

# TAB 4

**ATTACHMENT A**

**COMPLAINANT'S RESPONSE TO PETITION TO SET ASIDE CONSENT  
AGREEMENT AND FINAL ORDER AND FINAL ORDER**



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 4

ATLANTA FEDERAL CENTER  
61 FORSYTH STREET  
ATLANTA, GEORGIA 30303-8960

NOV 19 2019

Ms. Robin Allen  
Petition Officer  
Office of Regional Counsel  
61 Forsyth Street, S.W.  
Atlanta, Georgia 30303

Re: Complainant's Response to Petition to Set-Aside Consent Agreement and Final Order, Docket No. CWA-04-2018-5501(b), In the Matter of Jerry O'Bryan (CA/FO)

Dear Ms. Allen:

Pursuant to 40 C.F.R. § 22.45(c)(4)(iv), the U.S. Environmental Protection Agency, Region 4, hereby provides its written response to Petitioner Community Against Pig Pollution and Disease, Inc's Petition to set aside the above-referenced Consent Agreement and Final Order (CA/FO), as well as a copy of the CA/FO. A copy of this response is also being provided to the Petitioner and the Respondent, Mr. O'Bryan.

Thank you for your consideration. Please contact Suzanne Armor, Associate Regional Counsel, at (404) 562-9701, if you have any questions regarding this response.

Sincerely,

A handwritten signature in blue ink that reads "Daniel F. O'Hara for".

Mary Jo Bragan  
Chief, Water Enforcement Branch  
Enforcement and Compliance  
Assurance Division

Enclosure

cc: CAPPAD, Inc. (via certified mail, return receipt requested)

Mr. Jerry O'Bryan (via certified mail, return receipt requested)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 4

In the Matter of )  
 ) Docket No. CWA-04-2018-5501(b)  
JERRY O'BRYAN, )  
CURDSVILLE, KENTUCKY, ) Administrative Consent Agreement and  
 ) Final Order Under Section 309(g)(2)(A),  
Respondent. ) of the Clean Water Act, 33 U.S.C.  
 ) § 1319(g)(2)(A)

---

**COMPLAINANT'S RESPONSE TO PETITION TO SET ASIDE  
CONSENT AGREEMENT AND FINAL ORDER**

Complainant, the Chief of the Water Enforcement Branch of the Enforcement and Compliance Assurance Division, U.S. Environmental Protection Agency, Region 4, is responding to the Petition to Set Aside the Consent Agreement and Final Order (Petition) by Community Against Pig Pollution and Disease, Inc. (CAPPAD), in the matter of Jerry O'Bryan, Docket No. CWA-04-2018-5501(b) (CA/FO). Complainant respectfully submits its Response to the assigned Petition Officer under 1319(g)(4)(C) of the Clean Water Act (CWA), 33 U.S.C. § 1319(g)(4)(C), 40 C.F.R. § 22.45(c)(4)(iv) of the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits* (Rules of Practice), and the EPA Region 4 Regional Administrator's Assignment of Petition Officer Pursuant to 40 C.F.R. § 22.45(c)(4)(iii) (Oct. 24, 2019).

Complainant has carefully reviewed and considered the Petition, and the information provided on the issues raised therein. For the reasons outlined below, Complainant has determined that Petitioners do not raise any issues that are relevant and material to the issuance of the CA/FO that have not already been considered.

**I. Background**

**A. CA/FO**

Under 40 C.F.R. §§ 22.13(b) and 22.45(a) of the Rules of Practice, where the parties agree to settlement of one or more causes of action before the filing of a complaint, a proceeding may be simultaneously commenced and concluded by the issuance of a CA/FO pursuant to 40 C.F.R. § 22.18(b)(2) and (3).

Respondent, Mr. Jerry O'Bryan, owns certain parcels of land near Curdsville, Daviess County, Kentucky (referred to herein as the "Simpson/McKay Farm"), on which waters of the United States were impacted as a result of Respondent's unauthorized dredging and/or filling activities. Specifically, beginning in or around June 2016, Respondent discharged dredged and/or fill material using earth moving equipment during activities associated with the conversion of wetlands to agricultural land, impacting approximately 2.1 acres of wetlands adjacent 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. At no time during such discharge of dredged and/or fill material did Respondent have a permit under Section 404 of the CWA, 33 U.S.C. § 1344, authorizing him to perform such activities. Section 301 of the CWA, 33 U.S.C. § 1311, makes it unlawful for any person to discharge pollutants into waters of the United States without proper permit authorization, including Section 404 permit authorization.

Section 309(a)(3) of the CWA, 33 U.S.C. § 1319(a)(3), authorizes the EPA to issue orders to require compliance with the CWA. Pursuant to that authority, on May 10, 2018, the EPA entered into an Administrative Compliance Order on Consent, Docket No. CWA-04-2018-

5755 (AOC), with Respondent, whereby Respondent agreed to restore impacted wetlands. (Bates No. 000001-000046).

Subsequently, pursuant to its authority under Section 309(g)(2)(A) of the CWA, 33 U.S.C. § 1319(g)(2)(A), the EPA and Respondent agreed to resolve Respondent's liability for federal civil penalties associated with Respondent's unauthorized discharge of dredged and/of fill material in the proposed CA/FO. Respondent has agreed to pay a civil penalty of \$3,346 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 that will significantly reduce the sediment, nutrient, and pesticide runoff from the farm to the Green River.

#### **B. CA/FO Public Notice and Comment Period**

The EPA proposed the CA/FO and public noticed it in accordance on May 30, 2018, as required by 40 C.F.R. § 22.45(b)(1).<sup>1</sup> The 30-day public notice period closed on June 29, 2018, (Bates No. 000047-000050). The EPA received a total of six<sup>2</sup> comment letters during the public comment period, all opposed to the EPA's issuance of the proposed Settlement Agreement (Bates No. 000051-000097).

Pursuant to 40 C.F.R. § 22.45(c)(4), the EPA provided each commenter with a copy of the final CA/FO (Bates No. 000100-000126, 000145-000161) and a summary of and response to

---

<sup>1</sup> EPA Region 4 posts public notices for CWA CA/FOs on its website at: <https://www.epa.gov/aboutepa/about-epa-region-4-southeast#r4-public-notices>.

<sup>2</sup> The EPA received one additional comment letter, which lacked a return address. (Bates No. 000098-000099). See 40 C.F.R. § 22.3 (defining a "commenter" as a person who timely: (i) submits in writing to the Regional Hearing Clerk that he or she is providing or intends to provide comments on the proposed assessment of penalties pursuant to, *inter alia*, section 309(g) of the Clean Water Act, and intends to participate in the proceeding; and (ii) provides the Regional Hearing Clerk with a return address.). Hence, while the EPA considered the issues raised in that letter, the person providing those comments is not considered a "commenter" for purposes of this proceeding.

comments on August 20, 2019 (hereinafter, "Response to Comments") (Bates No. 000127-000146). The EPA subsequently corrected a ministerial error in Paragraph 35 of the CA/FO, and sent replacement pages to each commenter on August 23, 2019 (Bates No. 000162-000174). The certified mail return receipt and United States Postal Service tracking system indicate that Petitioner received the final, corrected CA/FO on August 27 (Bates No. 000163).

**C. Petition to Set Aside the CA/FO**

On September 24, 2019, Complainant received the timely Petition from CAPPAD on the basis that material evidence was not considered under Section 309(g)(4)(C) of the CWA, 33 U.S.C. § 1319(g)(4)(C) and 40 C.F.R. § 22.45(c)(4)(ii) (Bates No. 175-000180). After carefully considering the issues raised in the Petition, Complainant determined that the Petitioner did not raise any relevant and material issues that had not already been considered with respect to issuance of the CA/FO. Therefore, Complainant declined to withdraw the CA/FO under 40 C.F.R. § 22.45(c)(4)(iii).

On October 24, 2019, the Regional Administrator for EPA Region 4 (RA) assigned a Petition Officer to consider and rule on the Petition under 40 C.F.R. § 22.45(c)(4)(iii) (Bates No. 000181).

**II. Standard of Review**

Under Section 309(g)(4)(C) of the CWA, 33 U.S.C. § 1319(g)(4)(C), if no hearing is held before issuance of a CA/FO, any person who commented on the proposed CA/FO may petition, within 30 days after issuance of such CA/FO, the EPA to set aside the CA/FO 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 CA/FO, the EPA shall immediately set

aside the CA/FO and provide a hearing in accordance with Section 309(g)(2)(A) of the CWA, 33 U.S.C. § 1319(g)(2)(A).

Section 22.45(c)(4) of the Rules of Practice implement the requirements of Section 309(g)(4)(C) of the CWA. Under 40 C.F.R. § 22.45(c)(4)(ii), within 30 days of receipt of the CA/FO, a commenter may petition the RA to set aside the CA/FO on the basis that material evidence was not considered. If Complainant does not withdraw the CA/FO to consider the matters raised in the Petition within 15 days of receipt, the RA subsequently assigns a Petition Officer to consider and rule on the Petition under 40 C.F.R. § 22.45(c)(4)(iii).

The assigned Petition Officer shall review the Petition and Complainant's response, and issue written findings as to: (1) the extent to which the Petition states an issue relevant and material to the issuance of the proposed final order; (2) whether Complainant adequately considered and responded to the Petition; and (3) whether a resolution of the proceeding by the parties is appropriate without a hearing. 40 C.F.R. § 22.45(c)(4)(v).

### **III. Complainant's Response to the Issues Raised in the Petition**

#### **A. Petitioner Raises Issues Outside of the Scope of the CA/FO in Support of Its Request that the EPA Set Aside the CA/FO.**

The Petition raises concerns regarding Respondent's concentrated animal feeding operations<sup>3</sup> on other properties owned by Respondent (not the Simpson/McKay Farm that is the subject of this CA/FO),<sup>4</sup> and the Commonwealth of Kentucky's oversight and enforcement of such operations pursuant to Section 402 of the CWA, 33 U.S.C. § 1342. The Petitioner opines

---

<sup>3</sup> Perhaps Petitioner is confused by similar acronyms: the Consent Agreement and Final Order (CA/FO) at issue here, and Respondent's concentrated animal feeding operations (CAFO), over which Petitioner raises a host of concerns in its Petition. To avoid further confusion, Complainant refrains from using any acronym to refer to concentrated animal feeding operations; the acronym "CA/FO" as used in this Response refers only to the Consent Agreement and Final Order that is the subject of this Petition.

<sup>4</sup> As noted in the comment letter on the CA/FO, Petitioner appears to be primarily concerned with Respondent's animal feeding operations at the Hardy Farm, Iron Maiden Farm, and Doby/Bumblebee Farm. See Bates No. 00091.



that Respondent's operations fail to comply with certain Kentucky regulatory requirements and raises issues regarding Kentucky's "refusal" to conduct testing at these operations. Specifically, Petitioner contends that: (1) Respondent owns and operates animal feeding operations that meet the regulatory definition of "large" concentrated animal feeding operations pursuant to Kentucky Administrative Regulation (KAR), 401 KAR 5:002 and 40 C.F.R. § 122.23(b)(2) and therefore requires a Kentucky Pollutant Discharge Elimination System (KPDES) permit to comply with Section 402 of the CWA; (2) Respondent's animal feeding operations lack necessary wastewater treatment facilities; (3) the Kentucky Department of Water (KYDOW) has "refused to perform a hog count which would prove the combined number of swine" at the Respondent's operations; (4) KYDOW has "refused to test the [contents of certain lagoons at Respondent's operations]; (5) Respondent's lagoons "are nothing more than incubators for [b]acteria and [v]iruses[,] . . . are not covered,. . . have no liner[, and] create [h]ydrogen [s]ulfide [g]as and [a]mmonia gas; (6) Respondent "illegally bypassed" from the lagoon at the Hardy Farm and that wastewater contained high levels of e-coli and ammonia nitrogen; and (7) Respondent's animal feeding operations have impacted Petitioner's and the surrounding community's property values, contaminated the water, and depleted air quality.

None of the issues raised by Petitioner are relevant or material to the issuance of the CA/FO in this matter. The CA/FO at issue in this matter 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 beginning on or about June 2016. The EPA encourages settlement of a proceeding at any time if the settlement is consistent with the provisions and objectives of the CWA and applicable regulations. See 40 C.F.R. § 22.18(b). As described

above, Respondent entered into an AOC with the EPA to restore impacted waters of the United States. The EPA conducted an inspection of the Simpson/McKay Farm on April 17, 2019 to determine if Respondent had met the conditions of the AOC; the EPA found that Respondent had complied with such conditions and was satisfied with Respondent's restoration of the impacted area. (Bates No. 000182-000189). Additionally, the agreed-upon penalty of \$3,346 and performance of the SEP is consistent with the EPA's penalty<sup>5</sup> and SEP<sup>6</sup> policies, and conserves the significant government resources required by prolonged litigation. Therefore, this settlement is consistent with the provisions and objectives of Section 309 of the CWA.

Petitioner's concerns with Respondent's concentrated animal feeding operations and the Commonwealth of Kentucky's oversight of such operations are not related to this action, and do not provide bases for a hearing on this matter. While Petitioner raises a host of allegations regarding Respondent's animal feeding operations which, if true are indeed troubling, those allegations are simply not relevant and material to Respondent's unauthorized discharge of dredged and/or fill material to waters of the United States at the Simpson/McKay Farm. Moreover, although Petitioner levels a sharp critique of the Commonwealth of Kentucky's oversight of Respondent's operations, Kentucky has not assumed authority to administer the CWA Section 404 program, and its enforcement and oversight of the CWA Section 402 program is irrelevant and immaterial to this matter.

---

<sup>5</sup> Clean Water Act Section 404 Settlement Penalty Policy (Dec. 21, 2001), available at <https://www.epa.gov/enforcement/issuance-revised-clean-water-act-cwa-section-404-settlement-penalty-policy-december-21>.

<sup>6</sup> Supplemental Environmental Projects Policy 2015 Update (Mar. 10, 2015), available at <https://www.epa.gov/enforcement/2015-update-1998-us-epa-supplemental-environmental-projects-policy>.

**B. Complainant Has Previously Considered and Addressed Petitioner's Comments.**

Notwithstanding that Petitioner has raised issues which are irrelevant and immaterial to the CA/FO and the violations alleged therein, the EPA has previously considered and addressed such issues in the interest of transparency and principles of good governance. In its Response to Comments, the EPA addressed these concerns at length, devoting over two pages of the Response to Comments specifically to issues surrounding the animal feeding operations, the Commonwealth's oversight thereof, and the EPA's retention of enforcement authority for violations of the CWA. See Bates No. 000131-133.

**C. Resolution of the Proceeding by the Parties is Appropriate Without a Hearing.**

Section 309(g)(4)(C) and the Rules of Practice provide for a hearing on the merits of the CA/FO if a Petitioner presents evidence that is material and was not considered by Complainant in the issuance of the CA/FO. The purpose of such a hearing would be to determine whether Complainant has shown, by a preponderance of the evidence, that the violations alleged in the CA/FO occurred and that the relief sought is appropriate. See 40 C.F.R. §§ 22.24 and 22.45(c).

In this matter, Complainant would have the burden of establishing that 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 that the proposed penalty and SEP are appropriate. None of the issues raised by Petitioner call into question whether Complainant has failed to meet its burden such that a hearing on the merits is warranted.

**IV. Conclusion**

In sum, Petitioner has failed to identify any evidence or witnesses to be introduced or description of any information to be presented that are relevant and material to the allegations

addressed in the CA/FO. For the reasons described above, Petitioner does not raise any issues that Complainant has failed to adequately consider or that warrant a hearing on the merits.

Respectfully submitted,

November 13, 2019  
Date

Daniel F. O'Neil for  
Mary Jo Bragan  
Chief, Water Enforcement Branch  
Enforcement and Compliance  
Assurance Division

OF COUNSEL:  
Suzanne K. Armor  
Associate Regional Counsel  
Office of Regional Counsel  
Water Law Office  
U.S. Environmental Protection Agency  
Region 4  
61 Forsyth Street, S.W.  
Atlanta, Georgia 30303  
Tel: (404) 562-9701  
[Armor.Suzanne@epa.gov](mailto:Armor.Suzanne@epa.gov)

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I have this day served a true and correct copy of the foregoing "Complainant's Response to Petition to Set Aside Consent Agreement and Final Order" in the matter of Jerry O'Bryan, Docket No. CWA-04-2018-5501(b), on the parties listed below in the manner indicated:

Copy by Certified mail,  
Return receipt requested,  
to Petitioner

CAPPAD, Inc.  
P.O. Box 122  
Maple Mount, Kentucky, 42356

Copy by Certified mail,  
Return receipt requested,  
to Respondent

Jerry O'Bryan  
6939 Curdsville Delaware Road  
Owensboro, Kentucky 42301

Copy by email  
to Attorney for Complainant

Suzanne Armor  
Associate Regional Counsel  
U.S. EPA, Region 4  
Atlanta Federal Center  
61 Forsyth Street, S.W.  
Atlanta, Georgia 30303

Dated: 11/19/19



Suzanne K. Armor  
Associate Regional Counsel  
U. S. Environmental Protection Agency, Region 4  
Atlanta Federal Center  
61 Forsyth Street, S.W.  
Atlanta, Georgia 30303  
(404) 562-9701

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 4

IN THE MATTER OF:	)	
	)	
JERRY O'BRYAN	)	ADMINISTRATIVE
	)	COMPLIANCE ORDER
CURDSVILLE, KENTUCKY	)	ON CONSENT
	)	
	)	
RESPONDENT.	)	Docket No.: CWA-04-2018-5755
_____	)	

I. Statutory Authority

1. Section 309(a) of the Clean Water Act ("CWA"), 33 U.S.C. § 1319(a), provides that, whenever the U.S. Environmental Protection Agency ("EPA") finds that any person is in violation of any condition or limitation which implements, *inter alia*, Sections 301 and 404 of the CWA, 33 U.S.C. §§ 1311 and 1344, the EPA may issue an order requiring such person to comply with such condition or limitation, and shall specify a time for compliance that the EPA determines to be reasonable.

2. The following Findings of Fact and Determinations of Law are made and this Administrative Compliance Order on Consent ("AOC") is issued pursuant to the authority vested in EPA by Section 309(a) of the CWA, 33 U.S.C. § 1319(a), as amended. The authority to issue this AOC has been delegated from the Administrator of the EPA to the Regional Administrator of the EPA, Region 4. The Regional Administrator has further delegated this authority to the Director of the Water Protection Division, EPA, Region 4.

II. Findings of Fact and Determinations of Law

3. To accomplish the objective of the CWA, defined in Section 101(a) of the CWA, 33 U.S.C. § 1251(a), to restore and maintain the chemical, physical, and biological integrity of the nation's waters, Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants by any person into waters of the United States except in compliance with a permit issued under, *inter alia*, Section 404 of the CWA, 33 U.S.C. § 1344; or if the discharge meets the requirements for an exemption under Section 404(f) of the CWA, 33 U.S.C. § 1344(f), authorizing the discharge of dredged and/or fill material into waters of the United States for activities associated with normal farming, silviculture, and ranching.

4. This AOC pertains to the deposition of dredged and/or fill material into jurisdictional wetlands and waters of the United States including approximately 2.1 acres of wetlands and 800 linear feet of an unnamed tributary of the Green River (the "Site"). The Site is located near latitude 37.731169° N and longitude -87.382159° W ("Discharge Area") (see Exhibits A and B). The deposition of the dredged and/or fill material occurred during the conversion of forested wetlands to agricultural land.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 4  
ATLANTA FEDERAL CENTER  
61 FORSYTH STREET  
ATLANTA, GEORGIA 30303-8960

MAY 10 2018

CERTIFIED MAIL 7017145000079130179  
RETURN RECEIPT REQUESTED

Mr. Jerry O'Bryan  
6939 Curdsville Delaware Road  
Owensboro, Kentucky 42301

Re: Administrative Compliance Order on Consent  
Docket No.: CWA-04-2018-5755

Dear Mr. O'Bryan:

Enclosed please find the executed Administrative Compliance Order on Consent, Docket No.: CWA-04-2018-5755. The U.S. Environmental Protection Agency Region 4 has retained the original document for our enforcement files.

Thank you for your cooperation in this matter. If you have any further comments or questions, please contact Mr. Joel Strange, of my staff, at (404) 562-9455.

Sincerely,

A handwritten signature in black ink, appearing to read "Mary S. Walker".

Mary S. Walker  
Director  
Water Protection Division

Enclosure

cc: Mr. Sam Werner, U.S. Army Corps of Engineers, Louisville District

5. The impacted wetlands are adjacent to the unnamed tributary which flows directly to the Green River, a traditionally navigable water of the United States.

6. Mr. Jerry O'Bryan ("Respondent"), is a person within the definition set forth under Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

7. At all times relevant to this AOC, the Respondent was the owner and/or operator of a tract of land located west of Curdsville-Delaware Road and adjacent to the Green River, near Curdsville, in Daviess County, Kentucky ("the Site") that contain the Discharge Area.

8. Commencing on or about June 2016 to the present, the Respondent, and/or those acting on behalf of the Respondent, discharged dredged and/or fill material into jurisdictional wetlands on the Site using earth moving machinery, during activities associated with the conversion of wetlands to agricultural land. To date, the dredge and/or fill material remains in waters of the United States.

9. Respondent's unauthorized activities impacted approximately 2.1 acres of wetlands and 800 linear feet of an unnamed tributary of the Green River, a traditionally navigable water of the United States.

10. The discharged dredged and/or fill material, including earthen material deposited at the Discharge Area, are "pollutants" as defined under Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

11. The earth moving machinery employed by the Respondent to deposit the dredged and/or fill material at the Discharge Area are "point sources" as defined in Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

12. A "discharge of a pollutant" as defined in Section 502(12)(A) of the CWA, 33 U.S.C. § 1362(12)(A), is any addition of any pollutant to navigable waters from any point source.

13. Respondent's placement of the dredged and/or fill material into the Discharge Area constitutes a "discharge of pollutants" as defined in Section 502(12) of the CWA, 33 U.S.C. § 1362(12).

14. The term "navigable waters" as defined in Section 502(7) of the CWA, 33 U.S.C. § 1362(7), means the waters of the United States, including the territorial seas.

15. The Discharge Area includes "navigable waters" as that term is defined in Section 502(7) of the CWA, 33 U.S.C. § 1362(7).

16. At no time during the discharge of dredged and/or fill material into the Discharge Area from June 2016, to present, did the Respondent possess a permit under Section 404 of the CWA, 33 U.S.C. § 1344, authorizing the discharge of dredged and/or fill material by the Respondent.



17. Each discharge by the Respondent of pollutants into navigable waters without the required permit issued under Section 404 of the CWA, 33 U.S.C. § 1344, is a violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

18. Each day the material discharged by the Respondent remains in waters of the United States without possessing the required permit under Section 404 of the CWA, 33 U.S.C. § 1344, constitutes a day of violation of Section 301 of the CWA, 33 U.S.C. § 1311.

19. Therefore, based on the above, the EPA finds that Respondent has violated Section 301 of the CWA, 33 U.S.C. § 1311, by discharging pollutants into navigable waters without a permit.

### III. Agreement on Consent

20. Based on the foregoing Findings of Fact and Determinations of Law and pursuant to the authority of Sections 308 and 309(a) of the CWA, (33 U.S.C. §§ 1318 and 1319(a)), THE DIRECTOR HEREBY ORDERS AND THE RESPONDENT HEREBY AGREES AND CONSENTS TO THE PROVISIONS OF THE PARAGRAPHS BELOW:

a. The Respondent shall restore the Site in accordance with the signed restoration plan prepared for you by the Natural Resource Conservation Service on March 2, 2017 (Attachment A hereto).

b. Within 30 days after the Effective Date of this AOC, the Respondent shall notify the EPA of the anticipated construction start date for the restoration. Restoration must be completed within 180 days after the Effective Date of this AOC unless an extension is granted by the EPA.

c. Within 30 days after completion of the restoration, the Respondent shall submit a written statement of completion and schedule an inspection of the restored site.

21. All documentation required to be submitted by this AOC shall be sent by certified mail or its equivalent to the following address:

Mr. Joel Strange  
U.S. Environmental Protection Agency  
Marine Regulatory and Wetlands Enforcement Section  
61 Forsyth Street, S.W.  
Atlanta, GA 30303-8960

#### IV. General Provisions

22. The Respondent's compliance with this AOC does not necessarily constitute compliance with the provisions of the CWA, 33 U.S.C. § 1251 et seq., or its implementing regulations. The Respondent shall remain solely responsible for compliance with the terms of the CWA, its implementing regulations, and this AOC.

23. Nothing in this AOC shall constitute a waiver, suspension, or modification of the terms and conditions of the CWA or its implementing regulations, which remain in full force and effect.

24. Failure to comply with the requirements of this AOC shall constitute a violation of this AOC and the CWA, and may subject the Respondent to penalties as provided in Section 309(d) of the CWA, 33 U.S.C. § 1319(d), as modified by 40 C.F.R. Part 19.

25. This AOC shall not relieve the Respondent of his obligation to comply with all applicable provisions of federal, state, or local law, nor shall it be construed to be a ruling on, or determination of, any issue related to any other federal, state, or local permit. Compliance with this AOC shall not be a defense to any actions subsequently commenced pursuant to federal laws and regulations administered by the EPA.

26. Issuance of this AOC shall not be deemed as prohibiting, altering, or in any way limiting the ability of the EPA to pursue any other enforcement actions available to it under law. Such actions may include, without limitation, any administrative, civil, or criminal action to seek penalties, fines, injunctive, or other appropriate relief, or to initiate an action for imminent and substantial endangerment under the CWA or any other federal or state statute, regulation, or permit.

27. The EPA reserves all rights and remedies, legal and equitable, available to enforce any violation cited in this AOC and to enforce this AOC.

28. Nothing in this AOC is intended to nor shall be construed to operate in any way to resolve any criminal liability of the Respondent, or other liability resulting from violations that were not alleged in this AOC.

29. The provisions of this AOC shall apply to and be binding upon the Respondent, his agents, servants, employees, successors, and assigns.

30. Any change in the legal status of the Respondent, including but not limited to any transfer of assets or real or personal property, shall not alter the Respondent's responsibilities under this AOC.

31. The Respondent neither admits nor denies the factual allegations set forth within this AOC.

32. The Respondent admits to the jurisdictional allegations set forth within this AOC.

33. The Respondent waives any and all claims for relief and otherwise available rights or remedies to judicial or administrative review which the Respondent may have with respect to any issue of fact or law set forth in this AOC, including, but not limited to, any right of judicial review of this AOC under the Administrative Procedure Act, 5 U.S.C. §§ 701-706.

34. Each party shall bear its own costs and attorneys' fees in connection with the action resolved by this AOC.

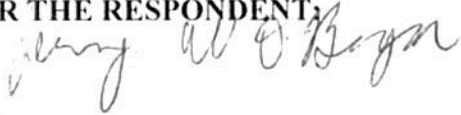
35. Pursuant to Section 309(a)(4) of the CWA, 33 U.S.C. § 1319(a)(4), the EPA has sent a copy of this AOC to the Commonwealth of Kentucky.

36. Each undersigned representative of the parties to this AOC certifies that he or she is fully authorized to enter into the terms and conditions of this AOC and to execute and legally bind that party to it.

