

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4

In the Matter of)
)
JERRY O'BRYAN,) **CORRECTED**
CURDSVILLE, KENTUCKY) Docket No. CWA-04-2018-5501(b)
)
Respondent.)
_____)

**“CORRECTED” ORDER DENYING PETITION TO SET ASIDE
CONSENT AGREEMENT AND PROPOSED FINAL ORDER**

Pursuant to Section 309(g)(4)(C) of the Clean Water Act, 33 U.S.C. § 1319(g)(4)(C), on September 24, 2019, the Community Against Pig Pollution and Disease, Inc. (“CAPPAD” or “Petitioner”) filed a Petition to set aside the Consent Agreement and proposed Final Order agreed upon by the parties to this matter. The Parties are the Complainant, Chief of the Water Enforcement Branch, Enforcement and Compliance Assurance Division, United States Environmental Protection Agency (“EPA,” “Agency” or “Complainant”), Region 4, and Respondent, Jerry O’Bryan. The Petition alleges that Complainant failed to consider material evidence before issuing the proposed Final Order as required under Section 309(g)(2)(A) of the Clean Water Act, 33 U.S.C. §1319(g)(2)(A). As the Petition fails to present any relevant and material evidence that was not adequately considered and responded to by Complainant, the Petition is **DENIED** without the need for a hearing. *See* 33 U.S.C. § 1319(g)(4)(C); 40 C.F.R. § 22.45(c)(4).

I. Relevant Statutes and Regulations

The purpose of the Federal Water Pollution Control Act, also known as the Clean Water Act (“CWA” or “Act”), “is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.” 33 U.S.C. § 1251(a). To that end, the Act requires that a permit be obtained for

"Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced shall be required to have a permit. . . ." Section 404 of CWA, 33 U.S.C. §1344(f)(2). In accordance with Section 301(a) of the CWA, 33 U.S.C. §1311, "the discharge of any pollutant into waters of the United States by any person without a permit in compliance with this Section and . . . §1344, shall be unlawful."

The CWA provides the EPA with various enforcement mechanisms for responding to violations of Sections 301(a) and 404 for discharging without a permit or for violating a Section 404 permit. Under CWA Section 309(a), 33 U.S.C. §1311, the EPA is authorized to issue an administrative compliance order (AO) requiring a violator to cease an unauthorized discharge, refrain from future illegal discharge activity, remove unauthorized fill, and/or restore the site. Under CWA Section 309(g) the EPA is authorized to assess administrative penalties for activities that constitute violations, including discharging dredged or fill material into waters of the United States without a Section 404 permit. Section 309(g) also establishes two classes of administrative penalties, which differ with respect to procedure and maximum assessment, for such violations. The alleged violation committed by Respondent in this matter falls under Section 309(g)(2)(A), a Class I Civil Penalty, for which an amount may not exceed \$11,000 per violation or a maximum amount of \$27,500.¹

In determining the appropriate amount of a civil penalty, the Act requires EPA to consider "the nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may

¹ See EPA Clean Water Act Section 404 Settlement Penalty Policy (Dec.21, 2001).
https://www.epa.gov/sites/production/files/2015-07/documents/2001_sec_404_penalty_policy.pdf

require.” CWA Section 309 (g)(3), 33 U.S.C. §1319(g)(3). Before issuing an order assessing a civil penalty under Section 309(g) of the CWA, the EPA is required to provide public notice of and reasonable opportunity to comment on the proposed issuance of such order. 33 U.S.C. §1319 (g)(4)(A). Any person who comments on a proposed assessment of a penalty under Section 309(g) is entitled to receive notice of any hearing and of the order assessing such penalty. 33 U.S.C. §1319(g)(4)(B). Moreover, if a hearing is held, such person shall have a reasonable opportunity to be heard and present evidence. 33 U.S.C. §1319(g)(4)(B). If a hearing is not held, the CWA provides,

“ . . . before issuance of an order assessing a penalty under this subsection, any person who commented on the proposed assessment may petition, within 30 days after the issuance of such order, the EPA . . . to set aside such order and to provide a hearing on the penalty. If the evidence presented by the petitioner in support of the petition is material and was not considered in the issuance of the order, the EPA . . . shall immediately set aside such order and provide a hearing in accordance with paragraph (2)(A) in the case of a class I civil penalty . . . If the EPA . . . denies a hearing under this subparagraph, the EPA . . . shall provide to the petitioner, and publish in the Federal Register, notice of and the reasons for such denial.” 33 U.S.C. §1319(g)(4)(C).

