permit proposing or authorizing the impoundment (with certain exemptions), diversion, or other control or modification of any body of water. The EPA consulted with the USFWS and determined that the permit requirements sufficiently minimize adverse impacts on fish and wildlife resources and habitat.

11. The Administrative Record and EPA Contact

The entire administrative record including application, draft permit, statement of basis, public notice, comments received, and supporting information is available by contacting the EPA using the below information.

NPDES Permitting Section Manager
U.S. Environmental Protection Agency, Region 4
Water Division | Surface Water Protection Branch
61 Forsyth Street SW | Atlanta Georgia 30303-8960
R4NPDESPermits@epa.gov