**V. Effective Date**

37. This AOC shall become effective upon the Respondent's receipt of the signed AOC.


**FOR THE RESPONDENT:**



Jerry O'Bryan

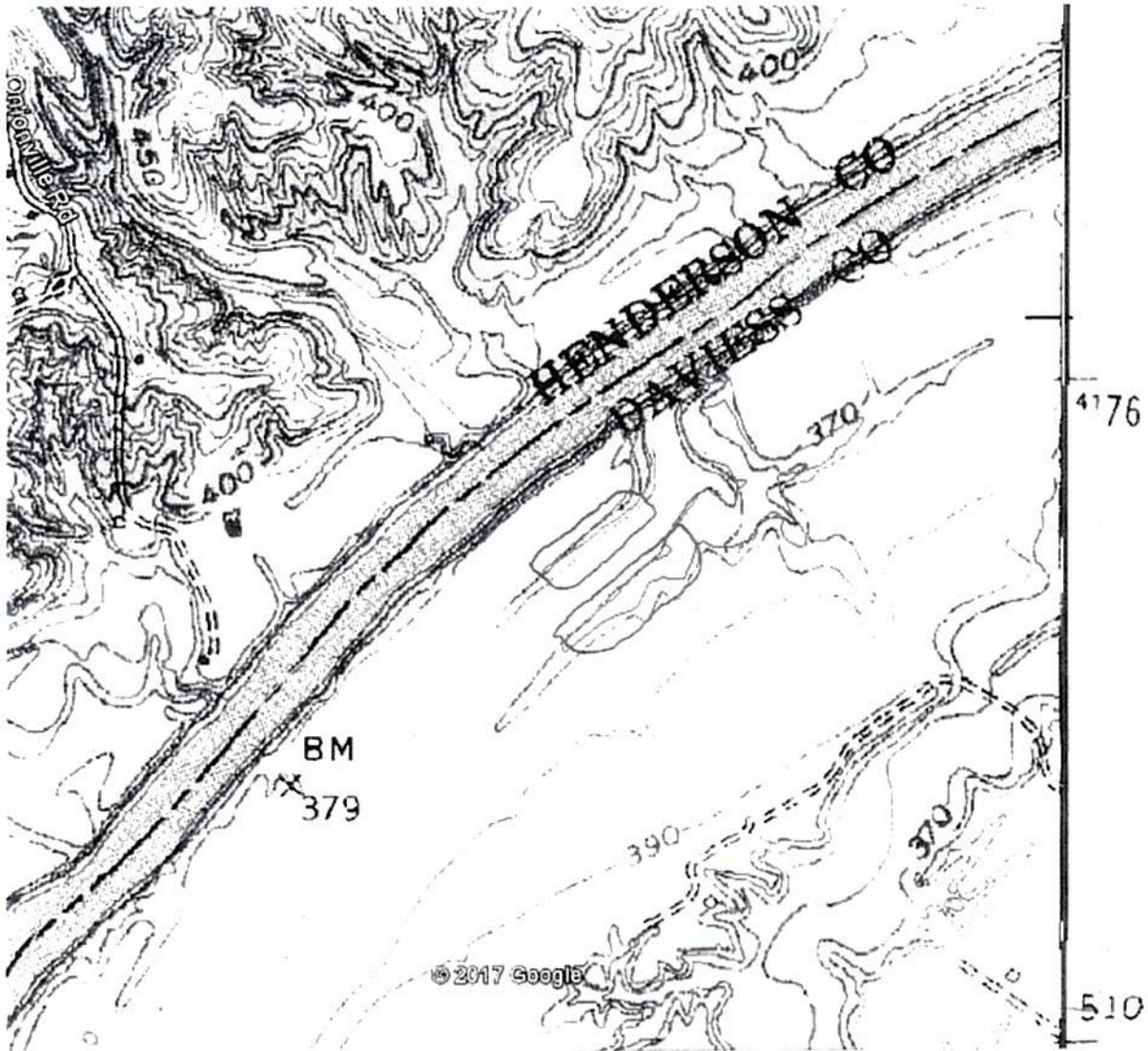
Date: 4/19/2018

**FOR THE U.S. ENVIRONMENTAL PROTECTION AGENCY:**

  
\_\_\_\_\_  
Mary S. Walker, Director  
Water Protection Division  
U.S. Environmental Protection Agency  
Region 4

Date: 5/10/18

Exhibit A



O'Bryan Site

Mr. Jerry O'Bryan

Daviess County, Kentucky

Exhibit B



O'Bryan Site  
Mr. Jerry O'Bryan  
Davies County, Kentucky

# **WETLAND RESTORATION PLAN**

**For A Wetland Conversions Located On**

**FSN-4844 Tract-7**

**Located in Daviess County, Kentucky**

**For**

**Jerry O'Bryan**

## **CONTENTS**

### **SECTION I**

Wetland Restoration Agreement

### **SECTION II**

Project Overview

### **SECTION III**

Project Location

### **SECTION IV**

Site Characterization of Pre-existing Physical Conditions

- A. Wetland Classification
- B. Soils
- C. Vegetation
- D. Hydrology
- E. Topography

### **SECTION V**

Restoration Techniques

- A. Design Documentation
- B. Soils
- C. Hydrology
- D. Re-vegetation

### **SECTION VI**

Monitoring Plan

- A. Soils
- B. Vegetation
- C. Hydrology
- D. Habitat
- E. Monitoring Reports
- F. Success Criteria

## SECTION VII

### Conservation Plan Information

- A. Location Map (highway)
- B. Location Map USGS 7.5 Minute Topo
- C. LiDAR Data
- D. National Wetland Inventory Map
- E. Soils Map
- F. Soils Map Legend
- G. Wetland Restoration Plan Map
- H. Conservation Plan Map
- I. Record of Landowner Decision, NRCS-CPA-068
- J. NRCS-CPA-068 Signature Page
- K. Cost Estimate for Conservation Practices
- L. NRCS-CPA-52
- M. NRCS-CPA-52a
- N. NEPA Special Environmental Concerns (SEC) Maps
- O. Interagency Threatened, Endangered and Rare Species Report
- P. Conservation Assistance Notes, CPA-6 (including 2004, 2008 and 2014 imagery)

## Section I

### WETLAND RESTORATION AGREEMENT

This agreement is to stipulate the conditions, which must be created and maintained by Jerry O'Bryan in order to satisfy the conditions of the Clean Water Act (CWA) in regards to the wetland violation that occurred on Farm Serial Number (FSN)-4844 Tract-7. This agreement may also be used to regain USDA program eligibility if approved by the Daviess County Farm Services Agency (FSA) County Committee, and completely implemented by Jerry O'Bryan.

I, Jerry O'Bryan, hereby agree to the terms set forth in the following wetland restoration plan, and understand that any willful action on my part that (1) is not consistent with the stipulated terms, or (2) will diminish the value of the restored wetlands, will result in this agreement becoming void resulting in penalties and sanctions being levied by the U.S. ARMY CORPS of ENGINEERS (USACE) in regards to the CWA violation and the possible loss of future USDA program eligibility. I agree that the following terms of the wetland restoration plan will be installed and maintained in a condition that is in accordance with all provisions of the CWA and the National Food Security Act Manual (NFSAM), Fifth Edition, Part 515 Subparts B and D. I agree to provide the right of access to the wetlands involved to the US Environmental Protection Agency (USEPA), the USACE, the Kentucky Division of Water (KDOW) and USDA/NRCS personnel in order to monitor the development to ensure that the terms of the agreement are being met.

This Wetland Restoration Agreement is for the restoration of the 2.1 acre identified Converted Wetlands (CW+2016) sites on FSN-4844 Tract-7, which is located in Daviess County, Kentucky, as depicted in Section III, Project Location of this restoration plan.

The wetland restoration acres will be restored to the pre-existing conditions following the guidelines outlined in Section V (Restoration Techniques) of this restoration plan. Monitoring of implementation will be completed as outlined in Section VI (Monitoring Plan) of this restoration plan.

With the full implementation of this restoration plan, the 2.1 acre identified CW+2016 will be totally restored by planting bottomland hardwoods.

All requirements of this restoration plan are met with full compliance upon completion of this agreement. Mr. O'Bryan has also stated that he will implement conservation measures (riparian buffers, grassed waterways, soil health management system consisting of no-till farming and cover crops) on the entire farm. They will reduce erosion, build organic matter content in the soil, increase water infiltration, increases available water content and improve water quality.

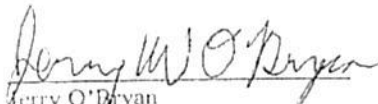
With the full implementation of this restoration plan, the identified CW+2016 sites will be totally restored. Once this plan is fully implemented, NRCS will change the wetland



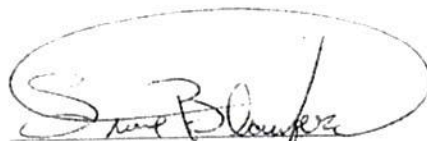
label from CW+2016 to Wetland (W) and provide the new determination to the FSA for their action regarding USDA benefits.

Successful performance will be based on the achievement of the goals of the restoration plan, which are functional in nature. If Mr. O'Bryan fails to restore and maintain the wetland values and functions as described and identified in this restoration plan, NRCS will report to the USEPA, the USACE, the KDOW and the FSA that Mr. O'Bryan is in non-compliance of this agreement. Failure to maintain the restored areas as outlined in this agreement may result in the loss of USDA program eligibility and possible penalties and sanctions being levied by the USACE in regards to the CWA violation. Should this occur, the areas will be relabeled as Converted Wetlands (CW+2016).

This wetland Restoration Agreement applies to the Clean Water Act and to the 1985 Food Security Act and its amendments. Other Federal and State permits may be required prior to project initiation. I, Jerry O'Bryan the landowner, will contact the USACE and/or the KDOW for the appropriate permits. This agreement becomes effective when signed by all parties.

  
Jerry O'Bryan  
Landowner

8/8/2017  
Date

  
Steve Blanford  
NRCS State Soil Scientist

8/9/17  
Date

## Section II

### PROJECT OVERVIEW

The USDA/NRCS received a letter dated July 15, 2016 from the USACE, Louisville District, soliciting comments as to whether an unauthorized activity on two unnamed tributaries on a property located at 37.729998 degrees North Latitude/-87.382107 degrees West Longitude, near Curdsville, Daviess County, Kentucky had significantly damaged the public's interest. The property is owned and operated by Jerry O'Bryan, and is identified as FSN-4844 Tract-7 with the USDA/FSA. Upon receipt of said letter, USDA/NRCS employees Coleman Gusler and Steve Blanford contacted USACE employee Sam Werner to discuss the issue. After the discussion, the participants agreed to meet at the site for further discussion. On August 17, 2016, USACE employees Sam Werner, Michael Ricketts and Jarred Bonnick; USDA/NRCS employees Dwayne Sandefur, David Gehring and Steve Blanford; The Nature Conservancy (TNC) employee Rachel Martin; and Wetland Services Inc. employee Tim Sandefur meet with Mr. O'Bryan at the site. After discussing the situation, it was mutually agreed that there was a violation, and that the USDA/NRCS would develop a restoration plan for the site. The plan would be submitted to the USACE for concurrence. It was also agreed that the USDA/NRCS would monitor the site. On August 24, 2016, USEPA employee Joel Strange; USACE employees Sam Werner and Michael Ricketts; KDOW employee Joyce Frye; USDA/NRCS employees Dwayne Sandefur, David Gehring, Donald Canary, Carlos Rhoda and Steve Blanford; and Wetland Services Inc. employee Tim Sandefur meet with Mr. O'Bryan at the site. After discussing the situation, it was mutually agreed that there was a violation, that the USDA/NRCS would develop a restoration plan for the site. The plan would be submitted to the USEPA for concurrence. It was also agreed that the USDA/NRCS would monitor the site.

The wetland restoration acres will be restored to the pre-existing conditions following the guidelines outlined in Section V (Restoration Techniques) of this restoration plan. Monitoring of implementation will be completed as outlined in Section VI (Monitoring Plan) of this restoration plan.

This restoration plan was developed at the request of the landowner with the intent to resolve the Clean Water Act wetland violation and the Food Security Act violation. It is the intent of the landowner to restore the wetland values and functions that were lost.

### Section III

#### PROJECT LOCATION

The 2.1 acre CW+2016 areas, of this restoration plan, are located on FSN-4844 Tract-7, in Daviess County, Kentucky and currently owned and operated by Jerry O'Bryan. The site is located near the community of Curdsville, and is identified on the Curdsville 7.5 minute USGS quadrangle at 37.729998 degrees North Latitude/-87.382107 degrees West Longitude, NAD83.

The site is located on the floodplain and terrace landforms along the Green River. The land use of the areas adjacent to the site consists of agricultural croplands, prior converted wetlands, and areas of bottomland hardwood wetlands.

## Section IV

### SITE CHARACTERIZATION OF PRE-EXISTING PHYSICAL CONDITIONS

#### A. Wetland Classification

The 2.1 acre CW+2016 sites are not identified on the Cowardin/National Wetland Inventory wetland classification maps, from the USFWS. However, there are sites on the farm identified, as being: Palustrine, Scrub-Shrub, Broad-Leaved Deciduous, Semipermanently Flooded Wetland (PSS1F); Palustrine, Emergent, Persistent, Seasonally Flooded Wetland (PEM1C); Palustrine, Forested, Broad-Leaved Deciduous, Temporary Flooded Wetland (PFO1A).

#### B. Soils

The 2.1 acre CW+2016 sites were originally mapped as Otwell silt loam, 0 to 2 percent slopes, rarely flooded and Weinbach silt loam, rarely flooded. They are listed as soils having hydric inclusions. The on-site investigation conducted by David Gehring, USDA/NRCS Resource Soil Scientist, on July 18, 2016 confirmed that the soils on the site were hydric. The soil matrix color within the top 1 inch of the soil is (10YR 4/2) with redoximorphic colors of (7.5YR 4/6), at depths from 1 to 12 inches the soil matrix color is (10YR 5/2) with redoximorphic colors of (7.5YR 4/6), and at depths of 12 to 20 inches the soil matrix color is (10YR 5/1) with redoximorphic colors of (7.5YR 4/6). The soils at the sites are hydric, meeting the F3-Depleted Soil Matrix indicator.

According to the US Geologic Survey gauge data for the Green River, at Livermore, and where the Green River enters into the Ohio River, the elevation of frequent flooding for long duration is 365 feet. The O'Bryan site, which is located at mile marker 31 on the Green River, is located between the elevation of 360 and 380 feet. Any soils at or below 365 feet of elevation are considered hydric due to frequent flooding for long duration.

The soils in the 2.1 acre CW+2016 sites are hydric due to saturation and some are hydric due to frequent flooding for long duration.

#### C. Vegetation

At the time of the certified wetland determination, the areas had been mechanically cleared of all vegetation, and the vegetation information was obtained from an adjacent woodland to the east of the investigation area. The comparison site has a predominance of hydrophytic plants growing on an area of identical geomorphology and soils as the investigation area. The dominate plant species were identified as follows:

Silver Maple	<u><i>Acer saccharinum</i></u>
American Sycamore	<u><i>Platanus occidentalis</i></u>
Eastern Cottonwood	<u><i>Populus deltoides</i></u>
Pin Oak	<u><i>Quercus palustris</i></u>

#### D. Hydrology

The wetland hydrology of the site is driven by overbank flooding and back-water from the Green River watershed. At the time of the investigation the soils primary indicators of wetland hydrology included: High Water Table, Saturation, Sediment Deposits, Drift Deposits, and Water-Stained Leaves. Secondary indicators of hydrology included: the FAC Neutral Test, Drainage Patterns, and Geomorphic Position.

#### E. Topography

The topography of the site is identified on the Curdsville 7.5 minute USGS topographic quadrangle map, and is located between the elevation of 360 and 380 feet above mean sea level.

## Section V

### RESTORATION TECHNIQUES

#### A. Design Documentation

A restoration plan map showing the actual size and location of the restoration practices is located in section VII. This map will serve as a base map for the implementation of the restoration plan that will be discussed in this section. All restoration conditions and requirements of this section must be implemented within 12 months of the effective date of the signed Wetland Restoration Agreement located in Section I of this document.

#### B. Soils

Hydric soil conditions present before the conversion activity are still present, therefore no restoration of hydric soils are necessary.

#### C. Hydrology

Hydrologic conditions present before the conversion activity are still present, therefore no restoration of the hydrology is necessary.

#### D. Re-Vegetation

The 2.1 acre identified CW+2016 areas will be planted to bottomland hardwoods.

##### 1. Species Selection

The areas will be planted with 3 gallon containerized trees at a rate of 70 trees per acre for a total of 147 trees. At least four or more species, from the following list of hard mast producing species, will be planted. The mixture must contain at least one species from the red oak family and at least one species from the white oak family.

<u>Common Name</u>	<u>Latin Name</u>	<u>Family</u>
Pin Oak	<i>Quercus palustris</i>	Red Oak
Shumard Oak	<i>Quercus shumardii</i>	Red Oak
Water Oak	<i>Quercus nigra</i>	Red Oak
Willow Oak	<i>Quercus phellos</i>	Red Oak
Cherrybark Oak	<i>Quercus falcata</i>	Red Oak
Swamp Chestnut Oak	<i>Quercus michauxii</i>	White Oak
Swamp White Oak	<i>Quercus bicolor</i>	White Oak
Overcup Oak	<i>Quercus lyrata</i>	White Oak
Big Shellbark Hickory	<i>Carya lacinosa</i>	Hickory
Pecan	<i>Carya illinoensis</i>	Hickory

Ultimately, specific tree species to be planted in the project area will be limited to nursery supply, but will be native to the general area.

Since hard mast species are typically slower growing and need a chance to attain sufficient growth to better establish themselves (compete for water, nutrients and light), we are not recommending the planting of any soft mass species.

Native, volunteer hardwood species will not be allowed to become established on the sites.

Native herbaceous wetland species will be allowed to volunteer on the sites for the establishment of herbaceous cover, wildlife habitat, and to help prevent erosion.

## 2. Site Preparation

The main purpose of site preparation is to create suitable growing conditions for the required tree seedlings. The planted areas shall be prepared by mowing the areas to a height of 8 inches or less and then by making two chemical applications before and after planting of the tree seedlings.

## 3. Planting Stock

The areas will be planted with 3 gallon containerized hard mast trees at a rate of 70 trees per acre for a total of 147 trees. Hard mast species will be native to the general area.

## 4. Planting Dates

The seedlings will be planted while they are dormant and when the soil is moist. Planting should be done between November 15 and April 15. Planting can be performed any time the ground is not frozen. The ideal planting weather is cloudy and cool.

## 5. Plant Spacing

The trees will be planted at the rate of 70 trees per acre for a total of 147 trees. The spacing to achieve this rate is approximately 25 feet by 25 feet.

## 6. Planting

The trees are to be planted by direct hand planting. The root collars should be planted between the ground surface and 2 inches below the ground surface.

## 7. Post Planting Weed Control

Unless the sites become infested with Johnson grass or woody vines, post-planting treatment will not be required. Mowing once or twice a year between the rows of trees will be adequate if a problem with weeds becomes evident in the first three years. Treatment with herbicides will be allowed with the approval of the USDA/NRCS personnel.

## Section VI

### MONITORING PLAN

Jerry O'Bryan and the USDA/NRCS will participate in the implementation of this monitoring plan.

Two monitoring stations will be created after the first growing season. These areas will be marked with a permanent post identifying the monitoring point. The latitude and longitude of the monitoring point marker will be recorded. The monitoring stations will consist of a circular sampling plot with a radius of 30 feet centered on each monitoring point marker. On site assessments will be performed once a year (at the end of the growing season) at each station for 5 years, or until the site is released by the USACE. Data recorded will consist of photos, species, and survival rates.

#### A. Soils

The soils investigation will be performed to demonstrate that wetland hydrology is achieving anaerobic soil conditions in the upper part of the soil profile. The investigation will also make sure that the soil conditions are consistent with the conditions described in the soils portion in Section IV, Site Characterization of Pre-existing Physical Conditions, of this restoration/mitigation plan.

#### B. Vegetation

Seedlings will be recorded by species and survival rates calculated. If the seedling survival rate is below 50% after the second growing season, replanting will be necessary. No single species can exceed 25% of the total stand diversity. Native, volunteer hardwood species will not be allowed to become established on the sites. After the five year monitoring period the sites will have a minimum survival rate of at least 80% of the planted trees.

Exotic invasive species, if found during the monitoring process, will be eradicated using herbicidal treatment methods that are consistent with all chemical label guidelines and specifications for use on areas that are water-safe and upland-safe.

#### C. Hydrology

The wetland hydrologic investigation will be performed to ensure that hydrology conditions are maintained. Surface water hydroperiod and seasonal groundwater table indicators of wetland functions will be observed and recorded to document hydrologic processes of wetland function.



#### D. Habitat

The habitat investigation will be performed to make a quantitative measure of the species utilizing the sites over time and a qualitative description of habitat development based on the HGM wetland functional assessment method.

#### E. Monitoring Reports

Monitoring reports will contain sufficient information and detail to assess the sites progress toward meeting the stated performance standards.

NRCS monitoring reports will be attached to this restoration plan which will be maintained in the NRCS customer case file in the Daviess County Field Office. Once all NRCS monitoring requirements document successful restoration, NRCS will complete a final status review which will be signed by NRCS and Jerry O'Bryan. After the final status review is completed, the restoration sites will only be monitored when deemed necessary by NRCS.

#### F. Success Criteria

After the fifth year of the monitoring period the sites will have a minimum survival rate of at least 80% of the planted trees. The sites shall be inundated and/or saturated for at least 5% of the growing season (<http://agacis.rcc-acis.org/?fips=21101>), and the soils will meet at least one current hydric soil indicator.

Exotic invasive species that are listed in the Kentucky Exotic Pest Plant Council lists 1 and 2 are to be controlled and are to comprise no more than 10% of the total vegetation cover in any year and are not to be included in the total aerial coverage of the site. Exotic invasive species shall be eradicated using spot herbicide application treatment methods that are consistent with all chemical label guidelines and specifications.

Failure to meet the specified criteria identified above may result in re-planting of hard mast tree species, modification of hydrology, soils remediation or other appropriate action as indicated by the NRCS representative. The NRCS representative should use best professional judgment to determine the relative success of each criterion outlined above on a case-by-case basis.

## Section VII

### CONSERVATION PLAN INFORMATION

(Includes)

Location Map (highway)

Location Map USGS 7.5 Minute Topo

LiDAR Data

National Wetland Inventory Map

Soils Map

Soils Map Legend

Wetland Restoration Plan Map

Conservation Plan Map

Record of Landowner Decision, NRCS-CPA-068

NRCS-CPA-068 Signature Page

Cost Estimate for Conservation Practices

NRCS-CPA-52

NRCS-CPA-52a

NEPA Special Environmental Concerns (SEC) Maps

Interagency Threatened, Endangered and Rare Species Report

Conservation Assistance Notes, CPA-6 (including 2004, 2008 and 2014 imagery)

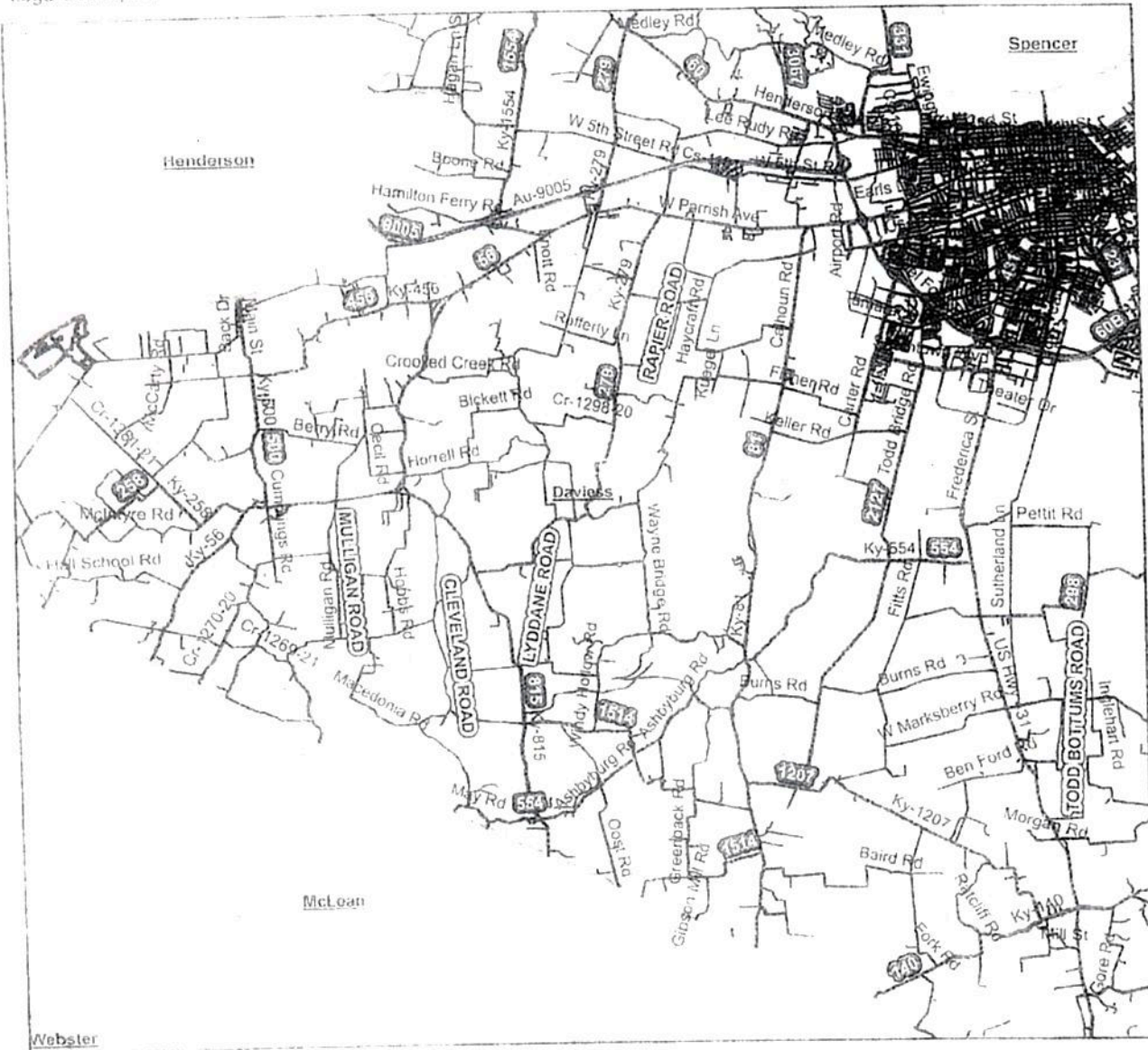
Location Map

Date: 4/20/2016

Customer(s): JERRY W O'BRYAN  
District: Daviess County Conservation District

Field Office: Owensboro Service Center  
Agency: USDA-NRCS  
Assisted By: Connie Mills

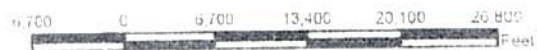
Legal Description: FN: 4844 TN: 7



Webster

Legend

- Case PLUs
- Daviess Co rdslcal
- Daviess Co rdspriamary
- Daviess Co roads100k
- national 2000 counties rtm16



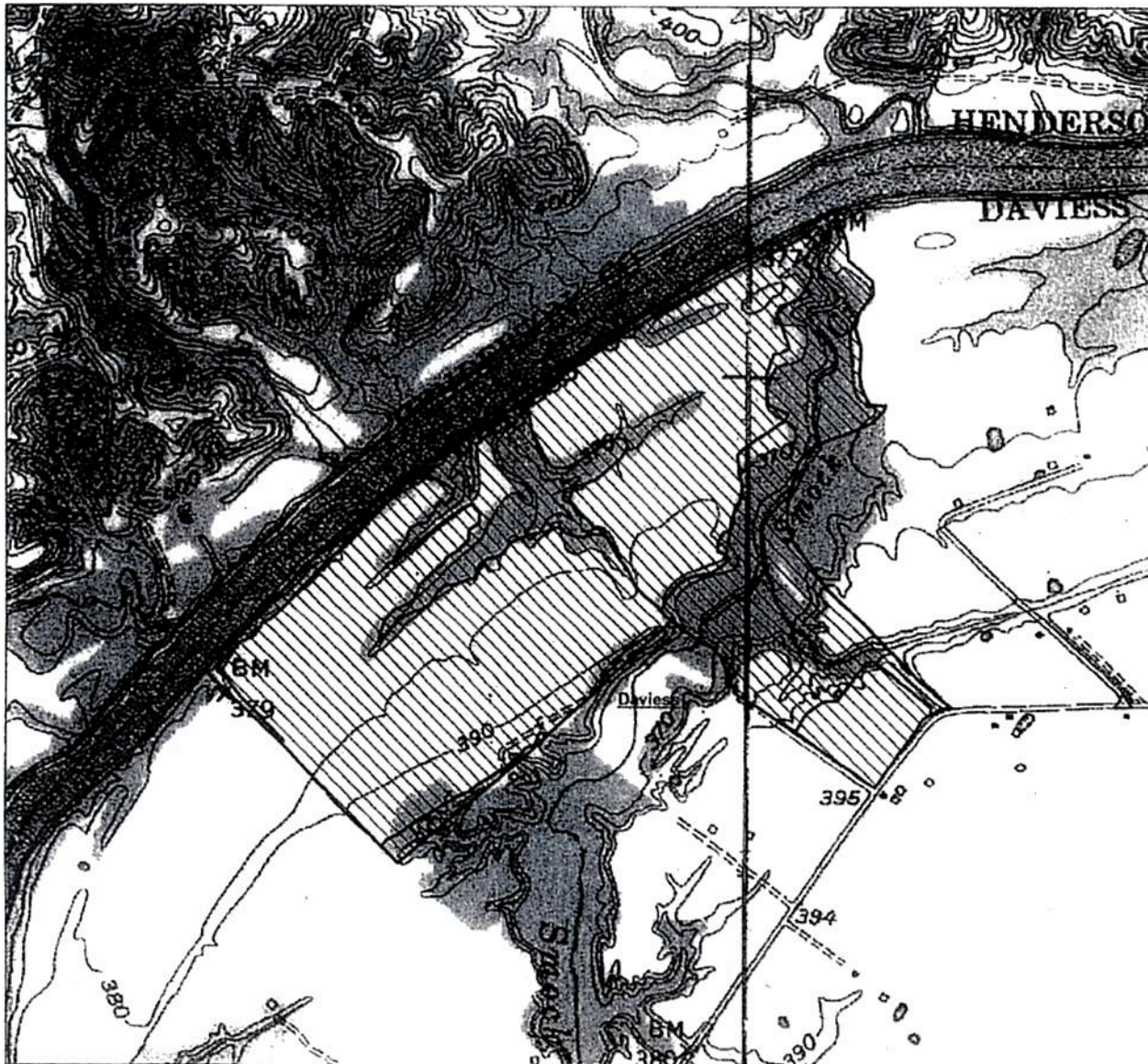
# Topo Map

Date: 10/5/2016

Customer(s): JERRY W OBRYAN  
District: OWENSBORO SOIL & WATER CONSERVATION DISTRICT

Field Office: OWENSBORO SERVICE CENTER  
Agency: USDA-NRCS  
Assisted By: MORGAN GENTRY  
State and County: KY, Daviess County, Kentucky

Legal Description: FN: 4844 TN: 7



### Legend

- <all other values>
- Plan
- Locked
- Legacy
- Draft
- Sketch

Prepared with assistance from USDA-Natural Resources Conservation Service



national\_2000\_counties\_utm16

...DAR Data

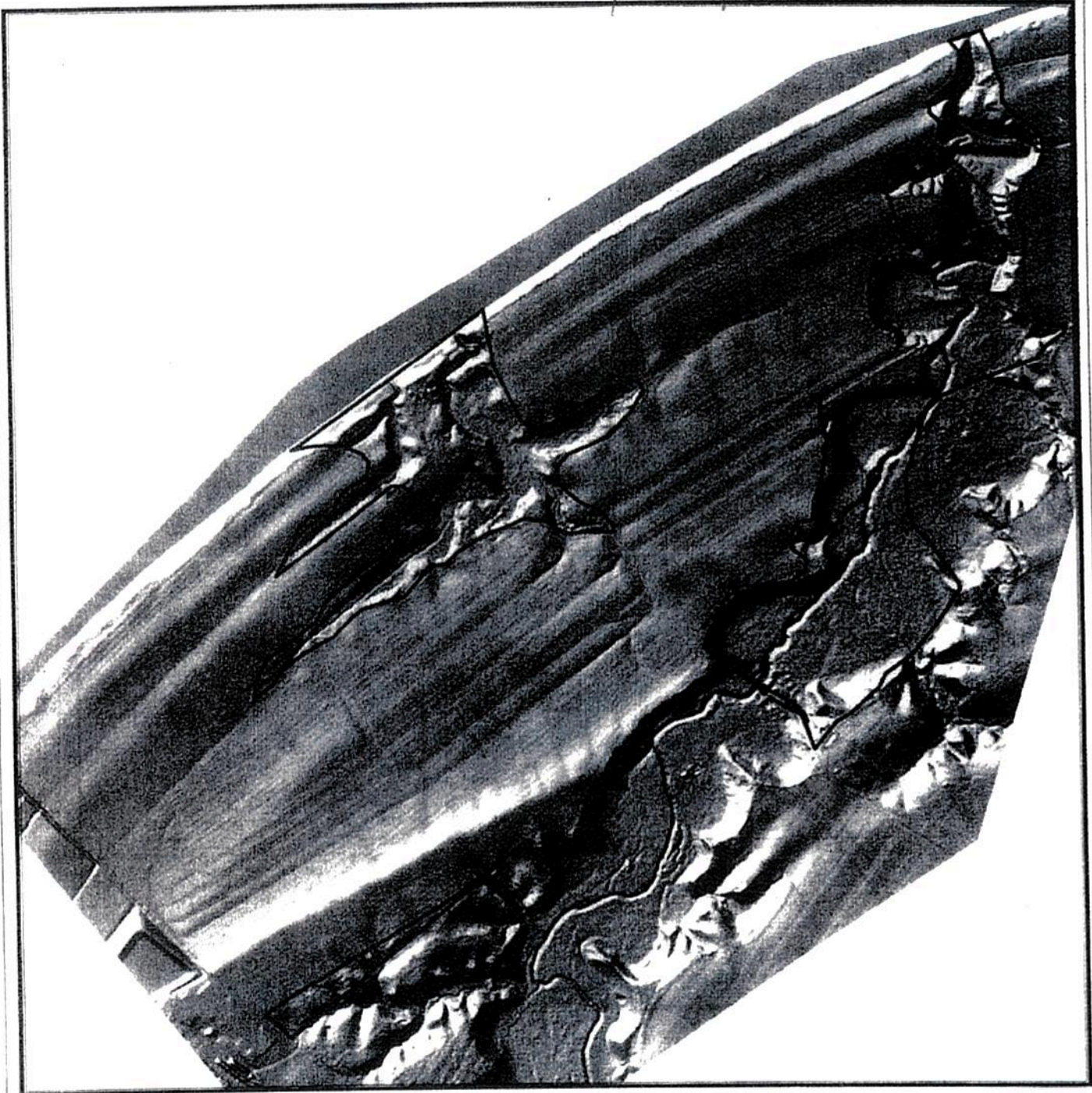
# Certified Wetland Determination

Daviess County, KY

FSA Farm No. 4844

Owner: Berry O Bryan

FSA Tract No. 7



Scale  
1:8,000  
(1"=667 ft.)