The Consolidated Rules of Practice (Consolidated Rules) also address proceedings under CWA Section 309(g)(4), 33 U.S.C. §1319(g)(4)(C).² The Rules provide that "where the parties agree to settlement of one or more causes of actions before the filing of a complaint, a proceeding may be simultaneously commenced and concluded by the issuance of a consent agreement and final order." 40 C.F.R. § 22.13(b); *See also* 40 C.F.R. § 22.18(b)(2), (b)(3) (describing the terms that a consent agreement must include and the need for an executed final order ratifying the parties' consent agreement in order to dispose of a proceeding).

² 40 C.F.R. Part 22, Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits.

With regard to a petition to set aside a consent agreement and final order under the Act, the Consolidated Rules provide: Within 15 days of receipt of a petition, the complainant may, with notice to the Regional Administrator . . . withdraw the consent agreement and proposed final order to consider the matter. 40 C.F.R. §22.45(c)(4)(iii). If Complainant does not give notice of withdrawal, the Regional Administrator . . . shall assign a Petition Office to consider and rule on the petition. *Id.*³

The Consolidated Rules further provide the Petition Officer shall review the petition, and complainant's response, and shall file with the Regional Hearing Clerk, with copies to the parties, the commenter, and the Presiding Officer, written findings as to:

- (A) The extent to which the petition states an issue relevant and material to the issuance of the proposed final order;
- (B) Whether complainant adequately considered and responded to the petition; and
- (C) Whether a resolution of the proceeding by the parties is appropriate without a hearing. 40 C.F.R. § 22.45(c)(4)(v).

The Consolidated Rules prescribe two actions a Petition Officer may take depending upon the determination of the appropriateness of a hearing for resolution of the proceeding. If the Petition Officer finds that a hearing is appropriate, the Presiding Officer shall order that the consent agreement and proposed final order be set aside and establish a schedule for a hearing. 40 C.F.R. § 22.45(c)(4)(vi). Conversely, if the Petition Officer finds that resolution of the proceeding without a hearing is appropriate, the Petition Officer shall issue an order denying the petition, stating reasons for the denial, and shall:

- (A) File the order with the Regional Hearing Clerk;
- (B) Serve copies of the order on the parties and the commenter; and
- (C) Provide public notice of the order. 40 C.F.R. § 22.45(c)(4)(vii).

³ The EPA Region 4 Regional Administrator assigned Robin Allen to serve as petition officer in this matter on October 24, 2019.

Neither the CWA, 33 U.S.C. §1319(g)(4)(C), nor the Consolidated Rules define the terms “relevant and “material.” However, the Act requires the Petition Officer set aside a proposed final order “if the evidence presented by the petitioner in support of the petition is “material” and was not considered in the issuance of the order," and the Consolidated Rules require a proposed final order be set aside to the "extent to which the petition states an issue “relevant” and “material” to the issuance of such order.” 40 C.F.R. § 22.45(c)(4)(v). The Petition Officer looked to the Federal Rules of Evidence and Environmental Appeals Board decisions for guidance. Under the Federal Rules of Evidence, information is "relevant" when "(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action."⁴ See *Fed. R. Evid. 401, In the Matter of BP Products North America Inc., Docket No. CWA-05-2016-0015 (EAB May 2018)*, (Order Denying Petition to Set Aside Consent Agreement and Final Order). Evidence is deemed "material" when, if presented, it reasonably has the potential to cause a different outcome. *In the Matter of BP Products North America Inc. at 5*, citing *United States v. Bagley*, 473 U.S. 667, 682 (1981).

II. Factual and Procedural Background

Jerry O’Bryan (Respondent) owns certain parcels of land near Curdsville in Daviess County, Kentucky, (also referred to as “Simpson/McKay Farm”) on which waters of the United States were impacted as a result of Respondent’s unauthorized dredging and/or filling activities which commenced in or about June 2016. Specifically, Respondent discharged dredged and/or fill material using earth moving equipment and engaging in activities associated with the conversion of wetlands to agricultural land. *Complainant’s Response to Petition*, p. 2. The site of these activities is located near latitude 37.731169°N and longitude -87.382159°W. *Administrative Compliance Order on Consent*, p. 000002. Respondent’s activities impacted approximately 2.1 acres of wetlands adjacent

⁴ Federal Rules of Evidence (2020), <https://www.rulesofevidence.org/>

to the Green River, a traditionally navigable water of the United States and approximately 800 linear feet of an unnamed tributary to the Green River. *Id.* Throughout the period of discharge, dredging and/or filling activities, Respondent did not have a permit under Section 404 of the CWA, 33 U.S.C §1344, that authorized such activities. *Id at 000003.*

On or about May 10, 2018, the Director of the Water Division of EPA Region 4 and Respondent executed an Administrative Compliance Order on Consent (AOC) pursuant to Section 309 (a)(3) of the CWA, 33 U.S.C. §1319, in the case styled, *In the Matter of Jerry O'Bryan Curdsville, Kentucky, Docket No. CWA-04-2018-5755. Id. at pp. 000002-000046.* The AOC addresses Respondent's unauthorized discharge of dredged and/or fill material. The EPA determined Respondent's activities violated Section 301 of the CWA, 33 U.S.C. §1311, which makes it unlawful for any person to discharge pollutants into waters of the United States without proper permit authorization, including permits issued under Section 404 of the CWA. In the AOC, Respondent agreed to restore impacted wetlands in accordance with a signed restoration plan prepared by the United States Department of Agriculture/Natural Resources Conservation Service (NRCS) on March 2, 2017. *Id. at 000009 - 000047.* Respondent further agreed to comply with timelines regarding the start and end date for project construction and final inspection.