United States Department of Agriculture  
**NRCS** National Conservation  
3100 Alvey Park Drive West  
Owensboro, KY 42303  
(270) 685-1707

Created - 7/18/2016 by David Gehring  
Soil Survey of Daviess and Hancock Counties, Kentucky  
Soil Survey Version 14 - 9/15/2015  
USDA-NRCS-NCGC 2014 NAIP Ortho MrSid Mosaic






U.S. Fish and Wildlife Service

# National Wetlands Inventory

## Jerry O'Bryan Farm Curdsville, KY



September 26, 2016

-  Estuarine and Marine Deepwater
-  Estuarine and Marine Wetland
-  Freshwater Emergent Wetland
-  Freshwater Forested/Shrub Wetland
-  Freshwater Pond
-  Lake
-  Other
-  Riverine

This map is for general reference only. The US Fish and Wildlife Service is not responsible for the accuracy or currentness of the base data shown on this map. All wetlands related data should be used in accordance with the layer metadata found on the Wetlands Mapper web site.

National Wetlands Inventory (NWI)  
This page was produced by the NWI Mapper

# Soils Map

Date: 4/20/2016

Customer(s) JERRY W OBRYAN  
District: Daviess County Conservation District

Field Office: Owensboro Service Center  
Agency: USDA-NRCS  
Assisted By: Connie Mills

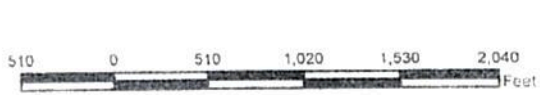
Legal Description: FN: 4844 TN: 7



### Legend

- Case PLUs
- Daviess Co rdslcal
- Daviess Co rdspriamry
- Daviess Co roads100k

soilmu\_a\_ky615  
national 2000\_counties\_utm16



## Map Unit Legend

Davies and Hancock Counties, Kentucky (KY615)			
Map Unit Symbol	Map Unit Name	Acres in AOI	Percent of AOI
AIF	Alluvial land, steep (wheeling flooded)	45.9	14.9%
EkA	Elk silt loam, 0 to 2 percent slopes, rarely flooded	1.5	0.5%
EkB	Elk silt loam, 2 to 6 percent slopes, rarely flooded	5.3	1.7%
Hu	Huntington silt loam	0.4	0.1%
Ja	Jacob silty clay loam	0.3	0.1%
Ld	Lindside silt loam	15.7	5.1%
Ne	Newark silt loam, 0 to 2 percent slopes, occasionally flooded	29.4	9.5%
OtA	Otwell silt loam, 0 to 2 percent slopes	48.6	15.7%
OtB	Otwell silt loam, 2 to 6 percent slopes	0.4	0.1%
Pa	Patton silt loam, 0 to 2 percent slopes, rarely flooded	0.0	0.0%
uAlfD3	Alford silt loam, 12 to 20 percent slopes, severely eroded	10.3	3.3%
uAlfF	Alford silt loam, 30 to 60 percent slopes	3.4	1.1%
uMelA	Melvin silt loam, 0 to 2 percent slopes, occasionally flooded	13.9	4.5%
UnA	Uniontown silt loam, 0 to 2 percent slopes	7.0	2.3%
uRobA	Robbs silt loam, 0 to 2 percent slopes	17.7	5.7%
W	Water	4.8	1.5%
Wh	Weinbach silt loam	96.8	31.3%
WnC	Wheeling loam, 6 to 12 percent slopes	7.7	2.5%
<b>Totals for Area of Interest</b>		<b>309.0</b>	<b>100.0%</b>



# Wetland Restoration Plan Map

Daviess County, KY


FSA Farm No. 4844


Owner: Jerry OBryan

FSA Tract No. 7



*Legend*


 Hydrography


 CW+2016 (2.1 acres)

*Scale*

1:2,760

1 inch = 230 feet



United States Department of Agriculture  
 3100 Alvey Park Drive West  
Owensboro, KY 42303  
(270) 685-1701

Created - 10/5/2016 by David Gehring  
Soil Survey of Daviess and Hancock Counties, Kentucky  
Soil Survey Version 14 - 9/15/2015  
USDA-NRCS-NCGC 2014 NAIP Ortho Mosaic

**ENVIRONMENTAL EVALUATION WORKSHEET**

A. Client Name: Jerry O'Bryan

B. Conservation Plan ID # (as applicable):  
Program Authority (optional): EQIP

D. Client's Objective(s) (purpose):  
To restore disturbed wetland per guidance.

C. Identification # (farm, tract, field #, etc. as required):  
F- 4844 T-7

**E. Need for Action:**

1.) Landowner encroached on wetland in farming endeavors. Re-establishment of wetland conditions needed 2.) Headcutting in various places in the fields (see map) 3.) Two concentrated flow areas convey water rapidly without infiltration into forested area. 4.) Fields near major river (Green) and infiltration rates could be enhanced to improve water quality. 5.) Sediment deposition in two ditches affecting capacity for water-flow and quality. 6.) Excessive runoff of surface water in Field 1 causing pond issues AND (7.) Three gullies forming (total) in fields 1 and 2

**H. Alternatives**

No Action	✓ if RMS	Alternative 1	✓ if RMS	Alternative 2	✓ if RMS
Wetland will remain altered and functionality will be diminished. Water and any leachable/transportable sediment and nutrients will enter river without being filtered in any way	<input type="checkbox"/>	1.) Re-establish wetland areas with WETLAND RESTORATION (657). 2.) Install GSS's (410) to address headcutting issues 3.) Install GRASSED WATERWAYS (412) with SUBSURFACE DRAIN (606) to channel flow, improve infiltration and filtering of water before it reaches the river. GSS 0410 will stabilize outflow and HUA (561) will allow equipment to cross without compromising vegetated areas. 4.) NO-TILL (329) AND COVER CROP (340) will keep fields vegetated at all times, which will improve infiltration rates and minimize overland flow. 5.) Cleanout of ditches will re-establish conveyance capacity and remove sediment with potential to be lost into river 6.) Installation of TERRACE (600) will address portion of excess water and convey it to one of the established waterways, also increasing infiltration 7.) WATER AND SEDIMENT CONTROL BASINS (638) with SUBSURFACE DRAIN (606) will address gully erosion problem in fields 1 and 2	<input type="checkbox"/>		<input type="checkbox"/>

**Resource Concerns**

In Section "F" below, analyze, record, and address concerns identified through the Resources Inventory process. (See FOTG Section III - Resource Planning Criteria for guidance).

**F. Resource Concerns and Existing/ Benchmark Conditions**  
(Analyze and record the existing/benchmark conditions for each identified concern)

**I. Effects of Alternatives**

Resource Concerns and Existing/ Benchmark Conditions	No Action		Alternative 1		Alternative 2	
	Amount, Status, Description <i>(Document both short and long term impacts)</i>	✓ if does NOT meet PC	Amount, Status, Description <i>(Document both short and long term impacts)</i>	✓ if does NOT meet PC	Amount, Status, Description <i>(Document both short and long term impacts)</i>	✓ if does NOT meet PC
<b>SOIL: EROSION</b> Concentrated flow  Two concentrated flow areas that lead to forestland causing ephemeral gullies. Three ephemeral gullies (total) formed within fields 1 and 2	Ephemeral gullies will become classic gullies as flow remains unchecked	<input type="checkbox"/>	GRASSED WATERWAY (412) with SUBSURFACE DRAIN (606) will address concentrated flow into forested acres. GSS (410) at the end will stabilize the outflow. HUA (561) on waterway in field 2 will allow equipment to cross without compromising vegetation of waterway once established WASCOS (638) with SUBSURFACE DRAIN (606) will address gullies in fields 1 and 2 and channel water to grassed waterway for filtration	<input type="checkbox"/>		<input type="checkbox"/>
		NOT meet PC		NOT meet PC		NOT meet PC

Excessive bank erosion from streams, shorelines or water conveyance channels	Headcutting will continue and erode gully into field	<input type="checkbox"/>	GRADE STABILIZATION STRUCTURE (410) will stabilize the area and prevent gullies from forming and soil from entering streams	<input type="checkbox"/>	<input type="checkbox"/>
Headcutting on streambank and ditches in various places in fields (see map)		NOT meet PC		NOT meet PC	NOT meet PC
<b>SOIL: SOIL QUALITY DEGRADATION</b>					
Organic matter depletion	Organic matter levels will remain steady or decline as field is dedicated to cropland	<input type="checkbox"/>	NO-TILL (329) of all planned crops and COVER CROP (340) over fallow period will slow rates of decay and add organic matter to improve OM levels over time	<input type="checkbox"/>	<input type="checkbox"/>
OM levels 2% according to Illinois Soil Color chart		NOT meet PC		NOT meet PC	NOT meet PC
No resource concern identified		<input type="checkbox"/>		<input type="checkbox"/>	NOT meet PC
		NOT meet PC		NOT meet PC	NOT meet PC
<b>WATER: EXCESS / INSUFFICIENT WATER</b>					
Excess (Ponding, flooding, seasonal high water table, seeps, and drifted portions of field 1 experiencing ponding from excessive runoff and lack of conveyance)	Situation will continue	<input type="checkbox"/>	TERRACE (800) will address excess water and convey to proper vegetated channels. Ditch cleanout will help in this endeavor	<input type="checkbox"/>	<input type="checkbox"/>
		NOT meet PC		NOT meet PC	NOT meet PC
<b>WATER: WATER QUALITY DEGRADATION</b>					
Other	Situation will continue and water quality of adjacent stream may suffer	<input type="checkbox"/>	WETLAND RESTORATION (657) will restore disturbed areas to their natural condition	<input type="checkbox"/>	<input type="checkbox"/>
Manipulated wetland by landowner degrades functionality		NOT meet PC		NOT meet PC	NOT meet PC
No resource concern identified		<input type="checkbox"/>		<input type="checkbox"/>	NOT meet PC
		NOT meet PC		NOT meet PC	NOT meet PC

F. Resource Concerns and Existing/ Benchmark Conditions (Analyze and record the existing/benchmark conditions for each identified concern)	i. (continued)		Alternative 1		Alternative 2	
	No Action Amount, Status, Description (Document both short and long term impacts)	✓ if does NOT meet PC	Amount, Status, Description (Document both short and long term impacts)	✓ if does NOT meet PC	Amount, Status, Description (Document both short and long term impacts)	✓ if does NOT meet PC
<b>AIR: AIR QUALITY IMPACTS</b>		<input type="checkbox"/>		<input type="checkbox"/>		<input type="checkbox"/>
No resource concern identified		NOT		NOT		NOT
No resource concern identified		<input type="checkbox"/>		<input type="checkbox"/>		<input type="checkbox"/>
		NOT meet PC		NOT meet PC		NOT meet PC
<b>PLANTS: DEGRADED PLANT CONDITION</b>		<input type="checkbox"/>		<input type="checkbox"/>		<input type="checkbox"/>
No resource concern identified		NOT meet		NOT meet		NOT meet
No resource concern identified		<input type="checkbox"/>		<input type="checkbox"/>		<input type="checkbox"/>
		NOT meet PC		NOT meet PC		NOT meet PC
<b>ANIMALS: INADEQUATE HABITAT FOR FISH AND WILDLIFE</b>		<input type="checkbox"/>		<input type="checkbox"/>		<input type="checkbox"/>
No resource concern identified		NOT meet PC		NOT meet PC		NOT meet PC

<b>ANIMALS: LIVESTOCK PRODUCTION LIMITATION</b>					
No resource concern identified		<input type="checkbox"/>		<input type="checkbox"/>	
		NOT meet PC		NOT meet PC	
No resource concern identified		<input type="checkbox"/>		<input type="checkbox"/>	
		NOT meet		NOT meet	
<b>ENERGY: INEFFICIENT ENERGY USE</b>					
No resource concern identified		<input type="checkbox"/>		<input type="checkbox"/>	
		NOT		NOT	
No resource concern identified		<input type="checkbox"/>		<input type="checkbox"/>	
		NOT meet		NOT meet	
<b>HUMAN: ECONOMIC AND SOCIAL CONSIDERATIONS</b>					
Public Health and Safety	None				
Land Use	None				
Labor	None				

**Special Environmental Concerns: Environmental Laws, Executive Orders, policies, etc.**

In Section "G" complete and attach Environmental Procedures Guide Sheets for documentation as applicable. Items with a "o" may require a federal permit or consultation/coordination between the lead agency and another government agency. In these cases, effects may need to be determined in consultation with another agency. Planning and practice implementation may proceed for practices not involved in consultation.

G. Special Environmental Concerns (Document existing/ benchmark conditions)	J. Impacts to Special Environmental Concerns					
	No Action		Alternative 1		Alternative 2	
	Document all impacts (Attach Guide Sheets as applicable)	if needs further action	Document all impacts (Attach Guide Sheets as applicable)	if needs further action	Document all impacts (Attach Guide Sheets as applicable)	if needs further action
• Clean Air Act <i>Guide Sheet FS1 FS-2</i> PLU not in a non-attainment area	No Effect Action not expected to increase the emission rate of any regulated air pollutant. Ground cover adequate to prevent noticeable wind erosion and Nox emissions	<input type="checkbox"/>	No Effect Action not expected to increase the emission rate of any regulated air pollutant. Ground cover adequate to prevent noticeable wind erosion and Nox emissions	<input type="checkbox"/>		<input type="checkbox"/>
• Clean Water Act / Waters of the U.S. <i>Guide Sheet Fact Sheet</i> PLU and wetland violation near to a DOW impaired water body per EQIP layer. Other streams adjacent to PLU.	No Effect Wetlands that have been previously cleared that have been altered will be subject to penalty by the CORPS and the EPA	<input type="checkbox"/>	No Effect Wetlands that have been destroyed 2.9 acres will be restored by Stream Restoration and a Wetland Restoration Project that meets the EPA's approval. All 2.9 acres will be monitored for 5 years to see the progress that the 2.9 acres in achieving as far as aquatic and wildlife enhancements for the future	<input type="checkbox"/>		<input type="checkbox"/>
• Coastal Zone Management <i>Guide Sheet Fact Sheet</i> Area not in a designated Coastal Zone Management Area	No Effect Area not in a designated Coastal Zone Management Area	<input type="checkbox"/>	No Effect Area not in a designated Coastal Zone Management Area	<input type="checkbox"/>	No Effect	<input type="checkbox"/>
Coral Reefs <i>Guide Sheet Fact Sheet</i> Area not in a designated Coral Reef Area	No Effect Area not in a Coral Reef	<input type="checkbox"/>	No Effect Area not in a Coral Reef	<input type="checkbox"/>	No Effect	<input type="checkbox"/>
• Cultural Resources / Historic Properties <i>Guide Sheet Fact Sheet</i> No Cultural Resources noted in field visit. No listed Historic Properties in PLU.	No Effect In no action alternative, there are no Undertakings with the potential to affect cultural resources planned, per Matrix	<input type="checkbox"/>	No Effect G and PG practices need approval from Bill Sharp	<input checked="" type="checkbox"/>		<input checked="" type="checkbox"/>
• Endangered and Threatened Species <i>Guide Sheet Fact Sheet</i>	No Effect No action alternative may result in a degradation of Indiana Bat or	<input type="checkbox"/>	No Effect Planned activities do not degrade Indiana Bat or Copperbelly	<input type="checkbox"/>		<input type="checkbox"/>

Per FOTG list Copperbelly Watersnake and Indiana Bat Forestland manipulated. Also see KICT tool report	Copperbelly Watersnake habitat as some trees have been removed		Watersnake habitat and will involved restoration of disturbed trees. No conventional tillage planned as part of vegetative establishment and no endangered plant species are listed for Daviess county.		No Effect	
Environmental Justice <i>Guide Sheet Fact Sheet</i> Per last census, 97.3% of the population is white. 0.9% is black, 1.1% is Hispanic. 14.3% of the population below poverty level	No Effect Low-income populations, minority populations, Indian Tribes, or other specified populations are not currently experiencing disproportionately high and adverse human health impacts as a result of current practices.	<input type="checkbox"/>	No Effect Low-income populations, minority populations, Indian Tribes, or other specified populations will not experience disproportionately high and adverse human health impacts as a result of proposed action.	<input type="checkbox"/>	No Effect	<input type="checkbox"/>
Essential Fish Habitat <i>Guide Sheet Fact Sheet</i> PLU not in an EFH area, per NOAA	No Effect PLU not in an EFH area	<input type="checkbox"/>	No Effect PLU not in an EFH area	<input type="checkbox"/>	No Effect	<input type="checkbox"/>
Floodplain Management <i>Guide Sheet Fact Sheet</i> PLU adjacent to FEMA 100 yr floodplain per Geodata layer. Land use has been agricultural for the last 3 of 5 years. Some previous disturbance of riparian area on part of landowner	No Effect No action alternative may result in an increased flood hazard or other adverse effect to the existing natural and beneficial values of the floodplain	<input type="checkbox"/>	No Effect Proposed action or alternative not likely to result in an increased flood hazard, incompatible development, or other adverse effect to the existing natural and beneficial values of the floodplain or lands adjacent or downstream	<input type="checkbox"/>		<input type="checkbox"/>
Invasive Species <i>Guide Sheet Fact Sheet</i> No FOTG invasive species noted during field visit	No Effect Current activities do not prevent invasive species establishment	<input type="checkbox"/>	No Effect Proposed activities preclude and/or alleviate invasive species establishment	<input type="checkbox"/>		<input type="checkbox"/>
Migratory Birds/Bald and Golden Eagle Protection Act <i>Guide Sheet Fact Sheet</i> No Bald Eagles noted within PLU	No Effect No eagles noted within the planning unit. Current activity will not result in the willful take of migratory birds.	<input type="checkbox"/>	No Effect No eagles noted within the planning unit. Proposed activity will not result in the willful take of migratory birds.	<input type="checkbox"/>		<input type="checkbox"/>
Natural Areas <i>Guide Sheet Fact Sheet</i> No Designated natural areas within PLU. Landscape mixed forest, cropland and natural areas	No Effect Current activity does not impact officially or unofficially designated natural areas	<input type="checkbox"/>	No Effect Planned practices will not degrade existing landscape aesthetics	<input type="checkbox"/>		<input type="checkbox"/>
Prime and Unique Farmlands <i>Guide Sheet Fact Sheet</i> PLU Prime Farmland, per GEO data layer	No Effect No conversion of Prime or Unique Farmland planned	<input type="checkbox"/>	No Effect No conversion of Prime or Unique Farmland planned	<input type="checkbox"/>		<input type="checkbox"/>
Riparian Area <i>Guide Sheet Fact Sheet</i> No streams run within PLU	No Effect No Action Alternative may affect the maintenance or improvement of water quality, water quantity, and fish and wildlife benefits provided by the riparian area	<input type="checkbox"/>	No Effect Proposed action does not conflict with the values or functions of a riparian area	<input type="checkbox"/>		<input type="checkbox"/>
Scenic Beauty <i>Guide Sheet Fact Sheet</i> No designated Scenic Beauty areas in PLU	No Effect Maintaining current activities will not affect scenic beauty	<input type="checkbox"/>	No Effect Proposed action will not affect scenic beauty	<input type="checkbox"/>		<input type="checkbox"/>
Wetlands <i>Guide Sheet Fact Sheet</i> Designated Wetlands in PLU, per Soil Scientist determination. See map for delineation	No Effect Wetland determination has been completed and a proposal has been discussed with the CORPS, DOW, and the EPA for a restoration plan to replace 2.9 acres of disturbed Wetlands	<input type="checkbox"/>	No Effect A Restoration Plan has been developed by USDA-NRCS to restore the Wetland acres 2.9 to the natural state	<input type="checkbox"/>		<input type="checkbox"/>
Wild and Scenic Rivers <i>Guide Sheet Fact Sheet</i> Green River adjacent to PLU. No Designated Wild and Scenic Rivers in PLU, per FOTG	No Effect Lack of action alternative may have an effect on the natural values of nearby Green River if sediment or nutrients enter river	<input type="checkbox"/>	No Effect Proposed action(s) should restore the natural, cultural or recreational values of nearby rivers	<input type="checkbox"/>		<input type="checkbox"/>

K. Other Agencies and Broad Public Concerns		No Action	Alternative 1	Alternative 2
Easements, Permissions, Public Review, or Permits Required and Agencies Consulted.		Discussion with DOW, CORPS, USDA-NRCS and EPA for the permits and required paperwork for restoration	Gather correct permits and paperwork from listed government agencies for the restoration of 2.9 acres	
Cumulative Effects Narrative (Describe the cumulative impacts considered, including past, present and known future actions regardless of who performed the actions)		Effects have been discussed with the DOW, CORPS, and EPA along with USDA-NRCS on a site visit	The effects will be monitored for 5 years by USDA-NRCS staff and will also follow a Wetland Restoration Plan approved by the EPA	
L. Mitigation (Record actions to avoid, minimize, and compensate)		No mitigation actions required for maintaining current practices	no mitigation actions required for planned action. The 2.9 area that was destroyed will be replaced with a Stream restoration and Wetland Restoration Plan planting Trees and other Wetland Species	
M. Preferred Alternative	Preferred alternative	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
	Supporting reason		This alternative supports stated landowner objectives and fully addresses noted resources concerns with no negative environmental impacts	

N. Context (Record context of alternatives analysis)  local  local  local

The significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality.

O. Determination of Significance or Extraordinary Circumstances

Intensity: Refers to the severity of impact. Impacts may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

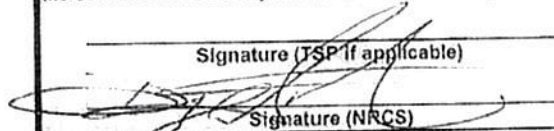
If you answer ANY of the below questions "yes" then contact the State Environmental Liaison as there may be extraordinary circumstances and significance issues to consider and a site specific NEPA analysis may be required.

Yes No

- Yes  No • Is the preferred alternative expected to cause significant effects on public health or safety?
- Yes  No • Is the preferred alternative expected to significantly affect unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas?
- Yes  No • Are the effects of the preferred alternative on the quality of the human environment likely to be highly controversial?
- Yes  No • Does the preferred alternative have highly uncertain effects or involve unique or unknown risks on the human environment?
- Yes  No • Does the preferred alternative establish a precedent for future actions with significant impacts or represent a decision in principle about a future consideration?
- Yes  No • Is the preferred alternative known or reasonably expected to have potentially significant environment impacts to the quality of the human environment either individually or cumulatively over time?
- Yes  No • Will the preferred alternative likely have a significant adverse effect on ANY of the special environmental concerns? Use the Evaluation Procedure Guide Sheets to assist in this determination. This includes, but is not limited to, concerns such as cultural or historical resources, endangered and threatened species, environmental justice, wetlands, floodplains, coastal zones, coral reefs, essential fish habitat, wild and scenic rivers, clean air, riparian areas, natural areas, and invasive species.
- Yes  No • Will the preferred alternative threaten a violation of Federal, State, or local law or requirements for the protection of the environment?

P. To the best of my knowledge, the data shown on this form is accurate and complete:

In the case where a non-NRCS person (e.g. a TSP) assists with planning they are to sign the first signature block and then NRCS is to sign the second block to verify the information's accuracy.

_____ Signature (TSP if applicable)	_____ Title	_____ Date
 Signature (NRCS)	<u>NRF</u> Title	<u>2-16-2012</u> Date

If preferred alternative is not a federal action where NRCS has control or responsibility and this NRCS-CPA-52 is shared with someone other than the client then indicate to whom this is being provided.

**The following sections are to be completed by the Responsible Federal Official (RFO)**

NRCS is the RFO if the action is subject to NRCS control and responsibility (e.g., actions financed, funded, assisted, conducted, regulated, or approved by NRCS). These actions do not include situations in which NRCS is only providing technical assistance because NRCS cannot control what the client ultimately does with that assistance and situations where NRCS is making a technical determination (such as Farm Bill HEL or wetland determinations) not associated with the planning process.

**Q. NEPA Compliance Finding (check one)**

The preferred alternative:

**Action required**

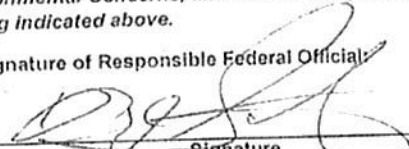
<input type="checkbox"/>	1) is not a federal action where the agency has control or responsibility.	Document in "R.1" below. No additional analysis is required
<input type="checkbox"/>	2) is a federal action ALL of which is categorically excluded from further environmental analysis AND there are no extraordinary circumstances as identified in Section "O".	Document in "R.2" below. No additional analysis is required
<input checked="" type="checkbox"/>	3) is a federal action that has been sufficiently analyzed in an existing Agency state, regional, or national NEPA document and there are no predicted significant adverse environmental effects or extraordinary circumstances.	Document in "R.1" below. No additional analysis is required.
<input type="checkbox"/>	4) is a federal action that has been sufficiently analyzed in another Federal agency's NEPA document (EA or EIS) that addresses the proposed NRCS action and its' effects and has been formally adopted by NRCS. NRCS is required to prepare and publish its own Finding of No Significant Impact for an EA or Record of Decision for an EIS when adopting another agency's EA or EIS document. (Note: This box is not applicable to FSA)	Contact the State Environmental Liaison for list of NEPA documents formally adopted and available for tiering. Document in "R.1" below. No additional analysis is required
<input type="checkbox"/>	5) is a federal action that has NOT been sufficiently analyzed or may involve predicted significant adverse environmental effects or extraordinary circumstances and may require an EA or EIS.	Contact the State Environmental Liaison. Further NEPA analysis required.

**R. Rationale Supporting the Finding**

<b>R.1</b> Findings Documentation	
<b>R.2</b> Applicable Categorical Exclusion(s) (more than one may apply)  7 CFR Part 650 Compliance With NEPA, subpart 650.6 Categorical Exclusions states prior to determining that a proposed action is categorically excluded under paragraph (d) of this section, the proposed action must meet six sidebar criteria. See NECH 610.116.	(1) Planting appropriate herbaceous and woody vegetation, which does not include noxious weeds or invasive plants, on disturbed sites to restore and maintain the sites ecological functions and services; Requires that the established vegetative community maintain the sites ecological functions and services, which could not be accomplished by converting native forests or grasslands.  (10) Constructing small structures or improvements for the restoration of wetland, riparian, in stream, or native habitats. Examples of activities include installation of fences and construction of small berms, dikes, and associated water control structures;

*I have considered the effects of the alternatives on the Resource Concerns, Economic and Social Considerations, Special Environmental Concerns, and Extraordinary Circumstances as defined by Agency regulation and policy and based on that made the finding indicated above.*

S. Signature of Responsible Federal Official:

  
Signature

*NRP*  
Title

*2-16-2017*  
Date

**Additional notes**

## Request for Cultural Resource Review (NRCS-KY-CPA 52a)

*(This document is Freedom of Information Act exempt) v7\_06*

County: Daviess                      Date: 2 9 2017                      Evaluator: Rachel Martin  
 Program: CTA- Conservation Technical Assistance                      USGS Quad:

**Area of Potential Effect (APE)**  
 Landowner/operator name(s): Jerry Obryan                      Tract # 7  
 Field #(s) 1, 2, 6                      Ground Cover: residue; forest                      Affected Acres: 6

Select up to three potential or ground disturbing practices from the list, and enter extent planned.

PRACTICE	UNITS	PRACTICE	UNITS
Grade Stabilization Structure (No.) (410)	24 Terrace (Ft.) (600)		3100
Heavy Use Area Protection (No.) (561)	400 Water and Sediment Control Basin (Ft.) (638)		300
Subsurface Drain (Ft.) (606)	4700 Wetland Restoration (Ac.) (657)		2.1

Current Land Use:                      Proposed Construction Date: Nov 2017

**Noteworthy Characteristics**

Cultural Resource Review	Yes	No
Is owner/operator aware of any historic structural remains, artifacts, etc?:	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Are any structures, buildings etc within the APE that are more than 50 years old?	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Are you aware of any National Register Sites in the APE?:	<input type="checkbox"/>	<input checked="" type="checkbox"/>

**Project Site Inspection**

Date APE walked and visually searched for evidence of historic and prehistoric artifacts: July 31 2016  
 Walked by: Dwayne Sandefur                      Percent of Ground Surface Visible?: 50 %  
 Was anything found? No

Briefly describe any potential cultural resources present:

*Place this sheet in the "Determinations" folder of the corresponding Customer Service Toolkit file. The ArcGIS shapefile for the conservation plan showing farm boundaries and location of APE for all ground disturbing or potentially ground disturbing activities that require CRS review must be available in Toolkit. Notify the CRS of availability.*

**Project approved, proceed with construction**

W Sharp 2-10-2017  
 Cultural Resources Specialist

**Progress Reporting Items**

- Undertakings Review
- Undertakings have Potential to Affect CR
- Field Investigations Conducted
- Sites Identified
- Sites Treated

Acres
6
2

*FIELD OFFICES SHOULD REPORT THE PROGRESS CHECKED ABOVE IN THE PRS CULTURAL RESOURCE DATA ENTRY SCREEN WHEN THIS FORM IS SIGNED AND RECEIVED FROM THE CRS or CRC.*

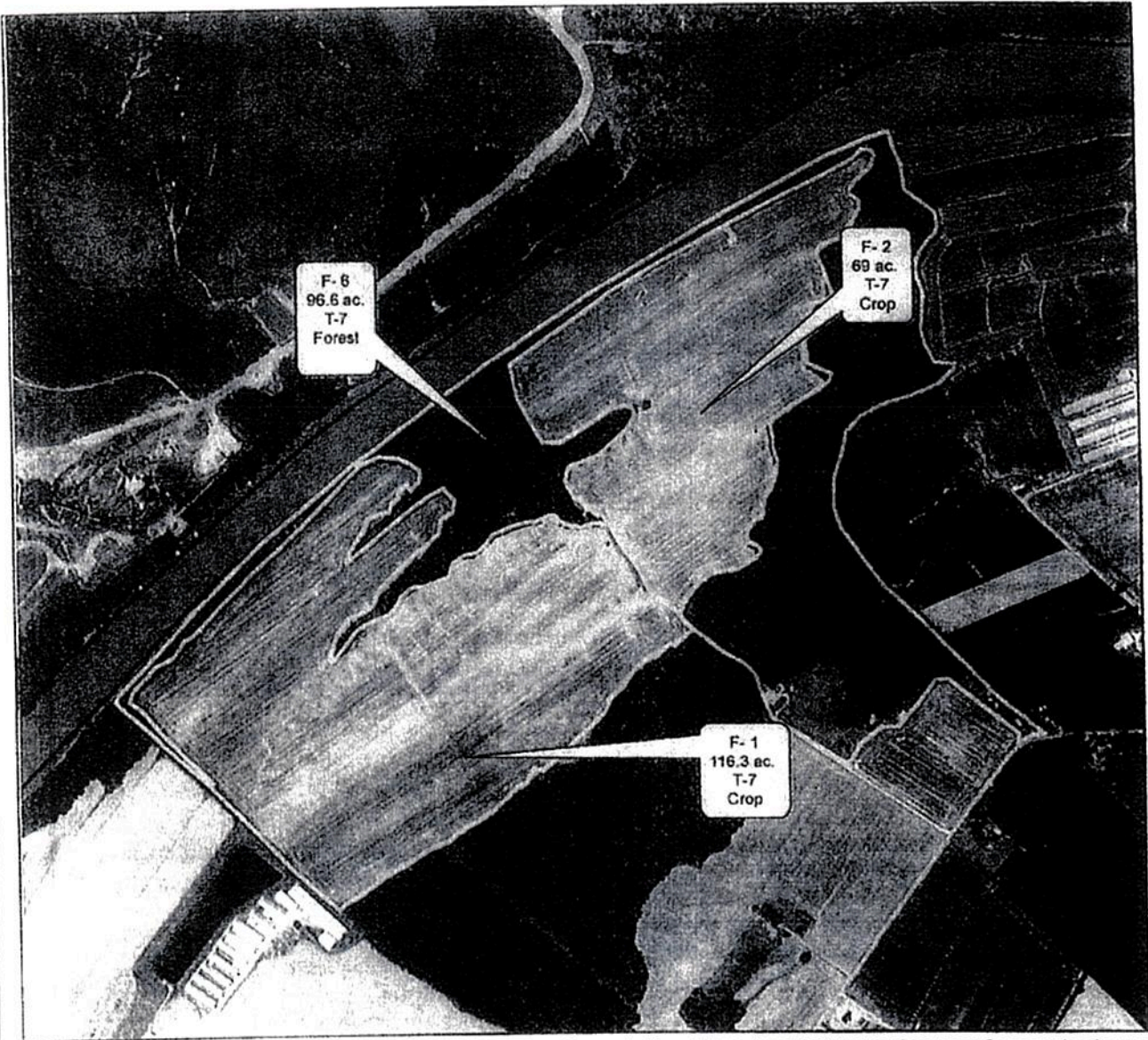


NEPA SEC MAP

Date: 10/11/2016

Customer(s): JERRY W OBRYAN  
Approximate Acres: 281.9  
Legal Description: F- 4844 T-7

Field Office: OWENSBORO SERVICE CENTER  
Agency: USDA-NRCS  
Assisted By: RACHEL Martin



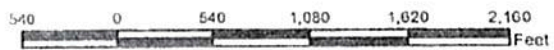
Prepared with assistance from USDA-Natural Resources Conservation Service



Legend

CTA-2016

Daviess Hyro



NEPA SEC MAP

Date: 10/11/2016

Customer(s): JERRY W OBRYAN  
 Approximate Acres: 281.9  
 Legal Description: F- 4844 T-7

Field Office: OWENSBORO SERVICE CENTER  
 Agency: USDA-NRCS  
 Assisted By: RACHEL Martin



Legend

Prepared with assistance from USDA-Natural Resources Conservation Service

- All areas are prime farmland
  - Prime farmland if drained
  - Prime farmland if drained and either protected from flooding or not frequently flooded during the growing season
  - Prime farmland if protected from flooding or not frequently flooded during the growing season
  - Farmland of statewide importance
  - Not prime farmland
- CTA-2016

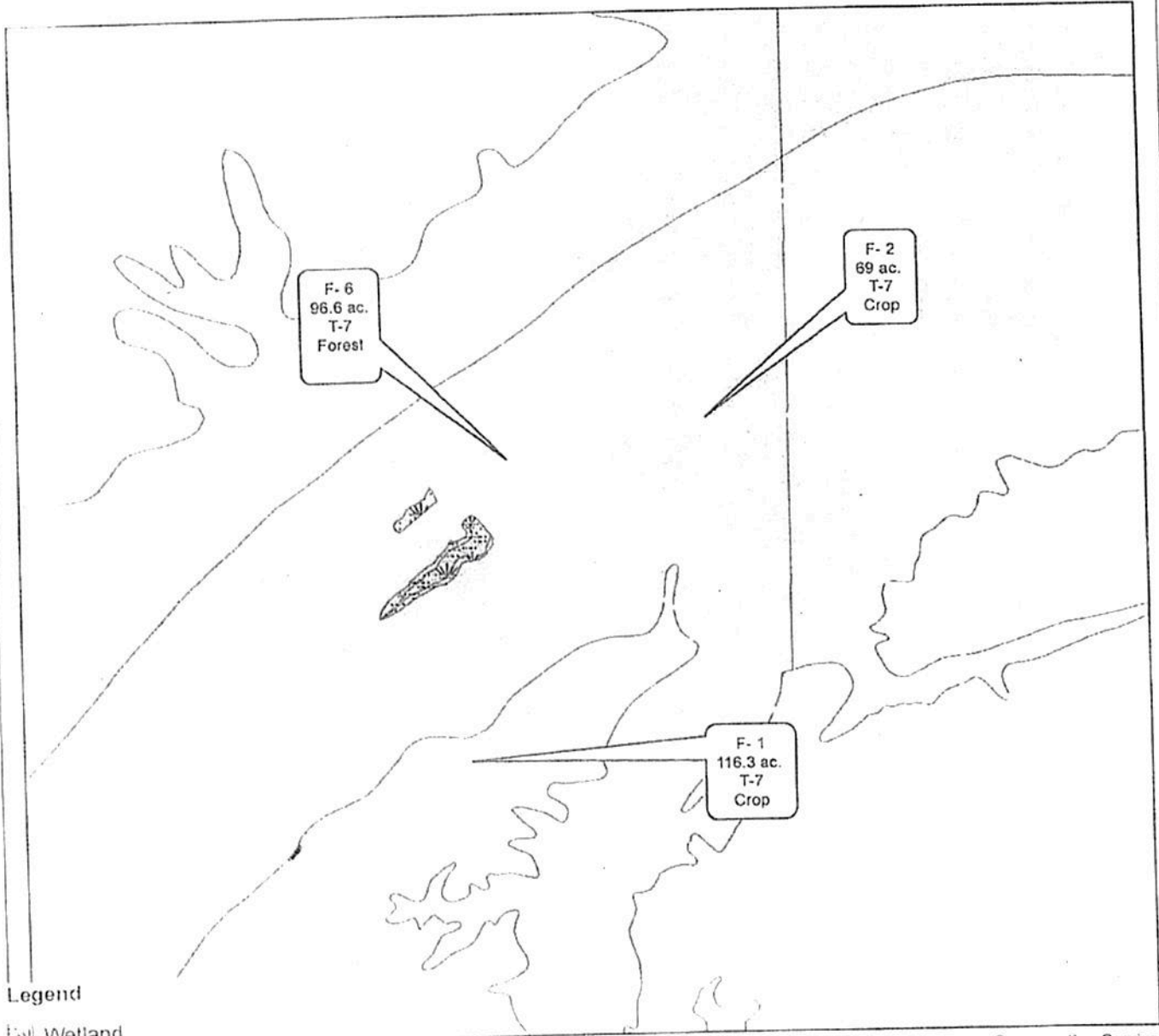


# NEPA SEC MAP

Date: 2/15/2017

Customer(s): JERRY W OBRYAN  
Approximate Acres: 281.9  
Legal Description: F- 4844 T-7

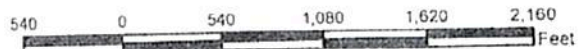
Field Office: OWENSBORO SERVICE CENTER  
Agency: USDA-NRCS  
Assisted By: RACHEL Martin



## Legend

- Wetland
- CTA-2016
- DOW\_Impaired\_Waterways\_I\_ky\_2017
- wetlands
- 100yr\_femaq3\_a\_ky
- DOW\_Impaired\_Waterbodies\_a\_ky\_2017
- DOW\_Identified\_Watersheds\_a\_ky\_2017
- Daviess Creeks 24k
- Ditch Cleanout

Prepared with assistance from USDA-Natural Resources Conservation Service



**KENTUCKY INTERAGENCY COORDINATION TOOL (KICT) -Threatened, Endangered, Candidate, Eagle and Rare Species Report**



Inquiry Date: 2017-02-09  
 Client: obryan  
 County: Daviess  
 Location: daviess co  
 Acreage: 27.1104

Practices Submitted For Review	Amount	Unit
Cover Crop (340)	185	Ac.
Grade Stabilization Structure (410)	24	No.
Grassed Waterway (412)	0	Ac.
Heavy Use Area Protection (562)	0	Ac.
Subsurface Drain (606)	5250	Ft.
Terrace (600)	3100	Ft.
Water and Sediment Control Basin (638)	3	No.
Wetland Restoration (657)	2	Ac.

**I. Potential Species And Impact Information**

The area submitted for review may contain populations or critical habitat of Indiana bat, Northern long-eared bat. It has been determined that the following adverse impacts could potentially occur as a result of installation of one or more of the conservation practices listed above:

Potential Adverse Impact
There is a potential to adversely affect federally listed by the removal or establishment of trees or tree cover.
There is a potential to adversely affect federally listed species through a resulting change in landuse or land clearing activities.

**II. Required Strategies & Effect Determination**

Based on the information submitted, the following strategies are REQUIRED to be implemented to avoid adverse effects to the species listed above. The strategies listed below must be incorporated into the specifications, conservation plan, layout and/or specifications.

Practice	Required Additional Strategies For Practice Implementation
----------	--

## KENTUCKY INTERAGENCY COORDINATION TOOL (KICT) -Threatened, Endangered, Candidate, Eagle and Rare Species Report

Water and Sediment Control Basin (638), Wetland Restoration (657)	Conduct any tree removal associated with this practice between November 15th and March 31st. Trees with a diameter at breast height (dbh) of less than 3 inches may be removed anytime during the year. No trees that exhibit exfoliating bark characteristics such as shell and shag bark hickories and white oak species; or dead and dying trees with exfoliating bark, broken tree tops, splintered or split areas; trees with cavities or hollowed areas shall be removed during this period.
Water and Sediment Control Basin (638)	Practice shall only be installed or applied to existing actively managed cropland, orchards and similar cropping systems.
Water and Sediment Control Basin (638)	Practice shall only be installed or applied in existing actively managed pasture, hayland or other planted grassland system (this includes farm headquarters areas).
Wetland Restoration (657)	The removal or adverse impacts to existing trees, shrubs or other native vegetation shall be avoided to the extent possible.

It has been determined that if all the required additional strategies listed above are implemented, the activities described are considered Not Likely to Adversely Affect (NLAA) the species or it's habitats. No further consultation under the Endangered Species Act is required with the U.S. Fish and Wildlife Service. Proceed with planning and implementation. Maintain a copy of this report as documentation of investigation according to NRCS policy. If practices are added, quantities, locations or other significant changes occur prior to installation, conservation planners must revise and resubmit this data. NOTE: If any of the required strategies listed above cannot be implemented, or the strategy specifically requires coordination or consultation with USFWS the proposed practice is determined as May Adversely Affect (MAA) as a direct or indirect result of implementation and will then require consultation with U.S. Fish and Wildlife Service. Contact the NRCS state biologist for ANY practice that is discovered to require incidental tree removal between April 1 and November 14.

### III. Management Recommendations

The following are considerations that may be used to support conservation, but are NOT REQUIRED to avoid adverse effects. When possible utilize these strategies during conservation planning of this area:

Subject	Management Recommendation
No Management Recommendations	

### IV. Potential Benefits

If all avoidance and required measures are implemented as outlined in this report, the following practices may beneficially affect species or their habitats.

Practice	Potential Benefits Provided By This Activity
Wetland Restoration (657)	This practice is considered beneficial if it provides additional habitat in the form of cover (native woody vegetation) macroinvertebrates (native forbs), or restores natural, light, thermal or hydrologic regimes to resources utilized by the species.
Wetland Restoration (657)	May be beneficial if planned and conducted in coordination with USFWS for benefit of species.

## KENTUCKY INTERAGENCY COORDINATION TOOL (KICT) -Threatened, Endangered, Candidate, Eagle and Rare Species Report

*Intended Use: This document is to be utilized for planning and documenting compliance with NRCS policy, the Endangered Species Act, the Bald and Golden Eagle Protection Act and some components of the National Environmental Policy Act. It is specific to activities in which NRCS staff is providing individual conservation technical assistance and/or funding under various Farm Bill programs; or for purposes of ranking to enroll in USDA programs. Projects that are larger in scope are not to utilize this methodology and will continue to follow NRCS policy and procedures as stated in GM Title 190, Part 410 - Compliance with NEPA and 190-VI-National Environmental Compliance Handbook (NECH).*

*Disclaimer: The information provided in this report is based on the best current data available to the U.S. Fish and Wildlife Service and the Kentucky State Nature Preserves Commission. However, errors or gaps in information and data may occur. Therefore planners should always check the site to determine the exact locations or suitability of habitat through on-site analysis. Occurrences of species or habitats could be located within the identified area of interest that is not included in this report. Responses provided by the KICT indicating the absence of species of interest may indicate that the area has not been surveyed or unknown data exists, rather than confirmation that the area lacks critical habitat or species. Verification of this information should always be performed on site. Upon discovery of protected resources or modification to original designs, further coordination may be required. If nesting eagles, Endangered, Threatened or Candidate species or their habitats are identified during implementation or construction activities, immediately cease the activity and contact your agency representative responsible for activities under the Endangered Species Act or Bald and Golden Eagle Act activities. This information is relevant only for the practices/activities identified and does not constitute formal consultation with the USFWS. The information contained herein should not be distributed to third parties without the written consent of the landowner. If you feel the information contained in this report is erroneous please contact the KICT local or state administrator.*

LAND USER Jerry O'Bryan	ADDRESS 6939 Cordsville Delaware Rd Cordsville, Ky 40301	ACREAGE 160+	LOCATION OF UNIT Cordsville P.O. 4844 W. 7
----------------------------	--	-----------------	--

CURRENT CONSERVATION OBJECTIVES

To reduce erosion as existing farm by using Best Management Practices And to clear possible trees for additional farming acreage.

LIST POSSIBLE ALTERNATIVE RESOURCE MANAGEMENT SYSTEMS THE NRCS CONSERVATIONISTS MIGHT CONSIDER WITH THE LAND USER (As objectives change record them in the notes)

NOTES OF SIGNIFICANT ASSISTANCE PROVIDED, ALTERNATIVES CONSIDERED, DECISIONS REACHED, RESOURCE MANAGEMENT SYSTEMS OR COMPONENT PRACTICES INSTALLED, AND FOLLOWUP PROVIDED MAY BE RECORDED CHRONOLOGICALLY BELOW AND ON ADDITIONAL PAGES TO PROVIDE A HISTORY OF RESOURCE CONSERVATION PLANNING AND IMPLEMENTATION ACTIVITIES WITH THE LAND USER. INCLUDE AND EVALUATION OF SIGNIFICANT AND SOCIAL, CULTURAL, ECONOMIC, AND ENVIRONMENTAL RESOURCES. (This included consideration of wetlands, flood plains, endangered species, archeological values, prime lands, etc.)

DATE	ASSISTED BY (Initials)	NOTES
4-14-16	CM	Received wetland determination from EPA.
11-20-15	CM	Completed map, sections, 30.6 x 70.0 for David Gehring.
7-15-16	CM	Wetland determination completed by David Gehring. Completed wetland letter and CPA-DAVE form for Dave to sign. Gave EPA a copy, & mailed certification to Jerry O'Bryan.
1-26-16	CM	Received certified mail receipts in mail.
8-15-16	DS	Jerry called about a CORPS letter that he received and wondered if I got one also. They have given him a cease and desist order for clearing trees off of a "W" site. I have not received a letter, but got a e-mail from Coleman Guster about him receiving the letter. Appt. scheduled with Steve Blanford and David Gehring to meet with the CORPS on Wednesday 8-17-16. Letter stated EPA was wanting to see site.
8-17-16	DS	Steve, David, Rachel, and I met with the CORPS @ Jerry's farm. CORPS included - Mike Kickells, Sam Warner, and Ryan(?) younger gentleman. It was raining, but we discussed in detail about site and proposal to discuss with EPA. CORPS said EPA out of Atlanta was coming regardless to view on site. Raining still so we did not get to see the actual site.

DATE	ASSISTED BY (Initials)	NOTES
8-24-16	DS/SB	Steve Blanford, David Gehring, Don Canary, Carlos Rhoda, and I met with CORPS - Sam Warner, Mike Ricketts, DOW Joyce Fey, and EPA - Joel Strange to discuss Wetland Violation on Jerry O'Bryens McClay Farm. We discussed Restoration on 2.6 Acres from Culvert down to Existing Wetland Area with Stream Restoration and Planting trees Around remaining 2.6 Acres. <del>Dr</del> Tim Sandefur with Wetland Services was also present - This is a Wetland Consultant that Jerry has hired to Assist with this project.
8-31-16	DS/CR/SB	Carlos, Brad Haney and I went to McClay Farm and Surveyed Stream Restoration Area and also looked at Erosion Control Sites on Rest of Adjacent fields - Diversion, Pipe Outlet, Terraces, Grassed Waterways, GSS and other BMP's were also discussed. These will all be part of our wetland Restoration Plan. 8-24-16 Cont. It was decided that NRCS <del>Dr</del> would write the restoration Plan and maintain and would deal directly with Joel Strange with EPA on this Violation.
10/6/16	DR/SB	Steve Blanford and I went and met with Jerry to discuss Restoration Plan, Stream Restoration plan and BMP (Engineering Practices) with Jerry. We Reviewed entire draft plan and what NRCS has/is preparing for the EPA. Jerry was excited and really liked the entire plan. We <sup>NRCS</sup> will make some small corrections and get a final draft ready for Jerry to Review before forwarding on to Joel Strange with EPA.
10/13/16	DS/RM	Completed Plan Maps, Conservation Plan, Cost-Estimate and other maps for Steve to Review.
10/20/16	DS/RM	Completed NEPA and finishing paperwork for Steve.



# Certified Wetland Determination

Daviess County, KY

FSA Farm No. 4844

Owner: Jerry OBryan

FSA Tract No. 7



2004 Aerial Imagery

Scale  
1:7,920  
(1"=660 ft.)



United States Department of Agriculture  
**NRCS**  
3100 N. Hwy Park Drive West  
Owensboro, KY 42303  
(270) 685-1707

Created: 7/18/2016 by David Gehring  
Soil Survey of Daviess and Hancock Counties, Kentucky  
Soil Survey Version 14 - 9/15/2015  
USDA-NRCS-NCGG 2004 NAIP Ortho M-Sid Mosaic

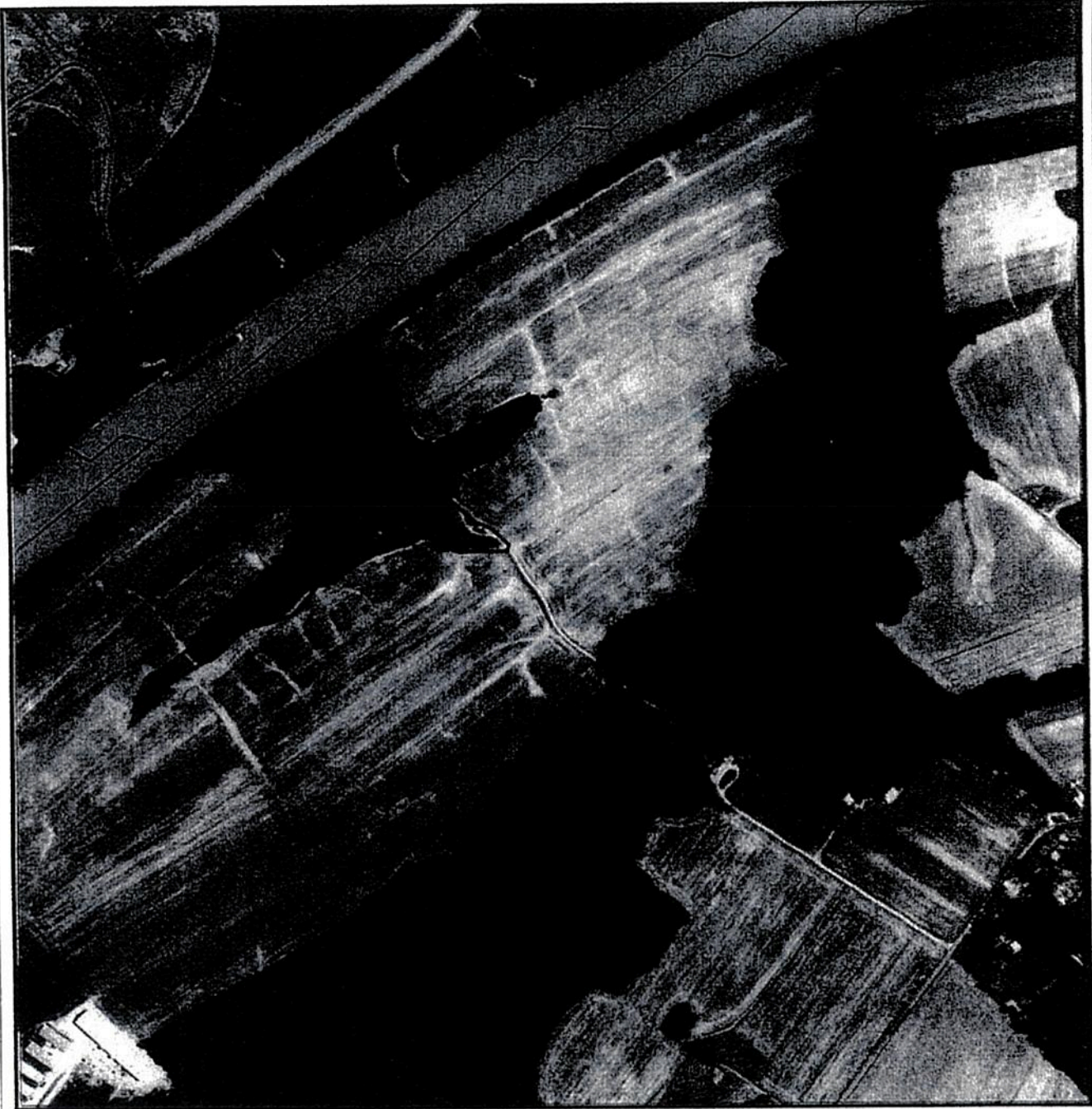
# Certified Wetland Determination

*Daviess County, KY*

FSA Farm No. 4844

Owner: Jerry OBryan

FSA Tract No. 7



2008 Aerial Imagery

Scale  
1:7,920  
(1"=660 ft)



United States Department of Agriculture  
**NRCS**  
National Conservation  
Advisory Service  
3100 Alvey Park Drive West  
Owensboro, KY 42303  
(270) 685-1707

Created: 7/18/2016 by David Gehring  
Soil Survey of Daviess and Hancock Counties, Kentucky  
Soil Survey Version 14 - 9/15/2015  
USDA-NRCS-NCGC 2008 NAIP Ortho Mosaic

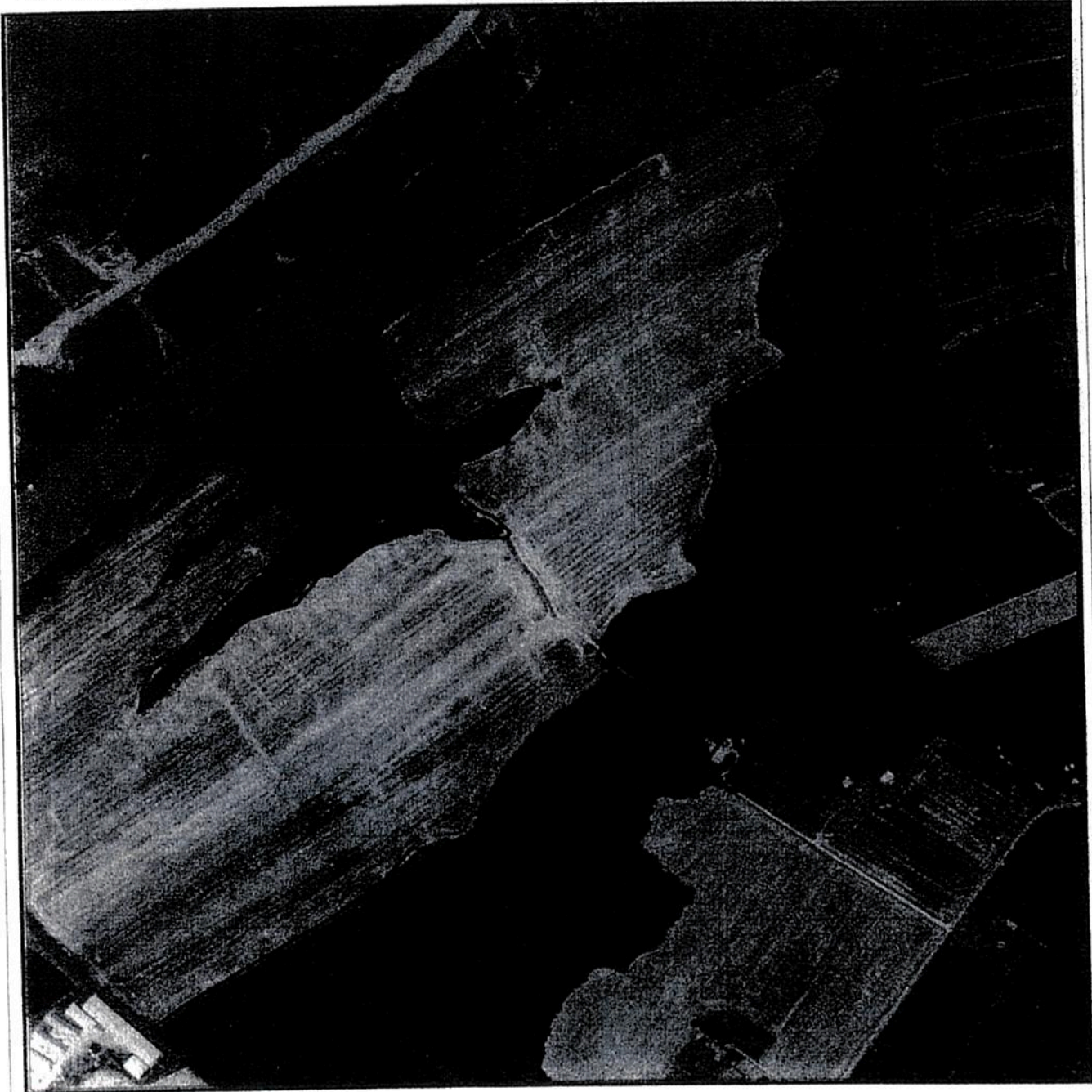
# Certified Wetland Determination

Daviess County, KY

FSA Farm No. 4844

Owner: Jerry OBryan

FSA Tract No. 7



2014 Aerial Imagery

Scale  
1:7,920  
(1"=660 ft.)