Thereafter, the EPA and Respondent agreed to resolve Respondent's liability for federal civil penalties associated with Respondent's unauthorized discharge of dredged and/or fill material in the proposed Consent Agreement and Final Order (CAFO); the subject of this Petition to set aside. The CAFO seeks to simultaneously commence and conclude an administrative penalty action under Section 309(g)(2)(A) of the CWA. Under the terms of the CAFO, Respondent admitted the jurisdictional allegations set forth in the CAFO but neither admitted nor denied the factual allegations and alleged violations. Respondent waived its right to a hearing or to otherwise contest the CAFO, and agreed to pay a civil penalty in the amount of \$3346 and perform a Supplemental

Environmental Project (SEP) to resolve the alleged CWA Section 404 violations. The SEP entails the conversion of approximately 281.9 acres of farmland located adjacent to the Green River from conventional farming practices to a soil health management farming system.

On May 30, 2018, consistent with 33 U.S.C. § 1319(g)(4), the EPA provided public notice of its intent to file the proposed CAFO and accept public comments thereon. *Public Notice, 000047-0000051*. The EPA received six timely filed comment letters during the public comment period. *Pages 0000051 - 000099*. All commenters, including Petitioner, opposed the proposed CAFO. *Pages 000051 - 000056*. Complainant subsequently prepared a Summary of and Response to the Public Comments (“Response to Comments”), which indicated the EPA would proceed with the proposed CAFO without amendment. *Pages 000127 - 000146*. The EPA mailed its Response to Comments to Petitioner and commenters with a copy of the proposed CAFO on or about August 20, 2019. *Pages 000147 - 000159*. Complainant subsequently corrected a ministerial error on Paragraph 35 of the proposed CAFO, and mailed replacement pages to Petitioner and commenters on August 23, 2019. *Pages 000160 - 000174*. Petitioner and other commenters received the documents on or about August 27, 2019. Petitioner timely filed its Petition seeking to set aside the proposed CAFO on or about September 17, 2019. *Pages 000175 - 000181*. The EPA Region 4 Regional Administrator (RA) received the Petition on or about September 24, 2019.

On behalf of the Agency, Complainant apprised Petitioner that that she considered issues raised in the Petition and determined not to withdraw the CAFO. *Letter to Petitioner, 000181*. By letter dated October 24, 2019, the RA assigned this matter to the Petition Officer, the undersigned, to consider and rule upon the Petition. *Id.* Pursuant to 40 C.F.R. §22.45(c)(4)(iv), the RA directed Complainant to present the Petition Officer a copy of the CAFO and written response to the Petition. *Id.*

Complainant filed its Response to the Petition (“Response to Petition”) on November 19, 2019, with the Regional Hearing Clerk (RHC). *Response to Petition, pp. 1 - 10*. Complainant addressed its Response to the Petition Officer and served copies on Respondent and Petitioner. However, Complainant’s filing with the RHC was in error because 40 C.F.R. §22.45(c)(4)(iv) requires that: “A copy of the response shall be provided to the parties and to the commenter, “but not to the RHC or Presiding Officer.” The RHC accepted the Response, but did not forward the Response to the Petition Officer. On December 3, 2019, the Petition Officer inquired by email whether Complainant filed a response to the Petition. Complainant realized the erroneous filing and sought to correct the error by filing a Memorandum in Support of Motion for Leave to File Response to Petition Under 40 C.F.R. §22.45(c)(4)(iv) (“Memorandum”). *Memorandum, pp. 1-5*. On December 9, 2019, the Petition Officer granted Complainant’s motion finding no harm resulted to Petitioner since Complainant timely served Petitioner and Respondent copies of Complainant’s Response to the Petition. Additionally, the RHC accepted and retained the file, but did not notify the Petition Officer that Complainant filed a Response to the Petition nor did the RHC forward Complainant’s Response to the Petition Officer.