United States Department of Agriculture  
National Resources Conservation Service  
3100 Ajvay Park Drive West  
Owensboro, KY 42303  
(270) 685-1707

Created - 7/19/2016 by David Gehring  
Soil Survey of Daviess and Hancock Counties, Kentucky  
Soil Survey Version 14 - 9/15/2015  
(USDA NRCS-NGCC 2014 NAIP Ortho Mosaic)



000066

## ANALYSIS REPORT

Report Date: 06/13/2018

ATTN: Don Peters  
CAPPAD  
P.O. Box 122  
Maple Mount, KY 42356

Sample ID: 42045-42048  
Sample Date: 06/12/2018

Sample ID: 42045 Client ID: 3032 IRON MAIDEN GREEN RIVER DITCH

Test	Analysis Date/Time	By	Method	Result	Units
E.coli	06/12/2018 @ 13:20	DM	SM 9223B	587	MPN/100-mL

Sample ID: 42046 Client ID: 3048 DOBY GREEN RIVER DITCH

Test	Analysis Date/Time	By	Method	Result	Units
E.coli	06/12/2018 @ 13:20	DM	SM 9223B	299	MPN/100-mL

Sample ID: 42047 Client ID: 3012 HARDY GREEN RIVER DITCH

Test	Analysis Date/Time	By	Method	Result	Units
E.coli	06/12/2018 @ 13:20	DM	SM 9223B	> 4,840	MPN 100-mL

Sample ID: 42048 Client ID: 2101 MAIN FARM DITCH

Test	Analysis Date/Time	By	Method	Result	Units
E.coli	06/12/2018 @ 13:20	DM	SM 9223B	3,623	MPN/100-mL

Submitted By: 

CAPPAD WATER SAMPLING STATISTICS

	K	L	M	N	O	P	Q	R	S	T	U	V	W
34													
35													
36	DATE	ID #	DATE	DATE	DATE	DATE	DATE	DATE	DATE	DATE	DATE	DATE	DATE
37	CFU/ML		CFU/ML	CFU/ML	CFU/ML	CFU/ML	CFU/ML	CFU/ML	CFU/ML	CFU/ML	CFU/ML	CFU/ML	CFU/ML
38													
39		3032											
40													
41													
42		3025											
43													
44													
45		3048											
46													
47													
48													
49													
50													
51		5105											
52													
53													
54		5200											
55													
56													
57		5202											
58													
59													
60		7101											
61													
62													
63													
64													

CAPPAD WATER SAMPLING STATISTICS

	A	B	C	D	E	F	G	H	I	J
	DESCRIPTION	ID #	LATITUDE	LONGITUDE	DATE CFU/ML	DATE CFU/ML	DATE CFU/ML	DATE CFU/ML	DATE CFU/ML	DATE CFU/ML
34										
35										
36										
37										
38										
39	Iron Maiden Green River Ditch	3032	37.726588°N	87.388820°W	9/22/16 3,033	10/21/16 >4,840	11/25/16 >4,840MPN	7/7/17 >4840MPN	6/12/18 587 MPN	
40										
41										
42	Smock Creek/ Green River	3025	37.736441°N	87.372737°W	9/22/16 63					
43										
44										
45	Doby Green River Ditch	3048	37.710221°N	87.393351°W	9/22/16 1,340	10/21/16 1,438	11/25/16 126MPN	7/7/17 >4840MPN	6/12/18 299 MPN	
46										
47										
48										
49										
50										
51	Green River Upstream of Doby	5105	37.708856°N	87.393522°W	11/25/16 11MPN					
52										
53										
54	Green River 100yds. Downstream of Simpson Farm Ditch	5200	37.377667°N	87.354441°W	11/25/16 18MPN					
55										
56										
57	Green River Between Hardy and Panther Creek	5202	37.737831°N	87.353326°W	11/25/16 14MPN					
58										
59										
60	Lattus/Truck Wash Boundry Ditch	7101	37.691690°N	87.349780°W	1/25/17 3					
61										
62										
63	Trk Wash Entrance McIntrye Rd.	6101	37.415811°N	87.207091°W	3/18/2017 >9680 MPN					
64										

**CAPPAD WATER SAMPLING STATISTICS**

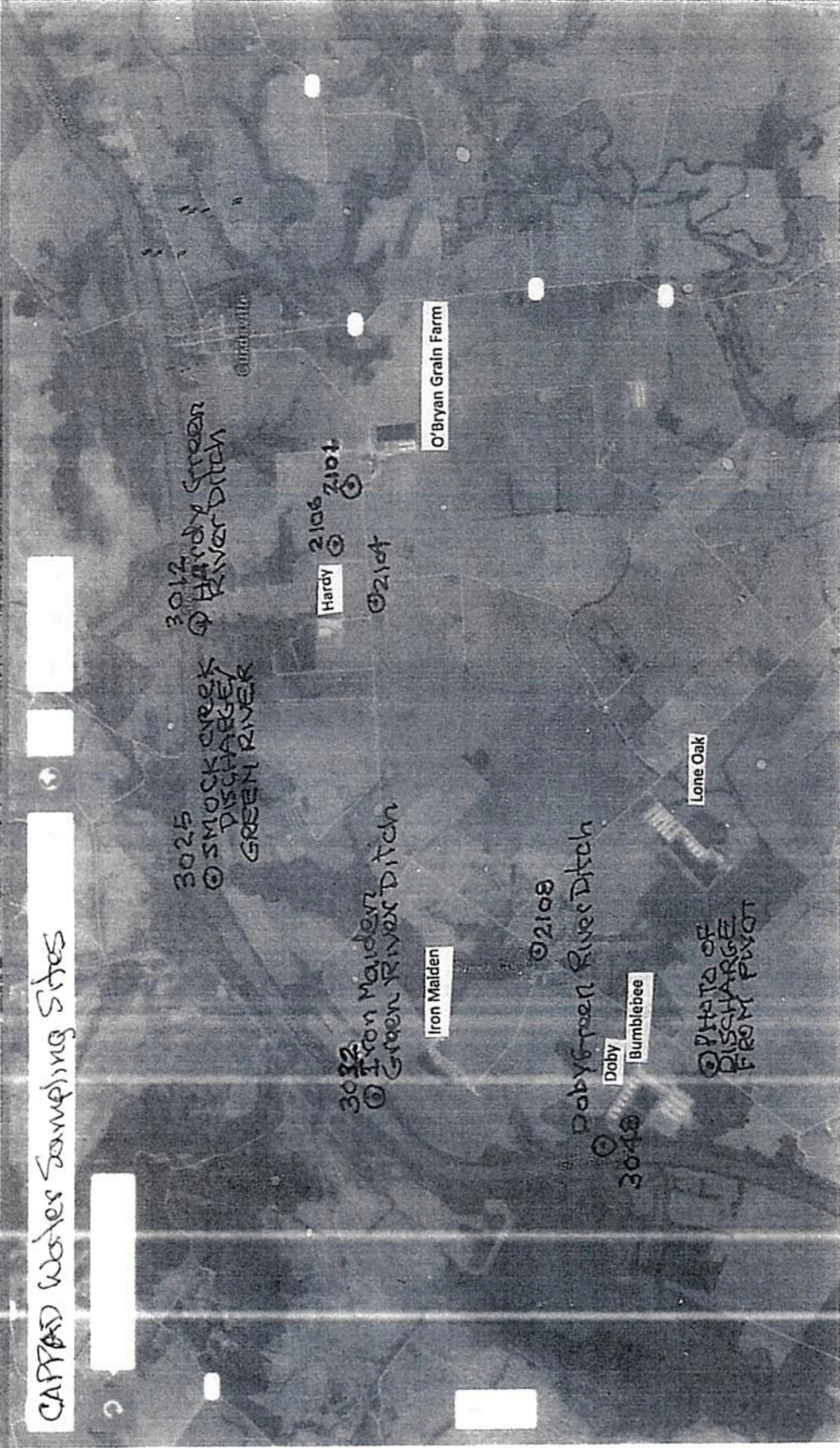
K	L	M	N	O	P	Q	R	S	T	U	V	W
1	ID #	DATE	DATE	DATE	DATE	DATE	DATE	DATE	DATE	DATE	DATE	DATE
2	CFU/ML	CFU/ML	CFU/ML	CFU/ML	CFU/ML	CFU/ML	CFU/ML	CFU/ML	CFU/ML	CFU/ML	CFU/ML	CFU/ML
3												
4	001	6/22/16	7/27/16	8/29/16	9/22/16	10/26/16	6/14/17	5/19/18				
5	1700	687	882	126	440	671	261MPN	5,475 MPN				
6												
7	002	6/22/16	7/27/16	8/29/16	9/22/16	10/26/16	6/14/17	5/19/18				
8	4406	1,300	1,960	497	59	33	365MPN	6,488 MPN				
9												
10	2101	6/14/17	9/23/17	5/19/18	6/12/18							
11	>4,840	74MPN	>4,840	24,196MPN	3,623 MPN							
12												
13	2104											
14												
15												
16	2106											
17												
18												
19	2108											
20												
21												
22	004											
23												
24												
25												
26												
27												
28												
29												
30												
31	3012											
32												
33												



CAPPAD WATER SAMPLING STATISTICS

A		B	C	D	E	F	G	H	I	J
1	DESCRIPTION	ID #	LATITUDE	LONGITUDE	DATE	DATE	DATE	DATE	DATE	DATE
2					CFU/ML	CFU/ML	CFU/ML	CFU/ML	CFU/ML	CFU/ML
3										
4	McIntyre Road Bridge-Upstream	001	37.415811°N	87.207091°W	9/30/15	11/25/15	12/30/15	1/27/16	2/24/16	3/23/16
5					512	344	434	<1	>4,840	286
6										
7	Highway 258 Bridge-Downstream	002	37.415911°N	87.207211°W	9/30/15	11/25/15	12/30/15	1/27/16	2/24/16	3/23/16
8					1,204	286	<1	<1	>4,840	223
9										
10	Main Farm Ditch	2101	37.436696°N	87.205976°W	6/22/16	7/27/16	8/29/16	9/22/16	10/26/16	11/30/16
11					>4,840	3,153	4,840	3,719	4,840	1,101
12										
13	Schadler Driveway Ditch	2104	37.436426°N	87.210856°W	6/22/16	7/27/16	2/8/17			
14					>2,420	382	1			
15										
16	Payne Farm Culvert	2106	37.437585°N	87.209275°W	6/22/16	5/19/18				
17					687	3,654 MPN				
18										
19	Smock Creek Bridge	2108	37.429908°N	87.227386°W	6/22/16	5/19/18				
20					488	2,851 MPN				
21										
22	Highway 258/56 Hog Truck	004			9/29/15	12/30/15	3/23/16			
23	Turnover				>2,420	519	12			
24										
25										
26										
27										
28										
29										
30										
31	Hardy Green River Ditch	3012	37.377667°N	87.354441°W	9/22/16	10/21/16	11/25/16	7/7/17	6/12/18	
32					1,445	1,137	83MPN	>4,840MPN	>4,840MPN	
33										

CAPPAD Water Sampling Sites



3012  
Hardy Green  
River Ditch

Hardy  
2106  
2107

O'Bryan Grain Farm

3025  
Smock Creek  
Discharge  
Green River

3022  
Iron Maiden  
Green River Ditch

Iron Maiden

3048  
Doby  
Bumblebee  
Doby Green River Ditch

Doby  
Bumblebee

Lone Oak

PHOTO OF  
DISCHARGE  
FROM PIVOT

Simpson Farm



Overview



Legend

- Consolidation Line
- Parcel Numbers
- Parcel Labels
- Roads
- <all other values>
- ALLEY
- BYPASS; HWY; PK
- USHY
- CITY ST; CITY\_ST
- COUNTY RD;
- COUNTY ROAD
- PRIVATE RD;
- PRIVATEST
- RAMP
- Parcels

Date created: 6/6/2018  
 Last Data Uploaded: 6/1/2018 6:21:52 PM  
 Developed by



representatives have visited the previously permitted site with you to discuss regulatory requirements and discuss permitting options. Additionally, a permit application for the work at this current site was received by my staff on June 29, 2016, indicating knowledge of the Corps' regulatory program. As a result of these previous encounters regarding our program, you are considered a willful and flagrant violator.

This letter will serve as a formal Cease-and-Desist Order specifically prohibiting any further activity involving the placement of excavated or fill material below the Ordinary High Water (OHW) elevation of the tributaries to the Green River or within their abutting and adjacent wetlands or other "waters of the U.S." on the subject tract. Such activity may not resume unless and until the work is authorized in a DA permit.

In accordance with existing regulations, a report of this unauthorized activity will be prepared. This report will serve as a basis for determining the appropriate administrative and/or legal action to be taken in this matter. Any information, particularly prior approvals or disclaimers, which might bear on our evaluation and decision, should be submitted immediately. The preparation of the report and findings on this case will consider any information or comments received within **30 days** from the date of this letter.

A copy of this letter this will be sent to the appropriate coordinating agencies (see enclosure for addresses). If any questions arise concerning this matter, please contact (b) (6) by writing to the above address, ATTN: CELRL-OPF-E or by calling (b) (6) at (b) (6). Any correspondence on this matter should refer to our ID No. LRL-2016-681-sew.

Sincerely,

Original Signed

(b) (6)  
Chief, Regulatory Branch  
Operations Division

JUL 19 2016

Enclosure

(b) (6) PF-W/rb/C&D Violator.docx (b) (6)  
/OPF-W (b) (6)  
PF (b) (6)

RECORD COPY

CERTIFIED MAIL  
RETURN RECEIPT REQUESTED

U.S. Postal Service™  
**CERTIFIED MAIL® RECEIPT**  
Domestic Mail Only

For delivery information, visit our website at [www.usps.com](http://www.usps.com)®.

**OFFICIAL USE**

Certified Mail Fee	\$
Extra Services & Fees (check box, add fee as appropriate)	
<input type="checkbox"/> Return Receipt (hardcopy)	\$
<input type="checkbox"/> Return Receipt (electronic)	\$
<input type="checkbox"/> Certified Mail Restricted Delivery	\$
<input type="checkbox"/> Adult Signature Required	\$
<input type="checkbox"/> Adult Signature Restricted Delivery	\$
Postage	\$
Total Postage and Fees	\$

Postmark  
Here

Sent To	Mr. Jerry O'Bryan
Street and Apt. No., or PO Box No.	6939 Curdsville Delaware Road
City, State, ZIP+4®	Owensboro KY 42301

PS Form 3800, April 2015 PSN 7530-02-003-9037 See Reverse for Instructions

7015 1520 0020 1385 1372  
ELECTRONIC RECEIPT

JUL 15 2000

Operations Division  
Regulatory Branch (MCE)  
ID No. LRL-2016-681-sew

Mr. Jerry O'Bryan  
O'Bryan Grain Farms, Inc.  
6939 Curdsville Delaware Road  
Owensboro, Kentucky 42301

CEASE AND DESIST ORDER

Dear Mr. O'Bryan:

During a recent inspection of your property in Daviess County, Kentucky, by Corps of Engineers' personnel, it was found that certain work had been performed in adjacent wetlands and tributaries flowing into the Green River, a Traditionally Navigable "water of the United States (U.S.)." A discharge of dredged and fill material had occurred within two unnamed tributaries and in wetlands on your property located at 37.729998° North Latitude/-87.382107° West Longitude. These discharges have occurred as a result of mechanized land clearing activities.

The Corps of Engineers exercises regulatory jurisdiction over "waters of the U.S." under the Clean Water Act (CWA). The Green River, its tributaries, and its abutting and adjacent wetlands are considered to be "waters of the U.S." as defined in 33 CFR Part 328. It is unlawful under Section 301 of this Act (33 USC 1311) to place dredged or fill material into "waters of the U.S.", without prior authorization. Normally, the authorization is in the form of a Department of the Army (DA) permit issued in accordance with the provisions of Section 404 of the CWA (33 USC 1344).

According to our records, no DA permit has been issued authorizing the work referenced above. Therefore, the work which has been done, constitutes a violation of Sections 301 and 404 of the CWA. This violation may subject you to civil action pursuant to Section 309(d) of the CWA (33 USC 1319(d)) with possible penalties not to exceed \$37,500.00 (as adjusted for inflation) per day for each violation; additionally, you may be subject to criminal action.

A search of our database shows that you have past knowledge of the Corps' regulatory program due to recent permitting at a nearby location in Daviess County, Kentucky within the past year. Also, Corps'

Ms. Patricia Bullock:

June 15, 2018

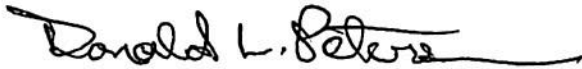
Page 6

nothing was said about fixing the situation physically. After reading the DOW inspection report and noting the existence of the dam, CAPPAD notified USACE of the situation. Mr. Sam Werner, with the Newburgh, IN Office of the Corps, inspected the site and noted that it was a dam blocking the blue-line stream in question. In the year following, USACE has been negotiating with the Owner as to how best restore? the site. Transforming the dam into a weir has been proposed.

WHY is the illegally constructed dam on the Hardy Farm being treated differently than the destruction of the Wetlands on the Simpson/McKay Farm? It is a clear violation of the Clean Water Act. WHY hasn't the Owner been directed to remove the dam and restore the stream bed to its original condition? CAPPAD herein requests that the Hardy Farm dam restoration be included in the Simpson/McKay USEPA CAFO resolution.

Isn't it about time that each of these individual infractions be treated as one, and the magnitude of the Owner's indifference to environmental regulations be recognized? Isn't it about time that the indifference of the DOW toward exercising oversight in this arena and its lack of adhering to its own regulations be recognized, as well? Isn't it about time that the USEPA take steps to remedy this situation?

Sincerely,



Donald L. Peters  
President  
CAPPAD, INC.

Attachments

cc: Mr. Joel Strange  
Mr. Scott Gordon  
Mr. Humberto Guzman  
Mr. Joe Don  
Mr. Mike Ricketts  
Mr. Sam Werner  
File

Ms. Patricia Bullock:

June 15, 2018

Page 5

Watershed Watch laboratory report of a water sample taken at the Main/Grain Farm ditch on May 19, 2018, reads an amazing 24,196 MPN/100ml per sample - a reading which is almost off the bacterial pollution scale.

- C. As has been noted previously, the DOW has shown no interest in exercising oversight of the Owner's operations and has in fact, facilitated and covered up his ignoring of environmental regulations. For that reason, CAPPAD requests that USEPA exercise oversight of the SEP construction effort and operations thereafter, making periodic and unannounced inspections of the site to ensure compliance with the USEPA CAFO.
- D. For the same reason, USEPA CAFO should also stipulate that should the Owner request permits for the construction and operation of hog barns and a lagoon on the property not covered by the SEP, that such requests must be made to USEPA and such approval would only go forward under an NPDES permit.
- E. CAPPAD also requests, that as part of the USEPA CAFO, USEPA conduct an unannounced visit to the previously identified Owner's farms and verify the number of hogs he is maintaining at each, and check whether those numbers are no more than he is allowed to have according to his permits; if the number exceeds that permitted, CAPPAD requests that USEPA require the owner to apply for new NPDES permits for those farms and that he be required to reduce his herd to comply with the originally permitted number of hogs or enlarge the capacity of his lagoons to the design requirement for the number of hogs he has and add the appropriate acreage to allow land application of the effluent generated.

The permit applications for the Owner's CAFO's issued by the DOW, state the Owner will maintain no more than the following number of hogs at each of the CAFO's and has the stipulated acreage available to land apply the effluent generated:

• Doby/Bumblebee Farm -	4,000 hogs;	80 acres
• Iron Maiden Farm -	13,000 hogs	208 acres
• Hardy Farm -	7,470 hogs	256.3 acres
• Main/Feed Farm -	1,700 hogs	250 acres
• Lone Oak Farm -	18,000 hogs	366 acres

- F. The USEPA CAFO was preceded by a directive to restore the Wetlands, the 2.1 acres, that were destroyed by the Owner. A restoration plan was executed and the land restored. Trees that had been cut down were removed, the terrain was adjusted and new plantings were put in place. This was required before addressing the issue of penalties. Restoration to as close to the land's original state was not negotiable and was required to be completed before discussing the penalty phase. In August 2017, the DOW finished its "comprehensive" inspection report of the Owner's CAFO's. In its comments on the status of the Hardy Farm dam (Dow did not identify it as a dam, but the photos taken by the DOW plainly show that it is) the DOW recommended to the Owner that he apply for a Stream Construction Permit to remedy the situation. A paper work fix was offered and

Ms. Patricia Bullock:

June 15, 2018

Page 4

argument, or adjudicating any issue in this matter, and in accordance with 40 C.F.R. § 22.13(b), this Administrative Consent Agreement and Final Penalty Order (CAFO) will simultaneously commence and conclude this matter.”

CAPPAD takes issue with the manner of settlement identified above. Though it may be less costly for USEPA to resolve the issue without a formal hearing, and it has taken two years to reach this point, it prompts the Owner to regard his settlement as merely the cost of doing business and will not deter him from further abuse. CAPPAD believes that, at some point, particularly when USEPA has substantive evidence of a violation, a formal hearing should be held to enforce the fact that this type of behavior is not acceptable. CAPPAD believes that this case should have been pursued with a formal hearing held to resolve it. This settlement does not serve as a deterrent.

CAPPAD wishes to present the following recommendations in order to finalize the USEPA CAFO and to deter the Owner from engaging in any further irresponsible activities, by making him consider the cost of this behavior. The State has not chosen to hold him responsible for his actions, and USEPA has the opportunity to curb this behavior by being firm in outlining what is expected of him in this case, and hopefully, in any of his future endeavors.

- A. Reference the Supplemental Environmental Project (SEP), the Conservation Plan Map should be updated to reflect the present Daviess County PVA Owner's land holdings, which for the Simpson/McKay Farm are presently 317 acres in total; 281.9 acres are to be devoted to the SEP. The present holdings represent the addition of a property adjacent to Curdsville-Delaware Road, and are included in Plot 002-00-00-008-00-000, titled under O'Bryan Land LLC in the Daviess County PVA database. This represents the property not as it existed in 2016, when the destruction of the Wetlands occurred, but the property as it probably will exist at the time the USEPA CAFO will be executed and of course, as it exists today. This is important, for if the Owner requests permits to build hog barns and a lagoon on the property not included in the SEP, it would most likely involve the land added to the Plot since 2016. He presently has built housing on this property for his farm employees.
- B. The USEPA CAFO should include verbiage to exclude the possibility of the Owner constructing and operating center pivots and/or any other type of agricultural irrigation system on the lands included in the SEP. Even if he were not allowed to build a lagoon on the Simpson/McKay Farm, he could easily cross connect the irrigation system to the Iron Maiden Farm lagoon, and indiscriminately discharge effluent onto the SEP property and ultimately into the Green River. He has cross connected the lagoons on his other farms, so as to spray irrigate most of his own cropland and under contract the cropland of adjacent farms, Knott Farms for example. Water samples taken from the point source discharges at the Main/Grain Farm ditch (3,623 MPN/100ml) and the Hardy Farm ditch at the Green River (>4,840 MPN/100ml) , as recently as June 12, 2018, shows the Owner's contempt for adhering to environmental regulations. Photos of the Hardy Farm Ditch point source discharging into the Green River on June 12, 2018, showing a continual flow of foam into the River, are attached. A recently made available Kentucky



Ms. Patricia Bullock:

June 15, 2018

Page 3

2. Much like Paragraph 1, above, the Owner has spray irrigated his cropland adjacent to the Main Feed Farm with a center pivot, that by its orientation has directly dumped effluent into a ditch that crosses under Curdsville-Delaware Road near Curdsville, and pollutes the land of an adjacent farm. The Owner has built bridges across the ditch on his property to facilitate the pivot crossing over the ditch and flooding it on a regular basis. The Owner sprays at night, and on weekends, when Kentucky Air Quality and/or DOW personnel cannot respond to calls requesting they observe the infractions. Sampling of the water flowing onto the adjacent farm's property is recorded in the above referenced matrix, and shows readings of greater than 4,840 CFU/100ml of sample taken for several months in a row. This information was also passed on to Mr. Goodmann at the March 2017 meeting noted above. He declared that this activity was trespass and should be stopped. Again, no remedial action appears to have been taken by the DOW to prevent this from occurring on a regular basis, not only when the State cannot respond, but when it is raining and when there is no crop in the field during the winter months.

It should be noted that the Owner has over the years added barns to his CAFO's and has more hogs than what he was originally permitted to have; he has not increased the volume of the lagoons that service the additional barns and is forced to spray and/or discharge more frequently than normal because of the excess effluent generated. The DOW was notified of this situation at the March meeting, but refused to address the issue during the "comprehensive" inspection, identified above.

3. This inspection revealed that the Owner had dammed a blue-line stream on the Hardy Farm near its lagoon. This backs water up over the Curdsville-Delaware Road during heavy rains and floods the land of an adjacent farm. The Owner claims that the obstruction was put in place to prevent erosion of the banks of the blue-line stream, as quoted from the commentary in the DOW "comprehensive" inspection report. This inspection report, suggests that the Owner obtain a Stream Construction Permit from the State to cover the damming activity, but says nothing about the Owner removing the dam, and nothing about how illogical it is to dam a stream in order to prevent erosion of its banks. CAPPAD reported this infraction to USACE and it is presently under review by the Newburgh, IN Office of the Corps.

These are just a few examples of the Owner's behavior - a behavior which suggests he will do anything he desires, and claim innocence when caught - totally ignoring Federal, and State laws and regulations. The list of events in which he has participated in this manner is long and has been sustained over a period of many years, hence, he can claim the title of not only being a "willful and flagrant violator", but a habitual violator, as well.

Section IV of the Consent Agreement states:

#### **“IV. Stipulations and Findings**

23. Complainant and Respondent have conferred for the purpose of settlement under 40C.F.R. § 22.18 and desire to resolve this matter and settle the allegations described herein without a formal hearing. Therefore, without gathering any evidence or testimony, making of any

Ms. Patricia Bullock:

June 15, 2018

Page 2

in disregarding both Federal and State environmental regulations, one would have to label him, not only a "willful and flagrant violator", but a habitual violator, as well. For that reason, CAPPAD wishes to point out some of these infractions, which the State has both ignored and facilitated, and which may not have come to the proper attention of the relevant Federal Agencies, but which should be considered in remediating the Simpson/McKay Farm Wetlands event.

In identifying the Owner's previous infractions, and the State's response or non-response, as may have been the case, it is not my purpose to try to re-adjudicate these events, but instead to establish a pattern of behavior, which I believe should be considered in resolving the issues surrounding the purposeful destruction of the Wetlands on the Simpson/McKay Farm. Without considering this pattern of behavior, this USEPA CAFO may encourage further deleterious activities on the Owner's part, rather than deterring them.