III. Issues Raised in Petitioner’s Comments and Petition

In Petitioner’s Comments on the proposed CAFO, Petitioner argues the EPA should consider prior infractions regarding Respondent’s management of concentrated animal feeding operations and impose a severe penalty to deter future behavior. Petitioner asserts Respondent engaged in various activities that violate the Clean Water Act and the Commonwealth of Kentucky (“Commonwealth”) refused to enforce compliance, resulting in Respondent’s activities adversely impacting the community. *Petitioner’s Comments at 000051 - 000056*. In the Petition, Petitioner disagrees with Complainant’s Response to Comments and reiterates arguments made in Petitioner’s Comments. *Petition at 000127 - 000146*. Petitioner requests a hearing to present evidence of

Respondent's prior infractions and demonstrate a severe penalty is warranted. In Complainant's Response to the Petition, Complainant enumerates issues raised by Petitioner, one through seven. Complainant argues such issues are not relevant and material to matters addressed in the proposed CAFO and that Complainant adequately considered all issues. Since issues raised by Petitioner primarily concern Respondent's animal feeding operations, the undersigned consolidated and relabeled them as addressed below.

(1) Respondent Operates Concentrated Animal Feeding Operations in Violation of Environmental Laws; the Kentucky Department of Water Refused to Verify Hog Counts and Collect Water and Soil Samples

In its Comments, Petitioner argues Respondent owns and operates concentrated animal feeding operations at the Doby/Bumblebee, Iron Maiden and Hardy farms, and asserts these farms discharged "E.Coli" with readings in excess of 4,4870 CFU/100 ml per sample into the Green River. *Petitioner's Comments* at 000052-000053. Petitioner argues point source discharges with such readings violate the "Ambient Water Rule." *Id.* Petitioner asserts it complained to the Kentucky Division of Water (KDOW) and provided "this information," along with water and soil samples from Respondent's farms to KDOW. *Id.* According to Petitioner, KDOW conducted an inspection "but found no evidence of effluent discharges or waters being polluted." *Id.* Petitioner asserts the inspection was a sham, noting the KDOW inspector accepted hog counts from Respondent without verifying the accuracy of such counts, and accepted soil and water samples taken by Respondent without verifying the validity of the data or KDOW taking its own samples. *Id.* The Petitioner asserts it asked that KDOW rescind the Kentucky No Discharge Operating Permits (KNDOPs) that govern management of animal waste lagoons at these farms, and instead, issue Kentucky Pollutant Discharge Elimination System (KPDES) permits.

In the Petition, Petitioner attempts to rebut Complainant's comments, reiterating its position that Respondent owns and operates "large" concentrated animal feeding operations that discharge

into waters of the United States, and KDOW has not taken enforcement action against Respondent. *Petition at 000175 - 000177.* Petitioner asserts Respondent's concentrated animal feeding operations meet the definition of Kentucky Administrative Regulation (KAR), 401 KAR 5:002 and 40 C.F.R. §122.23(b)(2). *Id.* Petitioner states these provisions define a large concentrated animal feeding operation as one that, "stables or confines as many or more than the numbers of animals specified as 2,500 swine each weighing 55 pounds or more, or 10,000 swine each weighing less than 55 pounds," therefore, a KPDES permit is required for compliance with the CWA. *Id.* Petitioner maintains KDOW initially issued KNDOPs to Respondent based on the size of Respondent's animal feeding operations (AFOs), which were small to medium when such permits were issued. Petitioner claims KDOW refuses to "perform a hog count which would prove the combined number of swine at the locations," and refuses to "test the black water lagoon contents, which are nothing more than incubators for bacteria and viruses." *Id.* As an example, Petitioner asserts samples taken from the Hardy Sow Farm Black Water Lagoon by the Madisonville Division of Water "revealed e-coli counts greater than 173,300 C.F.U./100 ML sample and Ammonia Nitrogen concentration greater than 950 mg/L." *Id. at 000176.*

In Complainant's Response to Comments, Complainant apprises commenters that the proposed CAFO relates only to Respondent's alleged violations of Section 404 of the Clean Water Act, 33 U.S.C. §1344, at the Simpson McKay Farm beginning on or about June 2016. *Response to Comments at 000132.* Complainant emphasizes that "nothing in the proposed CAFO obviates the Respondent's obligations to comply with applicable federal state, or local laws, including KNDOPs for AFOs." *Id.* Complainant explains the Commonwealth of Kentucky issues KNDOPs for AFOs that do not discharge or intend to discharge into waters regardless of size, therefore, a Kentucky Pollutant Discharge Elimination System (KPDES) permit is not required pursuant to KRS Chapter 224. *Id.* Complainant further explains AFOs that have liquid animal manure waste handling

systems are required to have individual KNDOPs in accordance with KAR 5:005 Section (1)(3)(a)(2). *Id.* The Commonwealth of Kentucky issues a KNDOP permit “for operating a wastewater treatment plant that does not have a discharge into a stream, including agricultural waste handling systems and spray irrigation systems.” *Id.* A KNDOP requires that an owner/operator of an AFO develop and implement a site-specific Agricultural Water Quality Plan and Comprehensive Nutrient Management Plan. *Id.* Complainant concludes her explanation of KNDOPs and KPDES permits, stating even if an AFO discharged into waters of the United States such that issuance of a KPDES permit was appropriate, the Commonwealth, not EPA, is the entity authorized to administer the NPDES program within the Commonwealth. *Id.* See *Memorandum of Agreement between the Commonwealth of Kentucky and the United States Environmental Protection Agency Region 4* (Mar. 10, 2008).⁵

Complainant also apprises commenters that the Agency “takes seriously allegations of unauthorized discharges to waters of the United States,” and referred commenters’ allegations to the Kentucky Energy and Environment Cabinet (Cabinet). *Id.*, 000132-000133. The Complainant reports in its Comments that the Cabinet inspected Respondent’s AFO in June 2018 and “issued Respondent a Notice of Violation for alleged violations of Respondent’s KNDOP Permit No. 059114846 and KRS Chapter 224 on July 20, 2018.” *Id.* at 000133. Complainant also reports that the Cabinet entered into an Agreed Order with Respondent on February 22, 2019 to address the alleged violations. *Id.* Complainant attached a copy of the Order with its Response to Comments for review by Petitioner and other commenters.

In Complainant’s Response to the Petition, Complainant generally contends the Petitioner has not raised any issues relevant or material to the issuance of the proposed CAFO that have not

⁵ The Memorandum may be accessed at: <https://www.epa.gov/sites/production/files/2013-09/documents/ky-moa-npdes.pdf>

already been considered. Complainant notes Petitioner's concerns regarding Respondent's concentrated animal feeding operations pertain to other properties owned by Respondent. *Response to Petitioner at 5.* Complainant notes the proposed CAFO memorializes a class I administrative penalty action in settlement of Complainant's allegations against Respondent for unauthorized discharge of dredged and/or fill material in violation of Section 404 of the CWA, 33 U.S.C. § 1344, at the Simpson/McKay Farm [*emphasis added*]. *Response to Petition at 6.* Complainant maintains Petitioner's allegations regarding Respondent's concentrated animal feeding operations and the Commonwealth's alleged lack of oversight of such operations are governed by Section 402 of the CWA, a different statute with different compliance and enforcement requirements.

It is indisputable that Complainant considered and responded to issues raised in Petitioner's Comments and Petition regarding Respondent's management of concentrated animal feeding operations, as well as, Petitioner's claims that KDOW has not exercised proper oversight of Respondent's operations. Complainant aptly states in its Response to Petition that these issues are not relevant and material to allegations pertaining to Respondent's unauthorized discharge of dredged and/or fill material in violation of Section 404 of the CWA, 33 U.S.C. §1344, at the Simpson/McKay Farm. *Response to Petition at 6.* In view of the information provided by Petitioner and Complainant's Responses thereto, it cannot be said that Petitioner has met its burden of demonstrating that issues raised concerning Respondent's animal feeding operation constitute material and relevant evidence, and Complainant failed to consider such issues in agreeing to the proposed CAFO. Accordingly, this issue must be **Denied**.

2. Respondent's Animal Feeding Operations Lack Necessary Wastewater Treatment Facilities.

The focal point of Petitioner's allegations concern Respondent's activities managing concentrated animal feeding operations in violation of the Clean Water Act. Regarding this specific issue, Petitioner asserts in its Comments that Respondent added barns and hogs to his concentrated

animal feeding operations “above what he was originally permitted to have,” but did not increase the volume of lagoons that service the additional barns. *Petitioner’s Comments at 000053*. The lack of adequate lagoons forced Respondent to “spray and/or discharge more frequently than normal because of excess effluent generated by hogs.” *Id.* Petitioner further asserts Respondent does not have wastewater treatment plants for his “large concentrated animal feeding operations.” *Petition at 000175*. Petitioner describes Respondent’s operations as “just a large hole in the ground, not lined, not regulated, not tested, and no ground water monitoring wells . . . totaling five at different locations, and “. . . incubators for bacteria and viruses.” *Id at 000176*. Petitioner contends the uncovered lagoons create “Hydrogen Sulfide Gas and Ammonia Gas,” and “past samples from the Hardy Sow Farm Black Water Lagoon collected . . . in July 2018 revealed e-coli counts greater than 173,300 C.F.U./200 ML sample and Ammonia Nitrogen concentration greater than 950 mg/L.” *Id.* Petitioner reiterates its contention that “KDOW refuses to test the black water lagoons [sic] contents” and has facilitated Respondent’s noncompliance with the CWA by misrepresenting the animal feeding operations as small to medium size. *Id.*