Listed below are a few of the Owner's activities and the State's response, which have been harmful to the environment and which have impacted our Community, and which I believe should be given consideration in finalizing this USEPA CAFO:

1. Point source discharges of E.Coli into the Green River from the Owner's Doby/Bumblebee, Iron Maiden and Hardy Farms for a period of years, reading greater than 4,840 CFU/100ml per sample and in violation of the Ambient Water Rule. A matrix of data is attached identifying the samples taken and their locations, as well as a map showing those locations. The samples were taken by a Kentucky licensed Water Sampler and Microbiologist with 41 years experience and analyzed in a Kentucky licensed environmental laboratory, in accordance with CAPPAD's QAPP, which follows the USEPA Guideline for QAPP's. This same information was formally presented to Mr. Goodmann, Director of the DOW at a meeting in March of 2017, with Mr. Keith Scott, Chief of Staff to the Commissioner, Kentucky Department of Agriculture, and Mr. Biff Baker, Project Manager, Governor's Committee on Agricultural Policy being present. It has subsequently been ignored by the DOW and it does not appear that any action has been taken by the DOW to eliminate these discharges. In fact, after CAPPAD requested the DOW rescind the KNDOP's governing the management of the animal waste lagoons at these farms, and issue KPDES permits instead, the DOW compensated for its inaction by performing, what it called a "comprehensive" inspection of these farms, where it accepted the hog counts given it by the Owner without verifying the validity of the counts; it accepted soil sample data from the farms' irrigated fields presented by the Owner without verifying the validity of the data, nor taking any samples itself; the DOW did not take any water or air quality samples itself, and thereafter declared it saw no evidence of effluent being discharged nor of the waters of the Commonwealth being polluted, in its final report. One has to ask, how, without the Owner discharging in front of the inspectors, one can make the statement that they saw no evidence of the waters of the Commonwealth being polluted without taking samples themselves and when they had the evidence in their possession in the form of the sample data presented to them by CAPPAD, several months earlier. The "comprehensive" inspection is little more than a sham inspection and a coverup of the Owner's infractions and the DOW's failure to act.

CAPPAD, INC.  
P.O. Box 122  
Maple Mount, KY 42356

June 15, 2018

Ms. Patricia Bullock  
Regional Hearing Clerk  
USEPA Region 4  
Atlanta Federal Center  
61 Forsyth Street SW  
Atlanta, Georgia 30303

Public Notice No: KY180001  
Docket No: CWA-04-2018-5501(b)

Dear Ms. Patricia Bullock:

This letter is written in response to the Public Notice referenced above and represents the views of the people making up "Community Against Pig Pollution and Disease, Inc." (CAPPAD), a Kentucky non-profit, tax exempt, educational and charitable corporation. CAPPAD has a direct interest in the outcome of this USEPA Consent Agreement and Final Order (USEPA CAFO), as it's membership has been harmed by the operations of the Owner of the Simpson Farm, as the property in question is known locally. US Army Corps of Engineers (USACE) communications refer to it as the McKay Farm.

We wish to first draw attention to the contents of the Cease and Desist Letter addressed to Mr. Jerry O'Bryan, the Owner, by the USACE and delivered to him by Certified Mail on July 15, 2016. In it, the following statement is made, "A search of our database shows that you have past knowledge of the Corps' regulatory program due to recent permitting at a nearby location in Daviess County, Kentucky within the past year. Also, Corps' representatives have visited the previously permitted site with you to discuss regulatory requirements and discuss permitting options. Additionally, a permit application for the work at this current site was received by my staff on June 29, 2016, indicating knowledge of the Corps' regulatory program. As a result of these previous encounters regarding our program, you are considered a willful and flagrant violator."

Unfortunately, both the Kentucky Energy and Environment Cabinet and its Division of Water (DOW), as well as the USEPA have not looked at the Owner's infractions as a continuum of activities, but instead have considered them as individual events, each to be settled and forgotten. This event, the destruction of Wetlands on the Simpson/McKay Farm, is the first time that the Owner's previous actions, in destroying Wetlands at the Mount St. Joseph Hog Truck Washing Facility (Truck Wash) have been referred to in adjudicating the subsequent event. As novel as this is, it really doesn't go far enough, because if one looks at the record of the Owner,

HEARING CLERK  
2018 JUN 19 PM 1:15



# Public Notice: Proposed Consent Agreement and Final Order (CAFO), Docket No.:CWA-04-2018-5501(b)

## Summary

Publish Date: 05/30/2018

The U. S. Environmental Protection, Region 4 proposes to issue a proposed CAFO that assesses an administrative penalty of \$3,346 to Mr. Jerry O'Bryan (Respondent), under the authority of Section 309(g)(2)(A) of the Clean Water Act (CWA), 33 U.S.C. § 1319(g)(2)(A). In addition, Mr. O'Bryan has proposed a Supplemental Environmental Project which 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 that will significantly reduce the sediment, nutrient, and pesticide runoff from the farm to the Green River. Any person wishing to comment on any aspect of the proposed action should do so within the comment period from May 30, 2018 to June 29, 2018.

## Applicant or Respondent

How to Comment
<b>Comments accepted through:</b> 06/29/2018
<b>How to Comment</b>
Mr. Joel Strange U.S. EPA, Atlanta Federal Center 61 Forsyth Street, S.W. Atlanta, Georgia, 30303 <a href="mailto:strange.joel@epa.gov">strange.joel@epa.gov</a>

South Carolina, Tennessee and 6 Tribes

## Key Issues

- [Hurricane Preparedness](#)
- [Hurricane Response](#)
- [Hurricane Irma Response](#)
- [Grenada Manufacturing, LLC, Facility Cleanup and Environmental Study](#)  
in Eastern Heights Neighborhood, Grenada, MS
- [EPA's Response to the Duke Energy Coal Ash Spill in Eden, NC](#)
- [Florida Everglades Restoration](#)
- [EJSCREEN: Environmental Justice Screening and Mapping Tool](#)
- [North Birmingham Environmental Collaboration Project](#)

## Public Notices

- [Public Notice: Proposed Consent Agreement and Final Order \(CAFO\), Docket No.:CWA-04-2018-5501\(b\) - Comments due by June 29, 2018](#)
- [Public Notice: Federal Register – Final Permit Issuance for](#)

*Offshore Oil & Gas Activities in the Eastern Gulf of Mexico*



Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, Tennessee and 6 Tribes

## Related Information

- [Contact Region 4](#)
- [404-562-9900](#) or in the Region 4 states, 800-241-1754
- [Organization chart](#)
- [Regional Administrator](#)
- [Region 4 Laboratory](#)
- [FOIA Requests](#)
- [Recycling Program](#)
- [Topics A to Z](#)

penalty assessment, should contact the Regional Hearing Clerk identified above. Unless otherwise noted, the public record for this action is located in the EPA Regional Office at 61 Forsyth Street, S.W., Atlanta, Georgia, and the file will be open for public inspection between 9:00 a.m. and 4:00 p.m., Monday through Friday.

**PUBLIC NOTICE**  
**U. S. ENVIRONMENTAL PROTECTION AGENCY, REGION 4**  
**WATER PROTECTION DIVISION**  
**CLEAN WATER ENFORCEMENT BRANCH**  
**ATLANTA FEDERAL CENTER**  
**61 FORSYTH STREET, S.W.**  
**ATLANTA, GEORGIA 30303**

**DATE: May 30, 2018**

**Notice of Proposed Issuance of  
Consent Agreement and Final Order**

The U.S. Environmental Protection Agency (EPA), Region 4, proposes to issue a Consent Agreement and Final Order (CAFO), Docket No. CWA-04-2018-5501(b), that assesses an administrative penalty of \$3,346 to Mr. Jerry O'Bryan (Respondent), under the authority of Section 309(g)(2)(A) of the Clean Water Act (CWA), 33 U.S.C. § 1319(g)(2)(A). In addition, Mr. O'Bryan has proposed a Supplemental Environmental Project which 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 that will significantly reduce the sediment, nutrient, and pesticide runoff from the farm to the Green River.

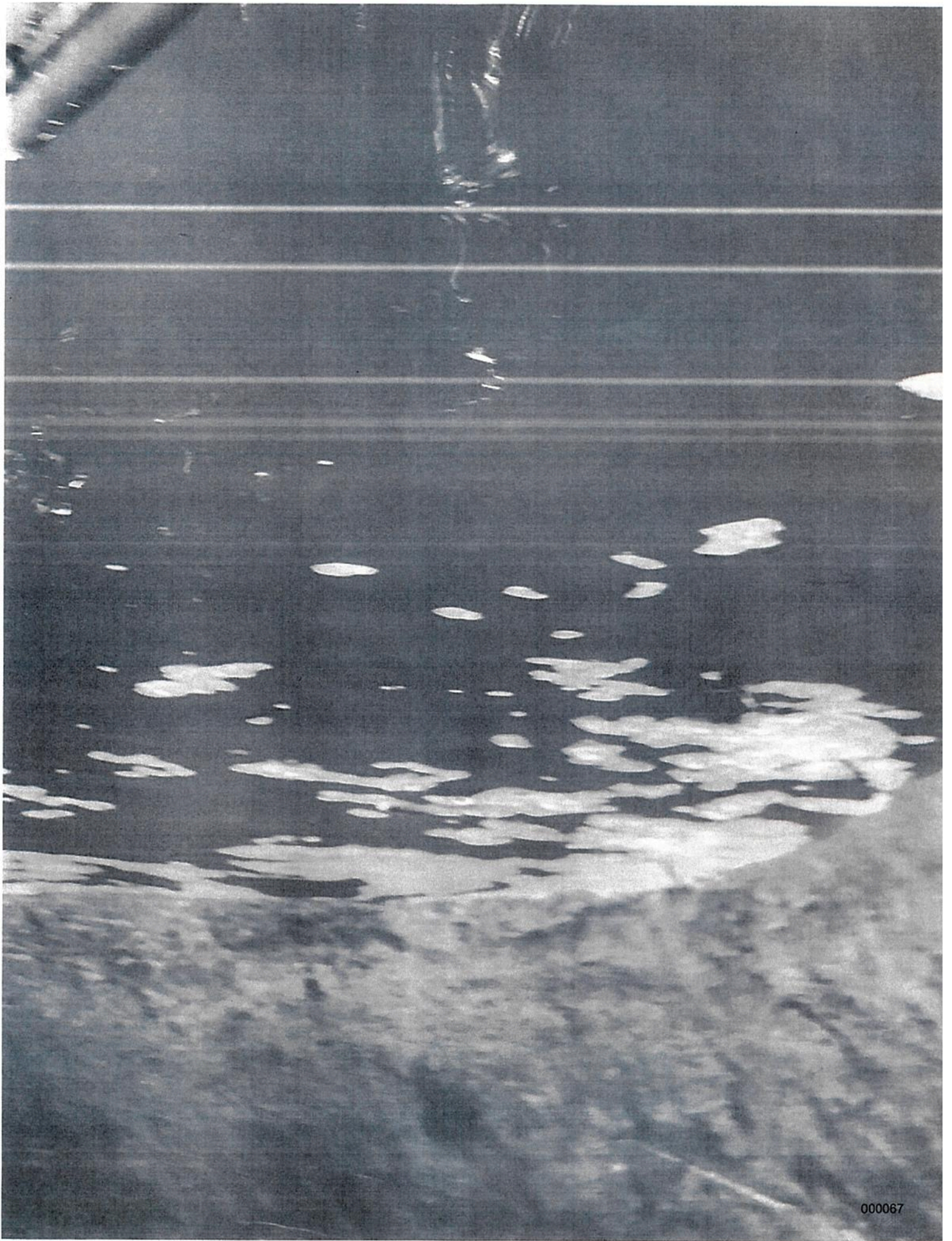
EPA alleges the Respondent has made unauthorized discharges of dredged and/or fill material into waters of the United States in violation of Section 301 of the Clean Water Act, 33 U.S.C. Section 1311. The Respondent's unauthorized activity impacted approximately 2.1 acres of forested wetlands adjacent to the Green River and approximately 800 linear feet of an unnamed tributary to the Green River. The Green River is a navigable water of the United States. The unauthorized activity is located near latitude 37.731169° N and longitude -87.382159° W, adjacent to the Green River near the town of Curdsville, Daviess County, Kentucky.

Any person wishing to comment on any aspect of the proposed CAFO Docket No. CWA-04-2016-5501(b) must submit such comments in writing to the Regional Hearing Clerk at U.S. EPA, Atlanta Federal Center, 61 Forsyth Street, S.W., Atlanta, Georgia, 30303. Comments must be submitted within 30 days of the date of this notice. Please include the Public Notice Number and the Docket Number with any submitted comments.

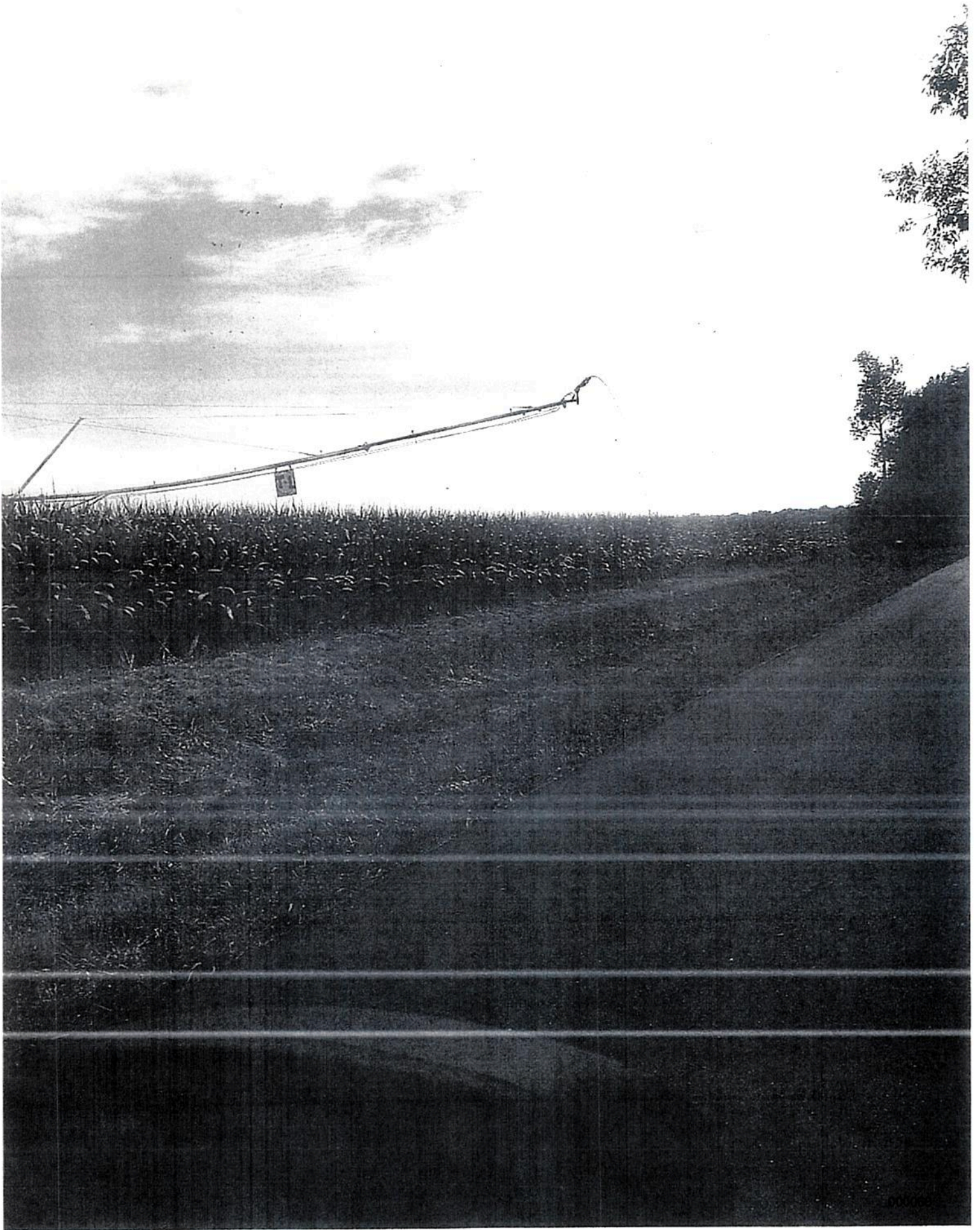
More information about this enforcement action can be found on the EPA Region 4 Website at: [http://www.epa.gov/region4/water/wpeb/npdes\\_states.html](http://www.epa.gov/region4/water/wpeb/npdes_states.html).

Because this matters involves a CWA Section 309(g) proceeding that is proposed to be simultaneously commenced and settled under 40 C.F.R. § 22.13(b), this matter will not be resolved or settled until ten days after the close of the public comment period in accordance with 40 C.F.R. § 22.45 (b) and (c).

**FOR FURTHER INFORMATION:** Persons wishing to receive a copy of the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits*, 40 C.F.R. Part 22, which apply to this matter, or comment upon the proposed









Concrete placed in unnamed blue line stream



## ANALYSIS REPORT

Report Date: 09/04/2017

ATTN: Don Peters  
CAPPAD  
P.O. Box 122  
Maple Mount, KY 42356

Sample ID: 38655  
Sample Date: 08/23/2017

Sample ID: 38655    Client ID: 3055    *Water Sample From Just Below Dam - Henchy Crw*

Test	Analysis Date/Time	By	Method	Result	Units
Leofl	08/23/2017 @ 11:45	DM	SM 9223B	4,840	MPN/100-ml

Submitted By: \_\_\_\_\_

*[Handwritten Signature]*

**Donald**

---

**From:** "Donald" <dlp0297@exede.net>  
**Date:** Monday, September 18, 2017 10:36 AM  
**To:** "Donald.Peters" <dlp0297@exede.net>  
**Subject:** Fw: Receipt of Jerry O'Bryan Farms/Piggy Express LLC Inspection Reports

**From:** Gabbard, Tom (EEC)

**Sent:** Wednesday, September 13, 2017 1:29 PM  
**To:** dlp0297@exede.net  
**Cc:** Goodmann, Peter (EEC) ; Quarles, Jackie (EEC) ; Gaddis, Sarah (EEC) ; Baker, William (EEC) ; McLeary, Shannon (EEC)  
**Subject:** FW: Receipt of Jerry O'Bryan Farms/Piggy Express LLC Inspection Reports

Mr. Peters:

We have reviewed your response regarding inspections conducted at the O'Bryan swine operations and truck wash facility. Please note our responses in blue font below.

Tom Gabbard, Assistant Director  
Division of Water  
300 Sower Blvd.  
Frankfort, Kentucky 40601  
Direct Phone (502) 782-6952  
DOW Phone (502) 564-3410

**From:** Donald [<mailto:dlp0297@exede.net>]  
**Sent:** Wednesday, August 23, 2017 4:14 PM  
**To:** Gabbard, Tom (EEC) <[Tom.Gabbard@ky.gov](mailto:Tom.Gabbard@ky.gov)>  
**Subject:** Fw: Receipt of Jerry O'Bryan Farms/Piggy Express LLC Inspection Reports

**Subject:** Receipt of Jerry O'Bryan Farms Inspection Reports

Dear Mr. Gabbard:

CAPPAD, INC. has received the subject Reports sent from the DOW Paducah Office and wishes to thank you for having them sent.

We are not certain that we have all the documents you intended to send. Though there are individual Reports written for all the Facilities, two, the Main Farm and Lone Oak Farm, do not

include Letters of Warning, though they have deficiencies. In addition, the Summary Letter identifies all but Lone Oak as having deficiencies, yet the individual Report for Lone Oak, does not appear on that letter. Is that of any significance? **No**

If, in fact, Letters of Warning were written for the Main Farm and Lone Oak Farm, we would appreciate obtaining copies of them. **No LOW's were issued.**

Do I understand correctly, that the type of inspection, i.e., identified in the individual Reports as "AgNonSample", means that the DOW did not do any sampling of water, soil, air, etc. for purposes of the Inspection? **Yes, no sampling was performed.**

The individual Reports identify actual hog counts at each of the Farms, as stated by Mr. O'Bryan. Did the DOW inspectors confirm those counts in any way themselves, i.e., sample counts, visual inspection of the number of hogs in each barn, etc.? **The inspections were visual and no counts were performed.**

The following appears on the individual Reports for all the Facilities, with the exception of the Piggy Express LLC, Hog Truck Washing Facility:

**Requirement:** Is there a point source discharge of wastewater from the facility? Does the facility hold the proper KPDES permit? [401 KAR 5:055 Section 2]

**Compliance Status:** C-No Violations observed

**Comment:** No evidence of point source discharge was noted during the inspection.

**Requirement:** Have pollutants entered the waters of the Commonwealth in excess of facility permit limits? [KRS 224.70-110]

**Compliance Status:** C-No Violations observed

**Comment:** [None].

**It should be noted that in the absence of visually identifying a pipe or other conveyance of effluent discharging into the environment, that the manner of inspection, i.e., lacking any sampling methodology, does not allow the inspector to identify whether or not there is a point source discharge, or that there are pollutants entering waters of the Commonwealth. The inspection did not reveal any indication of a discharge or impacts to waters of the Commonwealth that warranted sampling.**

The following appears on the individual Report for the Piggy Express LLC, Hog Truck Washing Facility:

**Requirement:** Is there evidence of stream degradation? If yes, were emergency reports made? Was the environment restored? Were BMP's properly implemented?.401 KAR 5:005 Section 25(2)

**Compliance Status:** C-No Violations observed

**Comment:** There was no evidence of stream degradation noted during the inspection. Upstream and downstream Knob Lick Creek was observed. Standing water was observed in the stream channel with no flow.

**The stream, West Fork Knoblick Creek, was degraded during construction of the Remediation Area, when a spillway was cut through the bank of the Creek, so the Remediation Area could drain. It is about 30 feet wide and has continued to deteriorate, washing out the bank on either side of the spillway, as rain floods the Creek and then ebbs.**

Requirement: Is the facility as described in the permit? If no, what alterations were observed?.401 KAR 5:005 Section 25(2) .

Compliance Status: C-No Violations observed

Comment: The facility has recently added a stack pad for solids. After the solids chamber is full, accumulated solids are placed on the stack pad to dry. They are then hauled off site for disposal.

**Has this stack pad been approved for construction in the last Revision to the Truck Wash Stream Construction Permit or was it constructed without DOW approval? This construction did not require a Stream Construction Permit since it was outside of the 100 year floodplain. Has the DOW specified a setback for its construction, as it is located approximately 350 feet from an occupied residence? and exposes raw sewage – a health hazard. This sewage has tested at >9,680 MPN/100ml for E.Coli. A wastewater system construction permit is not required and no setbacks were specified.**

Requirement: Are adequate setbacks and buffer zones maintained? Was over application observed? Was stream degradation observed? If yes, were emergency reports made in a timely manner? If applicable is the facility required to have an Ag Water Quality Plan? If yes, are the BMP's being properly implemented?.401 KAR 5:005 Section 25(2)

Compliance Status: C-No Violations observed

Comment: Facility appears to meet the 20 foot setback outline in the permit for land application. Facility was not applying at the time of the inspection.

**Whereas the 20 foot setback is adequate for "Gray Water", it is not adequate for animal waste effluent. Such a setback does not protect the Public's health. It should be revised and the Truck Wash spray field adjusted to conform to the new limits. In addition, though the KNDOP Permit identifies a setback for land application, the Stream Construction Permit, did not identify any setback for what the DOW accepted as a "Gray Water Basin" and now labels as a lagoon in this Inspection Report. The Kentucky Nutrient Management Planning Guidelines (KyNMP), published by the University of Kentucky, stipulate that, Kentucky No Discharge Operating Permit Holders must utilize setbacks and siting criteria as described by the DOW in Table B of these Guidelines as not less than 1500 feet for a dwelling not owned by the permit holder. The Truck Wash lagoon is located approximately 350 feet from such a dwelling. Piggy Express is not an Animal Feeding Operation (AFO) and therefore AFO setbacks do not apply.**

Requirement: Were the conditions for spray irrigation met? (i.e. weather, slope, etc? If not, what concerns were noted?.401 KAR 5:005 Section 25(2)

Compliance Status: I-No Violations obs-but impending viol trends obs

Comment: The area where irrigation occurs is close to the 6% slope limit in the permit.

**What does "impending viol trends obs" mean? "Impending viol trends obs" is a compliance rating that indicates that although no violation was documented or observed, conditions exist**

that could lead to a violation in the future.

**Why didn't the DOW measure the gradient of the sprayed field?** DOW used an electronic tool provided by NRCS that uses existing mapping to estimate the gradient of selected areas. According to this model, the gradient of the field in question was at approximately 6% which is permissible for spray irrigation. During the investigation, the area in question had been excavated, and the gradient of the slope has been further reduced (below 6%) at this location.

**It either exceeds the allowed gradient for drainage or it doesn't and if it doesn't, it needs to be corrected?** The area in question appears to have acceptable gradient for drainage and requires no further remediation at this time.

**Requirement:** Are records of monitoring maintained? Sampling and analysis data adequate and include the following: Dates, times, and location of sampling? Name of the individual performing the sampling? Analytical methods and techniques documented and in accordance AOI KAR 5:005 Section 25

**Compliance Status:** C-No Violations observed

**Comment:** Sample analysis was provided during the inspection. The permit does not specify which parameters to be analyzed.

**Why doesn't the permit specify which parameters are to be analyzed? Why have there not been requirements identified for record keeping on the animal waste lagoon, including weekly lagoon inspections? Why isn't there a lagoon depth marker installed? Given that the truck wash is not an animal feeding operation, the requirements, as listed in 401 KAR 5:005, Section 25, do not apply.**

The following appears on the individual Report for the O'Bryan Farms Hardy Hog Farm:

**Requirement:** Is the construction or placement of material within the 100 year floodplain without a Stream Construction Permit? [KRS 151.250]

**Compliance Status:** a-Out of Comp-LOW non-recurrent Adm. or O&M

**Comment:** Construction across or along a stream or in the flood way of any stream without obtaining a Stream Construction Permit. Concrete fill material had been placed in an unnamed blue line stream leading to Green River.

**Requirement:** Is the construction or placement of material within the flood way or stream channel without a Stream Construction Permit? [KRS 151.310]

**Compliance Status:** a-Out of Comp-LOW non-recurrent Adm. or O&M

**Comment:** Deposition of material in the flood way or in the channel that has resulted in restricting or disturbing the flow of water in the channel' or in the flood way without first obtaining a Stream Construction Permit. Concrete fill material had been placed in an unnamed blue line stream leading to Green River.

**Requirement:** Is the permittee complying with the conditions of the Stream Construction Permit? [KRS 151.280]

**Compliance Status:** N-Not Applicable

**Comment:** A permit has not been issued for this activity.



Requirement: Is the construction or placement of material within the floodplain/floodway or stream channel without a

Stream Construction Permit? [401 KAR 4:060 Section 2]

Compliance Status: a-Out of Comp-LOW non-recurrent Adm. or O&M

Comment: Construction across, along, or adjacent to a stream or in the flood way without first obtaining a Stream

Construction-Permit. Concrete fill material had been placed in an unnamed blue line stream leading to Green River.

**The damming of a blue line stream discharging to a navigable waterway is a violation of the Federal Clean Water Act. In order to work along that stream the Owner must obtain a 401 Certification and a 404 Permit. The requirements that have been cited in the inspection, seem to overlook the damage that has been done by building this dam. The waters that have built up behind this dam have inundated the property of an adjacent land owner, when heavy rains occur. Has the DOW notified the US Army Corps of Engineers of this violation by the Owner? This violation is the same kind of activity that the Owner engaged in when he destroyed several acres of Wetlands on the Simpson Farm, i.e., filling in blue line streams leading to the Green River. He was cited for that violation and labeled a, "willful and flagrant violator". He is presently under enforcement action by the Federal EPA. The drainage area is 0.15 sq. miles and 404 Permitting rests with the US Army Corps.**

The following [Does Not] appears on the individual Report for the Main Farm:

**It should be noted that at the March 8th Meeting with representatives of the Department of Agriculture, the Governor's Agricultural Policy Committee, Mr. Goodmann of the DOW, and CAPPAD, INC., in the EEC Offices, attention was drawn to the fact that the Center Pivot for the Main Farm was constructed so as to utilize bridges specifically placed in the large Ditch emanating from the area of the Farm's lagoon and crossing under Curdsville-Delaware Road, to an adjacent farm, so as to allow the Pivot to spray directly into the Ditch and ultimately contaminate the neighboring property. Mr. Goodmann declared that this practice constituted trespass and had to be investigated and stopped. It appears that the inspection did not cover this aspect of the Farm's operations.**

Thank you for your interest.

Sincerely,

Donald Peters  
President  
CAPPAD, INC.

Timothy Mulligan  
10405 McIntyre Rd.  
Owensboro, Ky. 42301

Ms. Patricia Bullock  
Regional Hearing Clerk  
USEPA Region 4  
Atlanta Federal Center  
61 Forsyth Street SW  
Atlanta, Georgia 30303

2018 JUN 29 PM 12:11  
HEARING CLERK

Public Notice No: KY180001  
Docket No: CWA-04-2018-5501(b)

Ms. Bullock:

I am writing to you with regard to the Public Notice referenced above. As a two-year employee of Jerry O'bryan, I had a front row seat, you might say, to how the man's mind works and operates. I think my perspective is worth strong consideration, in judging how to deal with him.

Allow me to share a brief history. As a teenager in high school, I learned that my closest buddy had an uncle named Jerry O'bryan. I met the man one time, but was not around him nearly long enough to form any strong opinion about him. However, I did find it interesting (and somewhat humorous), that my friend would good naturedly poke fun at his uncle. As

Robbie would say, "Jerry O'bryan is a different cat." He worked for his uncle off and on during high school, and said he was somewhat difficult to work for, he was hard to please, expected perfection, and paid his help very little. He was a young hog farmer who had a vision of producing hogs on a mass scale. Now, that he has accomplished, on the backs of migrant workers and a few local guys who are willing to work long hours for low wages.

I left home a couple years after high school. I served in the U.S. Navy, and resided in California and Kansas City for quite a few years. In 2012, at the age of 50, I moved back to my hometown of Owensboro, Ky. I bought a property that just happened to be a mile and a half from his hog operation. In looking for work, someone suggested I could go to work for Jerry O'bryan. So I did.