In Complainant’s Response to the Petition, Complainant maintains that issues raised by Petitioner are not relevant or material to the issuance of the proposed CAFO. *Response to Petition at 6*. Complainant explains in the Response to Comments that nondischarging AFO’s in the Commonwealth are regulated pursuant to Commonwealth law because Kentucky is authorized to administer the NPDES program within Kentucky. *Response to Comments at 000133*. Complainant further explains that to the extent Respondent’s AFOs are discharging to waters of the United States such that issuance of a KPDES permit would be appropriate, the Commonwealth is the entity with authority to administer the NPDES program. *Id.* Complainant informs commenters the EPA communicated their concerns to the Kentucky Department for Environmental Protection (KYDEP). Complainant also informs commenters that EPA “will support [their] Commonwealth partners in

resolving any outstanding environmental compliance issues to the extent practicable.” *Id.*

Complainant notes that although Petitioner raises issues that are irrelevant and immaterial to the proposed CAFO, the EPA considered and addressed such issues “in the interest of transparency and principles of good governance.” *Response to Petition at 8.*

As summarized above, Complainant considered and responded to Petitioner’s allegations regarding the lack of necessary wastewater treatment facilities at Respondent’s animal feeding operations. Complainant also adequately addressed Petitioner’s assertions that KDOW has not exercised oversight of Respondent’s operations. Petitioner has not demonstrated that this specific issue, which concerns Respondent’s animal feeding operations, constitute relevant and material evidence that EPA did not consider in agreeing to the proposed CAFO, therefore, this issue is **Denied.**

3. Respondent Constructed a Dam on Hardy Farm.

Petitioner asserts Respondent constructed a dam on the Hardy Farm and this construction floods an adjacent property during heavy rainfall. *Petitioner’s Comments at 000053.* Specifically, Petitioner claims Respondent “dammed a blue-line stream on the Hardy Farm near its lagoon” and claims this obstruction backs up over the Curdsville-Delaware Road during heavy rains, flooding land of an adjacent farm. *Id.* Petitioner asserts KDOW inspected the obstruction, and in the inspection report, KDOW did not refer to the obstruction as a “dam” and merely suggested Respondent obtain a Stream Construction Permit from the Commonwealth. *Id.* Petitioner was dissatisfied with the Commonwealth’s recommendation and reported this matter to the U.S. Army Corps of Engineers (USACE). *Id at 000053; 000055 - 000056.* Petitioner opines the construction of the dam on Hardy Farm is a clear violation of the CWA. *Id.* In its Petition, Petitioner mentions the Hardy Farm within the context of past water samples taken that revealed high e-coli readings and

refers to the construction as “the Hardy Sow Farm Black Water Lagoon illegal bypass.” *Petition at 000176*.

In the Response to Comments, Complainant apprises commenters that the proposed CAFO relates only to Respondent’s alleged violations of Section 404 of the CWA, 33 U.S.C. § 1344, at the Simpson/McKay Farm. . . *Response to Comments at 000127*. Complainant also apprises that nothing in the proposed CAFO obviates Respondent’s obligations to comply with applicable federal state or local laws, including Section 404 of the CWA for other properties or discharge areas. *Id.* Complainant informs commenters that nothing in the proposed CAFO limits or prohibits the EPA or USACE from seeking any other remedies or sanctions related to other potential violations by Respondent. *Id.* Complainant explains that pursuant to Section 404 of the CWA, the USACE is the federal entity with statutory authority to issue permits for discharges into navigable waters of the United States. *Id.* Complainant further explains the USACE generally serves as the lead enforcement agency for unpermitted discharges, conducts field investigations and pursues appropriate enforcement actions.⁶ *Id.* Additionally, Complainant informs commenters that EPA referred commenters’ allegations of “unauthorized discharge or fill material on Hardy Farm” to the USACE and this Agency “issued an after-the-fact Section 404 permit to Respondent on October 5, 2018 for these activities.” *Id.*

In Complainant’s Response to the Petition, Complainant reiterates that issues pertaining to the Hardy Farm and Farms other than Simpson/McKay are not relevant or material to the proposed CAFO, or violations alleged therein. Complainant emphasizes the proposed CAFO resolves Complainant’s allegations against Respondent for the unauthorized discharge of dredged and/or fill

⁶ Complainant cites the following memorandum for such authority: Federal Enforcement for the Section 404 Program of the Clean Water Act Memorandum Between the Department of the Army and the Environmental Protection Agency (Jan. 1989).

material in violation of Section 404 of the CWA at the Simpson/McKay Farm in or about the calendar year, 2016.

Complainant thoroughly addressed Petitioner's allegations concerning Respondent's activities at Hardy Farm in its Response to Comments and Response to the Petition, and has shown this issue is not relevant or material to the subject matter of the proposed CAFO. The Petitioner has not offered any evidence or argument that refutes, or casts doubt on Complainant's evidence and assertions. Therefore, this issue must be **Denied**.

4. Respondent's Animal Feeding Operations Have Adversely Impacted the Community.

In its Petition, Petitioner argues Respondent's animal feeding operations have adversely impacted their community. Specifically, Petitioner asserts their property values have declined because of contaminated water and depleted air quality caused by Respondent's activities. Petitioner further asserts taxpayers have footed "the bills for highway repair due to hog trucks wrecking and hog trucks spilling manure onto highways." *Petition at 000176*. Complainant maintains that this issue, similar to others raised by Petitioner, is not relevant or material to the proposed CAFO which seeks resolution of allegations regarding Respondent's unauthorized discharge of dredged and/or fill material at the Simpson McKay Farm in violation of Section 404 of the CWA.. It is noted that Complainant referred concerns raised by Petitioner and other commenters to KDOW for investigation. *See Response to Comments, pp. 000130 - 000133*. Petitioner's assertions are disturbing; however, Petitioner has not demonstrated that the alleged adverse impact on the community was caused or related to Respondent's unauthorized activities as stated in the proposed CAFO. Accordingly, Complainant has not shown that this issue is relevant or material to issuance of the proposed CAFO. Furthermore, Complainant adequately considered and responded to Petitioner's assertions. Accordingly, this issue must be **Denied**.

5. Petitioner Recommends EPA Modify the Proposed CAFO

Petitioner recommends an enhanced penalty that deters future behavior and additional conditions to the proposed CAFO. *Petitioner's Comments, 0000054 - 0000055*. These conditions include: expanding the scope of the CAFO to increase acreage in the SEP at the Simpson/McKay Farm from 281.9 to 317; adding verbiage that excludes the possibility of Respondent constructing and operating pivots and other agricultural irrigation systems on the Simpson/McKay Farm and others owned and operated by Respondent; the EPA exercise oversight of the SEP construction and Respondent's future operations; the EPA require that Respondent requests permits from EPA for construction and operation of hog barns and lagoons for properties not covered in the SEP; the EPA conduct unannounced inspections and review permits issued by KDOW at Respondent's farms located on Doby/Bumblebee, Iron Maiden, Hardy, Main/Feed and Lone Oak Farms; and that EPA require Respondent to remove the dam illegally constructed on Hardy Farm and restore the stream bed similar to the restoration of wetlands required at the Simpson/McKay Farm. *Id.* .

Complainant contends all recommendations made by Petitioner are inappropriate and/or outside the scope of EPA's authority. First, Complainant asserts the EPA calculated the penalty in accordance with the EPA Clean Water Act Section 404 Penalty Policy.⁷ *Response to Comments at 000129*. The undersigned notes the calculation and explanation provided in Complainant's Response to Comments comport with Section 309 (g)(3) of the CWA, 33 U.S.C. §1319(g)(3). Complainant explains in its Response to Comments that the Section 404 Penalty Policy requires that EPA review Respondent's noncompliance with Section 404, only, in assessing the significance of the noncompliance. *Id. at 000130*. The EPA determined that Respondent had no history of CWA Section 404 noncompliance prior to the subject CWA Section 404 violation at Simpson/McKay

⁷ Clean Water Act Section 404 Settlement Penalty Policy (Dec. 21, 2001), <https://www.epa.gov/enforcement/issuance-revised-clean-water-act-cwa-section-404-settlement-pcnaity-policy-december-21..>

Farm and was not aware of any ongoing CWA Section 404 violation, thus the penalty is appropriate for the violation alleged in the proposed CAFO. *Id.* Second, Complainant states the EPA verified with the NCSR that acreage identified on the Conservation Plan Map for the SEP was correct. *Id. at 000130.* Third, Complainant explains that adding verbiage that would restrict Respondent from operating pivots and irrigation systems is inappropriate because the Commonwealth of Kentucky has authority to set such parameters. *Id. at 000132.* Fourth, Complainant apprises that according to the EPA SEP Policy, the Agency may not retain authority to manage or administer SEPs following completion.⁸ *Id. at 000129.* Fifth, regarding Petitioner's recommendation that the EPA exercise regulatory oversight of Respondent's AFOs, conduct inspections and issue NPDES permits; Complainant explains the Commonwealth of Kentucky, not the EPA, has authority to regulate nondischarging AFOs and administer the NPDES program for AFOs that discharge into waters of the United States.⁹ *Id., 000132-000133.*

Complainant adequately considered and responded to Petitioner's recommendations. In doing so, Complainant explained that its actions were consistent with or mandated by the EPA Settlement Penalty Policy and SEP Policy, and that EPA's actions were taken in accordance with applicable regulations and statutes. Accordingly, Petitioner's recommendations to modify conditions of the CAFO are **Denied**.