His nephew was right. To this day, he is "a different cat." He sees things his way, with very little room in his mind for compromise. He has a shrewd way of getting what he wants, and paying very little in the process. Equipment, labor... Now, I don't begrudge a man for being clever enough to acquire good used equipment at auctions, but it is fundamentally wrong to low ball an employee in wage negotiations, and watch that employee work his

Robbie would say, "Jerry O'bryan is a different cat." He worked for his uncle off and on during high school, and said he was somewhat difficult to work for, he was hard to please, expected perfection, and paid his help very little. He was a young hog farmer who had a vision of producing hogs on a mass scale. Now, that he has accomplished, on the backs of migrant workers and a few local guys who are willing to work long hours for low wages.

I left home a couple years after high school. I served in the U.S. Navy, and resided in California and Kansas City for quite a few years. In 2012, at the age of 50, I moved back to my hometown of Owensboro, Ky. I bought a property that just happened to be a mile and a half from his hog operation. In looking for work, someone suggested I could go to work for Jerry O'bryan. So I did.

His nephew was right. To this day, he is "a different cat." He sees things his way, with very little room in his mind for compromise. He has a shrewd way of getting what he wants, and paying very little in the process. Equipment, labor... Now, I don't begrudge a man for being clever enough to acquire good used equipment at auctions, but it is fundamentally wrong to low ball an employee in wage negotiations, and watch that employee work his

heart out, while the employee is required to use his personal truck in his duties, and never once making good on any kind of raise as he had promised. And I witnessed other employees having their wages lowered as a contingency for continued employment. O'bryan just has an air about him, an arrogant confidence that his way of thinking is 100% correct. I realize that to be successful, one must be confident and decisive, but you can tell an awful lot about a man by the way he treats people.

I left his operation in October 2014 for a better job opportunity. I visited him twice in 2016 in an attempt to persuade him to not build the semi hog truck washing station in our neighborhood, to no avail. His mind was already made up. He was determined to build it on the spot he had selected, and even lied in the process. When I asked, "Why here? Why not closer to your home?" he said, "I was advised it has to be a minimum of 2 miles from the nearest live hog operation." As it turns out, it is only 1.6 miles from Lone Oak, one of his largest hog operations, with giant piles of "compost", which include the carcasses of daily swine casualties. So he either lied to me, or he is breaking the law in a big way.

The stench of the fecal matter/hog carcasses

From the "compost" is staggering. Each individual "farm" consists of several giant hog houses with concrete floors and giant fans. One summer night in 2014, power was to a couple of houses at his I.M. operation, and over 5,000 full grown hogs died from the heat. In one night. And it didn't phase him or his operation. He is always suggesting to people that he's a small time hog farmer on a "low budget", but he once said to me, "Tim, this isn't about money. I've got more money than I'll ever need! It's about the thrill of the chase."

You see ... he's not a hog "farmer." He's a hog producer on a massive, commercial scale. Former Kentucky Secretary of Agriculture and Kentucky State Senator David Boswell recently said, "O'bryan is the largest independent hog producer in the country." He's saying in the U.S.A. Mr. Boswell is probably right. I know O'bryan ships out approximately 1,000 hogs per week, or 250,000 a year. He has built this gargantuan operation on an obvious pattern of bending and breaking laws. He must be fined and curtailed accordingly. A single fine of \$3,346.00 is pocket change for the man.

I am asking the USEPA to see the big picture here. Over a period of 40 years, many environmental and ethical laws have been broken to accomplish his goals. Only the Good Lord knows for sure the extent to which the pollution of the Green River, and many streams and waterways around our community, as well as airborne effluent by way of irrigation type spraying, have affected people's health.

I am asking all who have the power to do so, to take appropriate and effective action to curtail this man's operation, and the bad habits he has already passed on to his son, who is the heir apparent to the corporation.

Thank you.

Respectfully,

Timothy Mulligan

Timothy Mulligan

June 26, 2018

Father Richard Powers  
10500 McIntyre Road W  
Owensboro, KY 42301

Ms. Patricia Bullock  
Regional Hearing Clerk  
USEPA Region 4  
Atlanta Federal Center  
61 Forsyth Street SW  
Atlanta, Georgia 30303

Public Notice No: KY180001  
Docket No: CWA-04-2018-5501(b)

Dear Ms. Patricia Bullock:

My name is Richard Powers, Father Richard Powers. I am a Roman Catholic Priest and have served the Curdsville-Mount St. Joseph, Kentucky Community for over thirty years. I feel I have a sense of what this Community is thinking and am greatly troubled by what has occurred here during the last several years – coming to a head in the last two.

I am responding to the Public Notice cited above, as the Respondent identified therein, is at the center of the problems this Community is facing. The Respondent, Mr. Jerry O'Bryan, constructed a 780,000 gallon hog waste lagoon and hog truck washing facility (Lagoon and Facility) only 350 feet from a private residence on an adjacent property in our Community, destroying the neighbor's property values and exposing them to health risks. He did this knowingly and with permits issued by the Kentucky Division of Water (DOW). The DOW did not do "due diligence" in issuing the permits, and authorizing the Lagoon and Facility to be built in the middle of Wetlands and a previously existing residential area. This incompetence on its part, led to the later destruction of Wetlands on the McKay Farm near Curdsville, which is cited in the Cease and Desist Letter (C&DL) written by the US Army Corps of Engineers (USACE) to Mr. O'Bryan and is herein attached. This letter identifies the Lagoon and Facility in the case brought against Mr. O'Bryan with reference to the McKay Farm. It also identifies Mr. O/Bryan as a, "willful and flagrant violator."

It is my opinion, the failure of both the Daviess County Fiscal Court and the DOW to effectively exercise any oversight of Mr. O'Bryan's activities and operations has facilitated his continued flouting of environmental laws and regulations and justifies labeling him a "habitual offender", as well as, a "willful and flagrant violator."

Among the offenses he has committed are his continual discharging of contaminated effluent from his hog lagoons into the Green River, spraying this same effluent from his Main Farm



lagoon into a ditch that pollutes his neighbor's property, and blocking a blue-line stream on the Hardy Farm with concrete fill, backing water up onto Curdsville-Delaware Road and neighboring properties, when it rains heavily.

I disagree with the actions taken by the US EPA in negotiating the subject Consent Agreement and Final Order (CAFO). This action substitutes an investment on Mr. O'Bryan's part for a fine, and increases the value of his property. It does not address his behavior and does not act as a deterrent. I request US EPA instead take this case to Court and through the process of discovery expose all of the infractions that he has perpetrated and damage that he has done.

If the US EPA declines this line of action, then I request that it include in the CAFO, the statement that US EPA will henceforth take responsibility for oversight of all of Mr. O'Bryan's activities and operations, including the issuance of any future permits and an in depth review of those permits previously issued him by the State. US EPA should pledge to take action to reissue those permits if the review establishes Mr. O'Bryan is in violation of the terms of those permits.

In any case, the State should not be allowed to oversee any portion of this CAFO.

Sincerely,



Father Richard Powers

cc: Mr. Scott Gordon, US EPA Region 4  
Mr. Joel Strange, US EPA Region 4

CERTIFIED MAIL  
RETURN RECEIPT REQUESTED

U.S. Postal Service™  
**CERTIFIED MAIL® RECEIPT**  
 Domestic Mail Only

For delivery information, visit our website at [www.usps.com](http://www.usps.com)®

**OFFICIAL USE**

Certified Mail Fee \$	Postmark Here
Extra Services & Fees (check box, add fee as appropriate)	
<input type="checkbox"/> Return Receipt (hardcopy) \$	
<input type="checkbox"/> Return Receipt (electronic) \$	
<input type="checkbox"/> Certified Mail Restricted Delivery \$	
<input type="checkbox"/> Adult Signature Required \$	
<input type="checkbox"/> Adult Signature Restricted Delivery \$	
Postage™ \$	
Total Postage and Fees \$	
Sent To Mr. Jerry O'Bryan	
Street and Apt. No., or P.O. Box No. 6939 Curdsville Delaware Road	
City, State, ZIP+4® Owensboro KY 42301	
PS Form 3800, April 2015 PSN 7530-02-000-9047 See Reverse for Instructions	

JUL 15

7101 5101 0251 2000 1385 1371 5271

Operations Division  
Regulatory Branch (MCE)  
ID No. LRL-2016-681-sew

Mr. Jerry O'Bryan  
O'Bryan Grain Farms, Inc.  
6939 Curdsville Delaware Road  
Owensboro, Kentucky 42301

**CEASE AND DESIST ORDER**

Dear Mr. O'Bryan:

During a recent inspection of your property in Daviess County, Kentucky, by Corps of Engineers' personnel, it was found that certain work had been performed in adjacent wetlands and tributaries flowing into the Green River, a Traditionally Navigable "water of the United States (U.S.)." A discharge of dredged and fill material had occurred within two unnamed tributaries and in wetlands on your property located at 37.729998° North Latitude/-87.382107° West Longitude. These discharges have occurred as a result of mechanized land clearing activities.

The Corps of Engineers exercises regulatory jurisdiction over "waters of the U.S." under the Clean Water Act (CWA). The Green River, its tributaries, and its abutting and adjacent wetlands are considered to be "waters of the U.S." as defined in 33 CFR Part 328. It is unlawful under Section 301 of this Act (33 USC 1311) to place dredged or fill material into "waters of the U.S.", without prior authorization. Normally, the authorization is in the form of a Department of the Army (DA) permit issued in accordance with the provisions of Section 404 of the CWA (33 USC 1344).

According to our records, no DA permit has been issued authorizing the work referenced above. Therefore, the work which has been done, constitutes a violation of Sections 301 and 404 of the CWA. This violation may subject you to civil action pursuant to Section 309(d) of the CWA (33 USC 1319(d)) with possible penalties not to exceed \$37,500.00 (as adjusted for inflation) per day for each violation; additionally, you may be subject to criminal action.

A search of our database shows that you have past knowledge of the Corps' regulatory program due to recent permitting at a nearby location in Daviess County, Kentucky within the past year. Also, Corps'

representatives have visited the previously permitted site with you to discuss regulatory requirements and discuss permitting options. Additionally, a permit application for the work at this current site was received by my staff on June 29, 2016, indicating knowledge of the Corps' regulatory program. As a result of these previous encounters regarding our program, you are considered a willful and flagrant violator.

This letter will serve as a formal Cease-and-Desist Order specifically prohibiting any further activity involving the placement of excavated or fill material below the Ordinary High Water (OHW) elevation of the tributaries to the Green River or within their abutting and adjacent wetlands or other "waters of the U.S." on the subject tract. Such activity may not resume unless and until the work is authorized in a DA permit.

In accordance with existing regulations, a report of this unauthorized activity will be prepared. This report will serve as a basis for determining the appropriate administrative and/or legal action to be taken in this matter. Any information, particularly prior approvals or disclaimers, which might bear on our evaluation and decision, should be submitted immediately. The preparation of the report and findings on this case will consider any information or comments received within **30 days** from the date of this letter.

A copy of this letter this will be sent to the appropriate coordinating agencies (see enclosure for addresses). If any questions arise concerning this matter, please contact (b) (6) by writing to the above address, ATTN: CELRL-OPF-E or by calling (b) (6) at (b) (6). Any correspondence on this matter should refer to our ID No. LRL-2016-681-sew.

Sincerely,

Original Signed

(b) (6)  
Chief, Regulatory Branch  
Operations Division

JUL 19 2016 R

Enclosure

(b) (6) PF-W/rb/C&D Violator.docx (b) (6)  
/OPF W (b) (6)  
PF (b) (6)

RECORD COPY

June 26, 2018

Mr. & Mrs. Ben Lattus  
10165 McIntyre Road W  
Owensboro, KY 42301

Ms. Patricia Bullock  
Regional Hearing Clerk  
USEPA Region 4  
Atlanta Federal Center  
61 Forsyth Street SW  
Atlanta, Georgia 30303

Reference: Public Notice No: KY180001  
Docket No: CWA-04-2018-5501(b)

Dear Ms. Patricia Bullock:

We are writing to you in response to the Public Notice referenced above. Our home borders the property that Mr. Jerry O'Bryan, the Respondent in the subject Consent Agreement and Final Order (CAFO) owns, and upon which he has built a Hog Truck Wash and Lagoon (Truck Wash). We have already had the value of our home depreciated by the County Property Valuation Administrator, as a result of its being placed there. The State has permitted the Truck Wash to spray the hog waste that is in the lagoon to within 20 feet of our property line. That means that he can spray the crap that is in the lagoon only 208 feet from our front door. Mr. O'Bryan, at a Town Hall Meeting held at St. Alphonsus Church in August of 2015, stated that he intended to inject the hog effluent onto the adjacent field and not spray it. Yet, among the first things he did is install a spray irrigation system. After researching the Truck Wash permit applications made to the Kentucky Division of Water (DOW), we learned that in addition to lying about injecting the lagoon effluent, he also lied about what he was building. He called the Lagoon a Gray Water Pond and a Settling Tank, a Septic Tank, in his applications. Gray Water according to State regulations is water that comes from a shower or washing machine. It does not contain feces and urine. The DOW didn't question the application and according to regulations permitted him to apply the effluent up to 20 feet from our property line. The "so-called" Septic Tank, is open to the air and as such is not a Septic Tank. To this date, the DOW has not sampled the contents of the lagoon, nor questioned the claim that it is a Gray Water Pond.

The Truck Wash was built in the Wetlands. The DOW approved the permits without checking to see if the Project intruded into the Wetlands, though it knew it was in the Flood Plain. This is the Project that is referred to in the US Army Corps of Engineers (USACE) Cease and Desist Letter to Mr. O'Bryan, when it discovered that again, he was building in the Wetlands at the McKay Farm. The Corps in that letter, labeled Mr. O'Bryan a "willful and flagrant violator." It is important that the EPA recognize Mr. O'Bryan's pattern of behavior and take it into

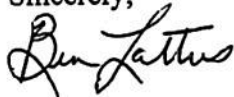
consideration, in deciding how to best handle the McKay Farm Wetland case. It is also important to recognize the DOW's pattern of behavior. It appears that the DOW does not have any interest in holding Mr. O'Bryan accountable, nor in exercising any oversight on what he does. It is for those reasons that what the EPA does in this case is so important.

We do not agree with the direction the EPA has taken in this CAFO. It neither punishes Mr. O'Bryan for his actions on the McKay Farm, nor deters him from continuing to disregard environmental laws and regulations. It enforces the theory that he can get away anything and the price he will pay can be considered the cost of doing business.

For the preceding reasons, we request that this CAFO be cancelled and that Mr. O'Bryan be taken to court, where all his infractions can be identified and addressed.

At the very least we request that the EPA relieve the DOW of any responsibility for oversight of Mr. O'Bryan's activities and operations and assume that responsibility itself. If the EPA goes forward with the present CAFO, this relief of responsibility needs to be written into the CAFO. The DOW has proven itself to be incompetent to carry out its responsibilities with reference to Mr. O'Bryan's activities and operations.

Sincerely,



Ben Lattus



Becky Lattus

**P.O. Box 122  
Maple Mount, KY. 42356**

**Ms. Patricia Bullock  
Regional Hearing Clerk  
USEPA Region 4  
Atlanta Federal Center  
61 Forsyth Street SW  
Atlanta, Georgia 30303**

**Public Notice No; KY180001**

**Docket No: CWA-04-2018-5501(b)**

**Dear Ms. Patricia Bullock;**

**This is a letter in response to the reference to the public notice and we the members "Community Against Pig Pollution and Disease, Inc." (CAPPAD), a Kentucky non-profit, tax exempt, educational and charitable corporation. CAPPAD and the community have a direct interest in the outcome of this USEPA Consent Agreement and Final Order (USEPA CAFO), as its members have been placed in harm's way by the owner of the Simpson farm. This is a rural location in Western Daviess county, Kentucky known as the Curdsville-Delaware area. The US Army Corps of Engineering (USACE) communications refer to it as the McKay Farm.**

**In the cease and desist Letter addressed to the owner Mr. Jerry O'Bryan, by the USACE and delivered to him by certified mail on July 15, 2016 concerning his Simpson-McKay farm the USACE considers him a flagrant and willful violator of Environmental laws. Sad to say the Kentucky Division of water and the Kentucky Energy and Environment Cabinet have ignored the activities such as additional CAFO barns added, mislabeling of the definition of a Lagoon, no surface or ground**

water sampling, Best management practices not adhered to. Allowing the owner to self-regulate the entire CAFO operations. The CAFO operations owned by Mr. O'Bryan are located at five different locations in a two-mile area with three of the hog CAFO's within a quarter of a mile from the Green River.

Mr. O'Bryan also owns a commercial hog truck wash built in 2015-2016 in the middle of our community. The commercial hog truck wash owner doesn't follow Kentucky Nutrient Management Planning Guidelines (KYMPG). His CAFO's do not follow the EPA's 'Managing Manure Nutrients at Concentrated Animal Feeding Operations.' His CAFO's are categorized as large which place's them in violation of 412:31(a). Also, 412:32(a), 412:33(a), 412.43(a) and 412:45(a). Adequate manure storage, litter, and processed wastewater 40 CFR 122:42€(1)(i) states CAFO's must ensure storage of manure, litter, and processed wastewater. Including procedures to ensure proper operation and maintenance of the storage facilities. In this regulation I will draw out the word 'processed.' Processed means the wastewater going to the black water lagoon has received treatment. The only treatment the commercial hog truck wash receives from the truck wash to the black water lagoon is in the storm water catch basin which is mislabeled by the design engineering company listing it a septic tank. We discovered this misrepresentation by the engineering firm from an elevated distance on a neighbor's property. This structure consists of physical treatment only. The black water lagoons at the CAFO's and the commercial hog truck wash did not apply 412:37(a)(2) to the building design. Two water wells were drilled at the commercial hog truck wash site. One of the wells is being utilized in the operation of the commercial hog truck wash which falls under 122.42(e)(1)(iii) which ensures that the clean water is diverted, as appropriate, from the production Area. The other drilled water well is in the spray field area and has been left uncapped since drilled. This violates section 9 KAR 6:310. This issue was called to the attention of Peter Goodman Director of the Kentucky Division of Water. He said it was OK uncapped because he wrote the regulations. Most of the CAFO's of the owner utilize drilled water wells. The air quality around the commercial hog truck wash and the CAFO operations is very poor due to Hydrogen Sulfide gas and Ammonia Gas being produced by the black water lagoons. Our local Daviess county air quality department does not have the proper air meters to detect the different gases emanating from these lagoons. Daviess County Air quality employee named Edward stated they use their nose for gas detection. There is a Federal PEL limit for Hydrogen sulfide and Ammonia gas. My home is located 1.5

miles from the nearest CAFO. If the wind is from the North West, we cannot go outside our homes. Other times the air is saturated with hydrogen Sulfide gas due to CAFO' spraying fields. Our community was established 30 years ago. The CAFO owner invaded our area. When we purchased our property in 2009 there was just 3 barns on the CAFO site. Now there are 14 barns on this location with an undersized lagoon. The hog truck wash is within 350 of a neighbor's home. The hog truck wash black water lagoon is 90 feet from a blue line stream. Both are serious setback violations. The wetlands were destroyed at two different locations in the building of the commercial hog truck wash. The bank of Knoblick Creek was dozed down to within two feet of the bottom of Knoblick creek draining the remediation area. Thirty feet of Knoblick creek bank was dozed to within two feet of the creek bed bottom to drain the remediation area. The USACE allowed this practice.

CAPPAD has developed an extensive QAPP Program. From our sampling team to our President we have extensive training in the environmental field. CAPPAD president graduated Annapolis Naval Academy, studied at MIT, design engineer in the construction of Nuclear power plants, retired as design and startup field engineer with Exxon Mobile. Our members consist of Accountant, Licensed Water Microbiologist, Kentucky Class 4 water and wastewater plant operator, Master builders, Farmers, Master mechanic, Licensed Kentucky water samplers. We are also licensed water samplers for the Kentucky Water Watch program. The following are a few of the owner's activities and the states response, which impacted our community, harmful to the environment and the health of our community. These should be given consideration in finalizing this USEPA CAFO;

The Ambient Water rule (40 CFR part 136) has been broken by the CAFO owner by point source discharges of E-coli into the Green River from the owner's Doby/Bumblebee, Iron Maiden and Hardy Farms for a period of years, readings greater than 4,840 C.F.U./100 ML sample and in violation of the ambient water rule. In the EPA manual, "Managing Manure Nutrients at concentrated Animal Feeding Operations," Chapter 4 of the CAFO rule requires that samples of manure be collected and analyzed for nitrogen and phosphorus a minimum of once per year (412.4(c)(3)). CAPPAD has not received any information from the State that these activities have been applied. We have asked the State of Kentucky Division of Water to resend the KNDOP at all CAFO locations and commercial hog truck wash owned by Mr. Jerry O'Bryan and issue NPDES instead. These are point



source discharges as defined by Title 33 -navigation and navigable waters page 498. The KDOW preformed a "Comprehensive" inspection of these farm operations better known as a, "sham inspection." The Dow did not even preform a hog count. One inspector did report a single row of cedar trees around one CAFO lagoon and that it solved all the problems. A short time after the same inspector was no longer employed by the DOW. I have operated both water and wastewater plants for several cities in Kentucky for over 41 years. I have had inspections from EPA Region 4, The USACE, The KDOW and never have I witnessed such an inspection. Some of the water and wastewater plants I operated were designed with new innovation technology. The CAFO's in America are primitive in design. Simply run pipes from the barns to unlined dirt pits dug in the ground.

A dam was created in a Blue line stream by the CAFO owner at the Hardy CAFO farm location. Normally the builder of such a dam would be hauled into court by the USACE. The KDOW could not decide if it was a dam. The DOW told the CAFO owner to apply for a stream construction permit. The USACE has been studying the dam for over a year and even proposed the CAFO owner convert it to a weir. In the meantime, the dam is backing water up onto another farmer's property placing his crop in danger. An excavator and 30 minutes would solve the problem. I would not be surprised if a single row of cedar trees would suffice.

In addressing the many infractions reflective of the commercial hog truck wash, the CAFO operations one must draw a conclusion that CAFO operations in Kentucky are self-regulated. We urge the USEPA to take control of these operations and issue NPDES permits. The land around these type of operations lay in destitute and moans in trivial. Our neighbor took a \$130,000.00 loss on the sale of his home due to the hog truck wash. We have to share a 17 ft. wide state highway with semi-trucks hauling hogs to slaughter. Numerous hog truck wrecks plague our county. When Americans are pushed from their homes due to these type of operations, their constitutional rights trampled on, their health at risk and now China has proved that hog hotels can be built almost anywhere I again pose the question. Could the USEPA take control of such activities. Second question: Does America need any more CAFO's built? Over 50% of produce American farmers raise is exported.

**Dr. Fauci team has listed an antibody MED18852 airborne transmission of the H1N1pdm09 virus. Respiratory syncytial virus is a serious risk for infants. Dr. Fauci is the director of the National Institute of Allergy and Infectious Diseases (NAID). He has defined H1N1 strain that can pass from (Birds, pigs), to humans. Don't forget the excitotoxins list such as MSG, Aspartate, Domoic acid, L-Boaa, Cysteine, and Casein posing a threat to our waterways. Aspartame is already in 6,000 consumer foods. Want Proof of contamination sample the Chesapeake Bay or most any area where CAFO's are built.**

**Sincerely,**

**Rick Murphy**

**Vice president**

**CAPPAD. INC.**

**Attachments**

**Cc: File/CAPPAD.Doc**

2. Article Number Transfer from previous label

9590 9403 0414 5163 1733 45



R. I. T. Murphy  
10361 McINTYRE RD.  
Owensboro, KY 42301

1. Article Addressed to:

- Complete items 1, 2, and 3.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

**SENDER: COMPLETE THIS SECTION**

3. Service Type
- Adult Signature
  - Adult Signature Restricted Delivery
  - Certified Mail®
  - Certified Mail Restricted Delivery
  - Collect on Delivery
  - Priority Mail Express®
  - Registered Mail™
  - Registered Mail Restricted Delivery
  - Return Receipt for Merchandise

D. Is delivery address different from item 1?  Yes  No

If YES, enter delivery address below:

B. Received by (Printed Name) R. I. T. Murphy

C. Date of Delivery 5-28-18

**COMPLETE THIS SECTION ON DELIVERY**

A. Signature  Agent

Addressee

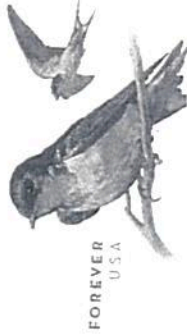
PLACE STICKER AT TOP OF ENVELOPE, TOP LEFT CORNER OF THE RETURN ADDRESS, FOLD AT DOTTED LINE.

**CERTIFIED MAIL®**



59662 1664 1000 0490 5100

R. Murphy  
10361 McINTYRE RD.  
Owensboro, Ky 42301



FOREVER  
U.S.A.



PITNEY BOWES

02 1P \$ 006.200

0004724810 JUN 26 2018

MAILED FROM ZIP CODE 42322



MS. PATRICIA BULLOCK  
Regional Heavy Clerk  
US EPA Region 4  
Atlanta Federal Center  
19 FORTY SEVENTH STREET SW





Tracking No: WTS P0000042734

**PANTER, PAULA V.**  
**WEST / 11176**  
**Dept: ECEB**      **Branch: SES**  
Phone: 404-562-8884  
Received On: 07-02-2018 08:04am



THIS ENVELOPE IS RECYCLABLE AND MADE WITH 30% POST CONSUMER CONTENT 

© USPS 2016

George Schädler  
6335 Ky 500  
Owensboro, Ky 42301

6/22/18

Ms Patricia Bullock  
Regional Hearing Clerk  
USEPA Region 4  
Atlanta Federal Center  
61 Forsyth Street SW  
Atlanta, Georgia 30303

Public Notice No: KY180001  
Docket No. CWA-04-2018-5501(b)

Dear Ms Patricia Bullock:

This letter is written in response to the Public Notice referenced above and represents the past history of Jerry O'Bryan.

First Jerry O'Bryan will do anything he wants until someone makes him do differently. He has made that comment before and he still practices it. He will continue to violate until someone keeps enforcement on him. Jerry O'Bryan had bought the McKay farm and Joe Bill McKay was the tenant of the McKay farm. Joe Bill ask Jerry, "Why do you want this Farm." Jerry responded, "With the trees in the front nobody can see what is going on and I can do what I want." It has been noticed and recognized that Jerry does not follow protocol to permits or procedures to do a job correctly or stay in compliance.

I own a farm that surrounds Jerry O'Bryan and he has polluted my ditch from runoff of his center Pivot that does reach the Green River. If you go to Ky Watershed Watch Site # 3536, you will see that the E-Coli count is 583 and should not exceed 126. The DOW has been notified but nothing has been done. Also downstream from me on the Hardy Farm in which is own by Jerry O'Bryan the ditch is considered a Blue Line Stream. Jerry O'Bryan has created a damn in the ditch. Now I have flood issues on my farm. The Core of Engineers have been notify and it is still under investigation and litigation to my understanding. It has been stated in several documents that Jerry O'Bryan is a "Willful and Flagrant Violator." He does this on purposed to try to flood me out so I go broke and sell out.

The Simpson/McKay Farm is a good example of what could happen if the USEPA does not crack down. The USEPA needs to think through and use corrective measures to keep this from happening.

Here are some items to consider. Will a Center Pivot coming from a Lagoon of any of his farms be allowed? What will happened to the runoff? Will there be catch basins installed

and pumped back to the Lagoon to keep it out of the River. Will Jerry O'Bryan be allowed to knife in Hog Manure from the lagoons on notill ground? What about the runoff from that? Will he be allowed to build another Lagoon on the Simpson/McKay Farm and add more hogs to his complex? Under the Supplemental Environmental Project (SEP), who will monitor and see that Jerry is held accountable in completing the said SEP task correctly and to continue to stay in compliance with the SEP? Can it be noted that under the SEP that absolutely no liquid or slurry hog waste to be put on the property.

I am a Farmer and very concerned with the polluting of the Rivers from the existing Confined Animal Feeding Operations that are all owned by Jerry O'Bryan . And there is nothing being done about it . It is time for USEPA to take action and make sure that this does not happened on the Simpson/McKay Farm that is now owned by Jerry O'Bryan.

Sincerely, George Schadler

2018 JUL -3 PM 12:15  
HEARING CLERK

Ms  
Bullock.

6-20-18

Regional Hearing clerk, USEPA Region 4  
Atlanta Federal center.  
61 forsyth st SW, Atlanta, Georgia 30303

Public Notice no ; ky180001  
Docket no; CWA-04-2018-5501{b}

Ms Bullock.

I am writing in response to the above mentioned public notice that pertains to the "McKay farm located in curdsville ky. I have lived in the area my entire 51 years of life and would like to share/express my opinion of these circumstances and how we feel they affect not only our everyday lively hood but also that of our children. We are also farm owners as well as contractors and have worked construction since we left the family farm and thus have knowledge of both practices. We also live a short distance from where Mr O'Bryan constructed his truck wash station. I feel it was important to present my background and family history as it relates to the mentioned matter.

As farm owners and contractors, we take exception to the final order and consent agreement. As contractors we have never been allowed to dictate to the EPA or any other governing body for means and methods of remediation work. Contractors are bound to tight rules and regulations as it relates to wet lands disturbance and water run off. We hire qualified vendors to solicit updated regulations and then to produce documentation to meet these requirements. Once we have documents we proceed to get permits and, in many cases, hire third party inspectors to ensure the work is performed per the approved documents. In many cases this is a long-term deal with frequent testing and monitoring. As farmers, we acknowledge and realize the value of the land and surrounding rivers, where are families swim and fish and we raise crops or livestock to feed not only our families but many others as well.