6. Request for a Hearing

The Petitioner argues the proposed settlement and penalty are inadequate and requests a formal hearing. At such hearing, Petitioner proposes to present evidence of Respondent's previous infractions, Respondent's behavior as a habitual violator, and demonstrate that a severe penalty is

⁸ EPA 2015 Update to the 1998 United States Environmental Protection Agency's Supplemental Environmental Projects Policy (Mar. 10, 2015).

⁹National Pollutant Discharge Elimination System Memorandum of Agreement Between the Commonwealth of Kentucky and the United States Environmental Protection Agency Region 4 (Mar 10, 2008).

warranted for deterrence. *Petitioner's Comments at 000051 - 000052*. In Complainant's Response to the Petition, Complainant counters the Consolidated Rules provide for a hearing on the merits of the CAFO *if* the Petitioner presents evidence that is material and was not considered by Complainant. *Response to Petition at 8*. The purpose of a hearing would be to determine whether Complainant has shown, by a preponderance of the evidence, that the violations alleged in the CAFO occurred and the relief sought is appropriate. *Id.* Specifically, Complainant would be required to present evidence that establishes Respondent discharged dredged and/or fill material into waters of the United States without proper authorization under Section 404 of the CWA, 33 U.S.C. §1344, and the proposed penalty and SEP are appropriate for this specific violation. *Id.* Consequently, evidence concerning Respondent's prior infractions and behavior as a habitual violator that is not related to the unauthorized discharge of dredge and/or fill material, as alleged in the CAFO, would not be admissible at a hearing. Evidence related to issues raised by Petitioner does not have the tendency to make facts more or less probable that Respondent engaged in the unauthorized discharge of dredged and/or fill material in or about June 2016 at the Simpson/McKay Farm; nor is such evidence of consequence in determining whether Respondent engaged in activities alleged in the CAFO. Lastly, evidence related to allegations raised by Petitioner, if presented at a hearing, would not cause an outcome different from that proposed in the CAFO. Accordingly, the Petitioner has not shown that issues raised in its Petition and Comments are material and relevant to the proposed CAFO.

As indicated above, the Consolidated Rules governing this proceeding provide that: The Petition Officer shall review the petition, and complainant's response, and shall file with the Regional Hearing Clerk, with copies to the parties, the commenter, and the Presiding Officer, written findings as to:

- (A) The extent to which the petition states an issue relevant and material to the issuance of the proposed final order;
- (B) Whether complainant adequately considered and responded to the petition; and
- (C) Whether a resolution of the proceeding by the parties is appropriate without a hearing. 40 C.F.R. § 22.45(c)(4)(v).

Upon review and consideration of these matters, the undersigned finds that resolution of this proceeding by the parties is appropriate without a hearing. First, it appears that Petitioner seeks a public forum to present evidence concerning allegations of prior violations of the Clean Water Act committed by Respondent in managing concentrated animal feeding operations, the Commonwealth of Kentucky's alleged failure to enforce compliance with applicable environmental laws, and Petitioner's belief that an enhanced penalty is warranted. As noted by Complainant, however, the applicable law does not provide a hearing for the presentation of evidence of this nature. Rather, it provides a hearing at which evidence is presented for the purpose of determining whether Complainant has met its burden of proving that Respondent committed violations alleged in the proposed CAFO and the penalty is appropriate based on applicable law and policy. Second, Petitioner has not identified relevant or material evidence, documentary or testimonial, that it would present at such hearing. Third, neither the Comments nor the Petition offer any evidence or arguments that have not already been adequately addressed by Complainant. Finally, Petitioner's arguments regarding a severe penalty for violations unrelated to the subject CAFO do not involve any disputed facts that could be adjudicated at a hearing. For the foregoing reasons, resolution of this proceeding without a hearing is deemed appropriate.

IV. Findings

For the reasons stated above, the undersigned finds as follows:

- (A) The Petition fails to state an issue that is relevant and material to the issuance of the proposed final order.

(B) Complainant adequately considered and responded to the issues raised in the Petition.

(C) Resolution of this proceeding without a hearing is appropriate.

Given this finding that resolution of this proceeding without a hearing is appropriate, the EPA

Region 4 Regional Administrator may issue the proposed final order. 40 C.F.R. §22.45(c)(4)(viii).

Such order shall become final 30 days after both this Order and a properly signed consent

agreement are filed with the Regional Hearing Clerk, unless further petition for review is filed by a

notice of appeal in the appropriate United States District Court within the 30-day period, with notice

simultaneously sent by certified mail to the Administrator of EPA and the Attorney General. *Id.*

Written notice of appeal also shall be filed with the Regional Hearing Clerk and sent to the

Presiding Officer and the parties. *Id.*

SO ORDERED this 28th day of July.

Robin B. Allen
Petition Officer
U.S. Environmental Protection Agency
Region 4
Atlanta, Georgia 30303