Most all of the local farmers in the area have a genuine care and concern for the land, the rivers and the environment and go to extremes to ensure that their farms meet most all rules and regs as set in place by the governing bodies.

We have discovered over the years that Mr O'Bryan does not feel as though he needs to operate by or under the same rules, many of us have heard him say "let them catch me" or "who is going to know". All of the surrounding neighbors know that O'Bryan does not play by the rules and that is why he has increased the size of his farming operation over the years. He has become too big to oppose and will go to extreme limits to put the small farmers in their place if he can. Many of us have placed call after call to the EPA, to our country government and then to the city over the years complaining of his ways or complaining of the odor that exist or even the heavy truck traffic and overturned loads of pigs on the roads. We have seen O'Bryan disregard many rules and regulations just to advance his farming operations or pork production. What you guys caught him doing at the McKay farm was a repeat of what he has done at several other of his local farms in this area. We always made the comment about these such as "well, Bill could not make that work but O'Bryan will drain it off, irrigate it with hog feces and grow nice crops. He has eluded many governing bodies throughout

his years and has gained his operations from this. He always said, "sue me" or take me to court or any means of bullying the family farm owners.

Is it not coincidental that most of his farms back up to the river, we have seen him purchase these farms, remove all trees and vegetation and then drain it to the river. Then he comes in and starts building and grading to his wants and needs with no oversight, permits or plans.

Many of us have long complained of his ways to any of the governing bodies that can, we have no luck with any of them. We have complained to the D.O.W, no results, to the city, no results, to the county with no results but typically he is able to continue as his attorneys will get involved and somehow things get cleared and he continues, or in many ways he will plead ignorance and has the ability to remove himself from any consequences.

Having said all of that my point to this letter relates to the consent agreement per the notice.

We believe he is once again escaping consequences brought on by his normal procedures. He has stated his intentions were not to convert wet lands, however if you check your records you will find that this is how he operates. He has done the exact same thing time and time again, we know he violated wetlands when constructing his truck wash facility less than one year apart from this infraction. This guy is a willful and repeat violator and will not stop until someone of higher authority forces him to. There have been water samples of the rivers and streams with extremely high E.Coli bacteria counts discharging from his farms and truck wash, these have been submitted to the DOW and the EPA with the first comments as "this is really bad or extremely high" and then five weeks later it becomes a non-issue and that everything is ok. Your consent states that Mr O'Bryan will be implementing conservative practices with control basin, terraces and sub-surface drains. We know this as "field drainage tiling" and many local farmers use this practice but, in this case, it seems that O'Bryan is once again getting the better part of the deal. He will be using the infraction fine money to increase the value of this farm. The cost estimates given by him would reflect the cost of anyone having subsurface work done. If the EPA were to visit any of his existing farms with lagoons and his revised procedures, they would find that what he says and what he does are two totally separate things. Some of his lagoon are not even permitted and thus when we place a call about him irrigating during a rain there are no records and no governing bodies even know these exist. I have had feces sprayed on my vehicle many times when passing by his irrigation systems.

One final concern, what happens if he decides to sell this farm and dump his problems? Who is going to verify, test and report the agreed upon practices are being kept in place for this farm

This guy needs to have unannounced visits and needs to be forced to abide by the same rules that every other person, farmer, developer and contractor must abide by in the U.S. it is my opinion that people who use the system and are repeat and willful violators have to be stopped

If the EPA does not stop this rogue farmer/developer and contractor, then no one else will and this will set the example of others to follow.

The evidence is clearly there, he does not even try to conceal it. This man is destroying our wetland, streams, rivers and our way of living.

I beg of you to re-visit the consent agreement and make an example of this situation so that it does not continue, and we will have clean water ways and clean air for us and our children.

Respectfully,  
Al McCarthy





UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 4  
ATLANTA FEDERAL CENTER  
61 FORSYTH STREET  
ATLANTA, GEORGIA 30303-8960

AUG 20 2019

**CERTIFIED MAIL**  
**RETURN RECEIPT REQUESTED**

Mr. Rick Murphy  
Vice President  
CAPPAD, Inc.  
P.O. Box 122  
Maple Mount, Kentucky 42356

Re: In the Matter of Jerry O'Bryan  
Consent Agreement and Final Order  
Docket No. CWA-04-2018-5501(b)

Dear Mr. Murphy:

The U.S. Environmental Protection Agency, Region 4 is in receipt of your comments regarding the above-referenced proposed Consent Agreement and Final Order for Mr. Jerry O'Bryan. The terms of the Consent Agreement and Final Order (CA/FO) were negotiated between the EPA and Mr. O'Bryan in settlement of alleged violations of the Clean Water Act. An enclosure, which provides information on common comments received during the public notice period, is attached for your reference.

Pursuant to regulations outlined in 40 C.F.R. § 22.45(c)(4), the EPA is also providing you a copy of the CA/FO. Should you wish to petition the Regional Administrator to set aside the CA/FO on the basis of the EPA's failure to consider material evidence in the case, you may do so by filing a petition within 30 days of receipt of this letter and the enclosed CA/FO. Please note that you are to send the petition directly to the EPA Regional Administrator, Mary S. Walker, and not to the Regional Hearing Clerk. You must also send copies of your petition to the parties, i.e., the EPA and Mr. O'Bryan. The addresses for each such recipient of the petition are:

Mary S. Walker  
Regional Administrator  
US EPA, Region 4  
61 Forsyth Street, S.W.  
Atlanta, Georgia 30303

With copies to:

Jerry O'Bryan  
6939 Curdsville Delaware Road  
Owensboro, Kentucky 42301

Suzanne K. Armor  
Office of Regional Counsel  
US EPA, Region 4  
61 Forsyth Street, S.W.  
Atlanta, Georgia 30303

If you do not timely file a petition to set aside the CA/FO, the EPA intends to issue the proposed CA/FO. Please contact Suzanne K. Armor, Associate Regional Counsel, at (404) 562-9701 if you have any questions.

Sincerely,



Suzanne G. Rubini  
Acting Director  
Enforcement and Compliance Assurance Division

Enclosures (2)

cc: Mr. Jerry O'Bryan

**U.S. Postal Service™**  
**CERTIFIED MAIL® RECEIPT**  
 Domestic Mail Only

For delivery information, visit our website at [www.usps.com](http://www.usps.com)®.

OFFICIAL USE

7019 0700 0000 6131 5181

Certified Mail Fee \$ \_\_\_\_\_

Extra Services & Fees (check box, add fee as appropriate)

Return Receipt (hardcopy) \$ \_\_\_\_\_

Return Receipt (electronic) \$ \_\_\_\_\_

Certified Mail Restricted Delivery \$ \_\_\_\_\_

Adult Signature Required \$ \_\_\_\_\_

Adult Signature Restricted Delivery \$ \_\_\_\_\_

Postmark  
Here

Postage

Mr. Rick Murphy  
 VP, CAPPAD, Inc.  
 P.O. Box 122  
 Maple Mount, Kentucky 42356

PS Form 3800, April 2015 PSN 7530-02-000-9047 See Reverse for Instructions

SENDER: COMPLETE THIS SECTION	COMPLETE THIS SECTION ON DELIVERY
<ul style="list-style-type: none"> <li>■ Complete items 1, 2, and 3.</li> <li>■ Print your name and address on the reverse so that we can return the card to you.</li> <li>■ Attach this card to the back of the mailpiece, or on the front if space permits.</li> </ul>	<p>A. Signature <input type="checkbox"/> Agent  <input checked="" type="checkbox"/> Addressee</p> <p>B. Received by (Printed Name) <input type="checkbox"/> Date of Delivery</p> <p>Cecelia Olinger</p>
<p>1. Article Addressed to:</p> <p>Mr. Rick Murphy                  VP, CAPPAD, Inc.                  P.O. Box 122                  Maple Mount, Kentucky 42356</p>	<p>D. Is delivery address different from item 1? <input type="checkbox"/> Yes                  If YES, enter delivery address below: <input type="checkbox"/> No</p>
<p>2. Article Number (Transfer from carrier label)</p> <p>9 0700 0000 6131 5181</p>	<p>3. Service Type</p> <p><input type="checkbox"/> Adult Signature <input type="checkbox"/> Priority Mail Express®</p> <p><input type="checkbox"/> Adult Signature Restricted Delivery <input type="checkbox"/> Registered Mail™</p> <p><input type="checkbox"/> Certified Mail® <input type="checkbox"/> Registered Mail Restricted Delivery</p> <p><input type="checkbox"/> Certified Mail Restricted Delivery <input type="checkbox"/> Return Receipt for Merchandise</p> <p><input type="checkbox"/> Collect on Delivery <input type="checkbox"/> Signature Confirmation™</p> <p><input type="checkbox"/> Collect on Delivery Restricted Delivery <input type="checkbox"/> Signature Confirmation Restricted Delivery</p> <p><input type="checkbox"/> Insured Mail</p> <p><input type="checkbox"/> Insured Mail Restricted Delivery (over \$500)</p>

Domestic Return Receipt

PS Form 3811, July 2015 PSN 7530-02-000-9053

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 4

IN THE MATTER OF: )  
)  
) ADMINISTRATIVE  
JERRY O'BRYAN ) CONSENT AGREEMENT AND  
) FINAL PENALTY ORDER  
CURDSVILLE, KENTUCKY )  
)  
)  
RESPONDENT. ) Docket No.: CWA-04-2018-5501(b)  
\_\_\_\_\_ )

**CONSENT AGREEMENT**

**I. Statutory Authority**

1. This is a civil penalty proceeding under Section 309(g)(2)(A) of the Clean Water Act (CWA), 33 U.S.C. § 1319(g)(2)(A), and the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders and the Revocation, Termination or Suspension of Permits*, published at 64 Fed. Reg. 40,176 (July 23, 1999), codified at 40 Code of Federal Regulations (C.F.R.) Part 22 (Part 22).

2. The authority to take this action under Section 309(g)(2)(A) of the CWA, 33 U.S.C. § 1319(g)(2)(A), is vested in the Administrator of the United States Environmental Protection Agency. The Administrator has delegated this authority to the Regional Administrator Region 4, who in turn has redelegated this authority to the Director of the Water Protection Division, who in turn has delegated this authority to the Chief of the Water Enforcement Branch of the Enforcement and Compliance Assurance Division of EPA Region 4 (Complainant).

**II. Statutory and Regulatory Background**

3. Section 309(g)(1) of the CWA, 33 U.S.C. § 1319(g)(1), states "[w]henever, on the basis of any information available - the Administrator finds that any person has violated [section 301 of the CWA, 33 U.S.C. § 1311], . . . the Administrator . . . may, after consultation with the State in which the violation occurs, assess a class I civil penalty or a class II civil penalty under [33 U.S.C. § 1319(g)(2)]."

4. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), states "[e]xcept as in compliance with . . . [Section 404 of the CWA, 33 U.S.C. § 1314], the discharge of any [dredged or fill material] by any person shall be unlawful." Section 404 of the CWA, 33 U.S.C. § 1344, authorizes the Secretary of the Army, acting through the Chief of Engineers, U.S. Army Corps of Engineers (COE), to issue permits for the discharge of dredged or fill material into navigable waters.

5. Section 502(12) of the CWA, 33 U.S.C. § 1362(12), defines a “discharge of pollutants” as “[a]ny addition of any pollutant to navigable waters from any point source . . . .”

6. Section 502(14) of the CWA, 33 U.S.C. § 1362(14), defines “point source” as “[a]ny discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit [or] discrete fissure . . . from which pollutants are or may be discharged.”

7. Section 502(7) of the CWA, 33 U.S.C. § 1362(7), defines “navigable waters” as “[t]he waters of the United States, including the territorial seas.”

8. Federal regulations under 40 C.F.R. § 232.2 define the term “waters of the United States” to include “wetlands.”

9. Federal regulations under 40 C.F.R. § 232.2 and 33 C.F.R. § 328.3(b) define “wetlands” as “[t]hose areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.”

### **III. Allegations**

10. The term “Discharge Area” means the jurisdictional waters that have been impacted either through filling or dredging as a result of the unauthorized activities that are the subject of this enforcement action. More specifically, the Discharge Area is approximately 2.1 acres of wetlands adjacent to the Green River and approximately 800 linear feet of an unnamed tributary of the Green River, a traditionally navigable water of the United States, located near latitude 37.731169° N and longitude -87.382159° W, lying west of Curdsville-Delaware Road and adjacent to the Green River, near Curdsville, in Daviess County, Kentucky. The Discharge Area is indicated on the enclosed Exhibits A and B.

11. The term “Site” means the parcel or parcels of land on which the Discharge Area is located.

12. Respondent, Jerry O’Bryan at all times relevant to this Consent Agreement and Final Order, was the owner and/or operator of the Site.

13. Respondent is a person within the definition set forth under section 502(5) of the CWA, 33 U.S.C. § 1362(5).

14. Commencing on or about June 2016 to the present, Respondent, or those acting on behalf of the Respondent, discharged dredged and/or fill material into waters on the Site using earth moving machinery, during unauthorized activities associated with the conversion to agricultural land.

15. Respondent impacted approximately 2.1 acres of jurisdictional wetlands and 800 linear feet of an unnamed tributary (Discharge Area) that are connected to the Green River, a traditional navigable water of the United States.

16. The discharged dredged and/or fill material, including earthen material deposited at the Discharge Area, are “pollutants” as defined under the CWA § 502(6), 33 U.S.C. § 1362(6).

17. The earth moving machinery employed by the Respondent to deposit the dredged and/or fill material at the Discharge Area are “point sources” as defined under the CWA § 502(14), 33 U.S.C. § 1362(14).

18. Respondent’s placement of the dredged and/or fill material at the Discharge Area constitutes a “discharge of pollutants” as defined under the CWA § 502(12), 33 U.S.C. § 1362(12).

19. At no time during the discharge of dredged and/or fill material at the Discharge Area from June 2016 to the present, did the Respondent possess a permit under Section 404 of the CWA, 33 U.S.C. § 1344, authorizing the activities performed by Respondent.

20. Each discharge by the Respondent of pollutants into navigable waters without the required permit issued under Section 404 of the CWA, 33 U.S.C. § 1344, is a violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

21. Each day the material discharged by the Respondent remains in waters of the United States without the required permit under Section 404 of the CWA, 33 U.S.C. § 1344, constitutes a day of violation of Section 301 of the CWA, 33 U.S.C. § 1311.

22. Therefore, the Respondent has violated Section 301 of the CWA, 33 U.S.C. § 1311, due to its discharge of dredged and/or fill material into waters of the U.S. without the required permit under Section 404 of the CWA, 33 U.S.C. § 1344.

#### **IV. Stipulations and Findings**

23. Complainant and Respondent have conferred for the purpose of settlement under 40 C.F.R. § 22.18 and desire to resolve this matter and settle the allegations described herein without a formal hearing. Therefore, without gathering any evidence or testimony, making of any argument, or adjudicating any issue in this matter, and in accordance with 40 C.F.R. § 22.13(b), this Administrative Consent Agreement and Final Penalty Order (CAFO) will simultaneously commence and conclude this matter.

24. For the purposes of this CAFO, Respondent admits the jurisdictional allegations set out above and the factual allegations set out above.

25. Respondent hereby waives his right to contest the allegations set out above and his right to appeal the Final Order accompanying this Consent Agreement.

26. Respondent consents to the assessment of and agrees to pay the administrative penalty as set forth in this CAFO and consents to the other conditions set forth in this CAFO.

27. By signing this CAFO, Respondent certifies that the information he has supplied concerning this matter was at the time of submission, and is, truthful, accurate, and complete for each such submission, response and statement. Respondent realizes that there are significant penalties for submitting false or misleading information, including the possibility of fines and/or imprisonment for knowing submission of such information.

28. Complainant reserves the right to assess and collect any and all civil penalties for any violation described in this Consent Agreement to the extent that any information or certification provided by Respondent was materially false or inaccurate at the time such information or certification was provided to Complainant.

29. Complainant and Respondent agree to settle this matter by their execution of this CAFO. The parties agree that the settlement of this matter is in the public interest and that this CAFO is consistent with the applicable requirements of the CWA.

#### V. Payment

30. Under Section 309(g)(2)(A) of the CWA, 33 U.S.C. § 1319(g)(2)(A), and 40 C.F.R. § 19, and considering the nature of the violations and other relevant factors, EPA has determined that **three thousand three hundred and forty-six dollars (\$3,346)** is an appropriate civil penalty to settle this action.

31. Respondent shall submit payment of the penalty specified in the preceding paragraph within 30 days of the effective date of this CAFO via a cashier's or certified check, payable to the order of "Treasurer, United States of America." The check shall reference on its face the name of Respondent and the Docket Number of this CAFO. Such payment shall be submitted by U.S. Postal Service to:

U.S. Environmental Protection Agency  
Fines and Penalties  
Cincinnati Finance Center  
P.O. Box 979077  
St. Louis, MO 63197-9000

For other payment options (EX: wire transfers, overnight mail, ACH and on line) please refer to Attachment A.

32. At the time of payment, Respondent shall send a separate copy of the check, and a written statement that payment has been made in accordance with this CAFO, to the following persons at the following addresses:

Regional Hearing Clerk  
U.S. Environmental Protection Agency - Region 4  
Atlanta Federal Center  
61 Forsyth Street, S.W.  
Atlanta, Georgia 30303-8960

and

Ms. Mary Mattox  
U.S. Environmental Protection Agency, Region 4  
Enforcement and Compliance Assurance Division  
61 Forsyth Street, S.W.  
Atlanta, Georgia 30303-8960

33. Civil penalty payments under this CAFO are penalties within the meaning of Section 162(f) of the Internal Revenue Code, 26 U.S.C. § 162(f), or of 26 C.F.R. § 1.162-21 and are not tax deductible expenditures for purposes of federal law.

34. Under Section 309(g)(9) of the CWA, 33 U.S.C. § 1319(g)(9), failure by Respondent to pay the penalty assessed by the CAFO in full by its due date may subject Respondent to a civil action to collect the assessed penalty plus interest (at currently prevailing rates from the effective date of this CAFO), attorney's fees, costs for collection proceedings and a quarterly nonpayment penalty for each quarter during which such failure to pay persists. Such nonpayment penalty shall be in an amount equal to twenty percent (20%) of the aggregate amount of such penalty and nonpayment penalty which are unpaid as of the beginning of such quarter. In any such collection action, the validity, amount and appropriateness of the penalty and of this CAFO shall not be subject to review.

35. In addition, Respondent has proposed a Supplemental Environmental Project (SEP) which 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 that will significantly reduce the sediment, nutrient, and pesticide runoff from the farm to the Green River. Construction of the SEP will begin within 30 days of the Effective Date of this CAFO and all aspects of the SEP should be implemented within three (3) years of the Effective Date of this CAFO. The SEP is attached to this CAFO as Exhibit C and incorporated by reference.

With regard to the SEP, Respondent certifies the truth and accuracy of each of the following:

- a. That all cost information provided to the EPA in connection with the EPA's approval of the SEP is complete and accurate and that Respondent in good faith estimates that the cost to implement the SEP is \$58,421.24;



- b. That, as of the date of executing this CAFO, Respondent is not required to perform or develop the SEP by any federal, state, or local law or regulation and is not required to perform or develop the SEP by agreement, grant, or as injunctive relief awarded in any other action in any forum;
- c. That the SEP is not a project that Respondent was planning or intending to construct, perform, or implement other than in settlement of the claims resolved in this CAFO;
- d. That Respondent has not received and will not receive credit for the SEP in any other enforcement action;
- e. That Respondent will not receive reimbursement for any portion of the SEP from another person or entity;
- f. That for federal income tax purposes, Respondent agrees that it will neither capitalize into inventory or basis nor deduct any costs or expenditures incurred in performing the SEP.

36. Any public statement, oral or written, in print, film, or other media, made by Respondent making reference to the SEP under this CAFO from the date of its execution of this CAFO shall include the following language: "This project was undertaken in connection with the settlement of an enforcement action by the U.S. Environmental Protection Agency to enforce federal laws."

37. Respondent shall submit a final SEP completion report at the end of the SEP activity. This report should be certified by Respondent. The report should provide evidence of SEP completion.

38. As described in Paragraph 37, above, Respondent shall submit a SEP Completion Report to EPA within thirty (30) days of completing the SEP. The SEP Completion Reports shall contain the following information:

- (a) A detailed description of the SEP as implemented including photographs of the newly constructed water control features;
- (b) A description of any implementation problems encountered and the solutions thereto;
- (c) Itemized costs, documented by copies of invoices, purchase orders, receipts, canceled checks, or wire transfer records that specifically identify and itemize the individual costs associated with the SEP;

- (d) Certification that the SEP has been fully completed;
- (e) A description of the environmental and public health benefits resulting from the implementation of the SEP;
- (f) A statement that no tax returns filed or to be filed by Respondent will contain deductions or depreciations for any expense associated with the SEP; and
- (g) The following statement, signed by the Respondent, under penalty of law, attesting that the information contained in the SEP Completion Report is true, accurate, and not misleading:

*I certify under penalty of law that I have examined and am familiar with the information submitted in this document and all attachments and that the information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fines and imprisonment.*

## **VI. General Provisions**

39. This CAFO shall not relieve the Respondent of his obligation to comply with all applicable provisions of federal, state, or local law, nor shall it be construed to be a ruling on, or determination of, any issue related to any federal, state, or local permit. Other than as expressed herein, compliance with this CAFO shall not be a defense to any actions subsequently commenced under federal laws and regulations administered by the Complainant.

40. Nothing in this CAFO shall be construed as prohibiting, altering, or in any way limiting the ability of United States to seek any other remedies or sanctions available by virtue of the Respondent's violation of this CAFO or of the statutes and regulations upon which this agreement is based, or for Respondent's violation of any federal or state statute, regulation or permit.

41. Except as otherwise set forth in this document, this CAFO constitutes a settlement by Complainant and Respondent of all claims for civil penalties under the CWA with respect to only those violations alleged in this CAFO. Except as otherwise set forth in this document, compliance with this CAFO shall resolve the allegations of violations contained in this CAFO. Nothing in this CAFO is intended to nor shall be construed to operate in any way to resolve any criminal liability of the Respondent, or other liability resulting from violations that were not alleged in this CAFO. Other than as expressed in this document, Complainant does not waive any right to bring an enforcement action against Respondent for violation of any federal or state statute, regulation or permit, to initiate an action for imminent and substantial endangerment, or to pursue criminal enforcement.

42. Each undersigned representative of the parties to this CAFO certifies that he or she is fully authorized to enter into the terms and conditions of this CAFO and to execute and legally bind that party to it.

43. This CAFO applies to and is binding upon Respondent and any officers, directors, employees, agents, successors and assigns of the Respondent.

44. Any change in the legal status of Respondent including, but not limited to, any transfer of assets of real or personal property, shall not alter Respondent's responsibilities under this CAFO.

45. Each party shall bear its own costs and attorneys' fees in connection with the action resolved by this CAFO.

46. In accordance with 40 C.F.R. Part 22.5, the individuals below are authorized to receive service relating to this proceeding.

For Complainant:

Suzanne Armor  
Associate Regional Counsel  
U.S. Environmental Protection Agency, Region 4  
Atlanta Federal Center  
61 Forsyth Street, S.W.  
Atlanta, Georgia 30303  
(404) 562-9701

For Respondent:

Jerry O'Bryan  
6939 Curdsville Delaware Road  
Owensboro, Kentucky 42301  
270-570-4275

47. The parties acknowledge and agree that this CAFO is subject to the requirements of 40 C.F.R. § 22.45(c)(4), which provides a right to petition to set aside a consent agreement and proposed final order based on comments received during the public comment period.

48. Under Section 309(g) of the CWA, 33 U.S.C. § 1319(g), and 40 C.F.R. § 22.38(b), Complainant represents that the Commonwealth of Kentucky was provided a prior opportunity to consult with Complainant regarding this matter.

49. This CAFO in no way affects the rights of the Complainant as against any person or entity not a party to this CAFO.

50. Effective upon signature of this CAFO by Respondent, Respondent agrees that the time period commencing on the date of its signature and ending on the date EPA receives from

Respondent the payment required by this CAFO shall not be included in computing the running of any statute of limitations potentially applicable to any action brought by the EPA related to the matters addressed in this CAFO and that, in any action brought by the EPA related to the matters addressed, Respondent will not assert, and may not maintain, any defense or claim based upon principles of statute of limitations, waiver, laches, estoppel, or other defense based on the passage of time during such period. If EPA gives notice to Respondent that it will not make this CAFO effective, the statute of limitations shall begin to run again commencing ninety days after the date such notice is sent by EPA.

## **VII. Release by Respondent**

51. Respondent hereby covenants not to sue and agrees not to assert any claims or causes of action against the United States, including any department, agency or instrumentality of the United States, with respect to the matters addressed and resolved in this CAFO, including but not limited to, any claim that any of the matters or actions described in this CAFO have resulted in a taking of Respondent's property without compensation.

**VIII. Effective Date**

51. The effective date of this CAFO shall be the date on which the CAFO is filed with the Regional Hearing Clerk.

**AGREED AND CONSENTED TO:**

For RESPONDENT:

\_\_\_\_\_  
Jerry O'Bryan

Date: \_\_\_\_\_

For COMPLAINANT, U.S. ENVIRONMENTAL PROTECTION AGENCY:

\_\_\_\_\_  
Mary Jo Bragan  
Chief, Water Enforcement Branch  
Enforcement and Compliance Assurance Division  
U.S. EPA Region 4

Date: \_\_\_\_\_

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 4

IN THE MATTER OF: )  
)  
) ADMINISTRATIVE  
JERRY O'BRYAN ) CONSENT AGREEMENT AND  
) FINAL PENALTY ORDER  
)  
CURDSVILLE, KENTUCKY )  
)  
RESPONDENT. ) Docket No.: CWA-04-2018-5501(b)  
\_\_\_\_\_ )

**FINAL ORDER**

In accordance with the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders and the Revocation, Termination or Suspension of Permits*, 40 C.F.R. Part 22, and authorities delegated to me, the forgoing Consent Agreement is hereby approved and incorporated by reference into this Final Order. Under Section 309(g)(2)(A) of the CWA, 33 U.S.C. § 1319(g)(2)(A), Respondent is hereby ordered to comply with the terms of the foregoing Consent Agreement.

U.S. ENVIRONMENTAL PROTECTION AGENCY

\_\_\_\_\_  
Tanya Floyd  
Regional Judicial Officer  
U.S. EPA Region 4

Date: \_\_\_\_\_

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I have this day served a true and correct copy of the foregoing Consent Agreement and Final Order in the matter of: **Docket No. CWA-04-2018-5501(b)** on the parties listed below in the manner indicated:

EPA Internal Mail:

Joel Strange  
Marine Regulatory and  
Wetlands Enforcement Section  
U.S. EPA, Region 4  
Atlanta Federal Center  
61 Forsyth Street, S.W.  
Atlanta, Georgia 30303-8960

By hand-delivery:

Suzanne Armor  
Associate Regional Counsel  
U.S. EPA, Region 4  
Atlanta Federal Center  
61 Forsyth Street, S.W.  
Atlanta, Georgia 30303

By Certified mail,  
return receipt requested:

Jerry O'Bryan  
6939 Curdsville Delaware Road  
Owensboro, Kentucky 42301

Dated: \_\_\_\_\_

\_\_\_\_\_  
Patricia Bullock  
Regional Hearing Clerk  
U. S. Environmental Protection Agency, Region 4  
Atlanta Federal Center  
61 Forsyth Street, S.W.  
Atlanta, Georgia 30303  
(404) 562-9511

# **Supplemental Environmental Project**

**For the Conversion of Conventionally-Tilled Farmland  
to a Soil Health Management System**

**On**

**Jerry O'Bryan**

**Located in Daviess County, Kentucky**

## **CONTENTS**

### **SECTION I**

Project Location

### **SECTION II**

Project Overview

### **SECTION III**

Conservation Practices and Cost Estimates

### **SECTION IV**

Summary



## Section III

### CONSERVATION PRACTICES AND COST ESTIMATES

A conservation plan map showing the location of the conservation practices, and associated cost estimates is attached. This map will serve as a base map for implementing the following conservation practices:

**WATER AND SEDIMENT CONTROL BASIN (CODE 638)** - An earth embankment or a combination ridge and channel constructed across the slope of minor watercourses to form a sediment trap and water detention basin with a stable outlet. This practice may be applied as part of a resource management system for one or more of the following purposes: to reduce watercourse and gully erosion, to trap sediment, or to reduce and manage onsite and downstream runoff. Locate Water and Sediment Control Basins to control erosion in drainage ways. Basins may be installed singly or in series as part of system. Adjust the location to fit the topography, maximize storage and accommodate farm equipment and farming operations.

**GRADE STABILIZATION STRUCTURE (CODE 410)** - A grade stabilization structure is a structure used to control the grade in natural or constructed channels. The purpose of a grade stabilization structure is to stabilize grade, reduce erosion, or improve water quality.

**SUBSURFACE DRAIN (CODE 606)** - A conduit installed beneath the ground surface to collect and/or convey excess water. This practice may be applied as part of a resource management system to achieve one or more of the following purposes: remove or distribute excessive soil water, or to remove salts and other contaminants from the soil profile. This standard applies to agricultural land where a shallow water table exists and where a subsurface drainage system can mitigate the following adverse conditions caused by excessive soil moisture: poor health, vigor and productivity of plants; poor field trafficability; accumulation of salts in the root zone; health risk and livestock stress due to pests such as flukes, flies, or mosquitoes; or wet soil conditions around farmsteads, structures, and roadways. This standard also applies where collected excess water can be distributed through a subsurface water utilization or treatment area.

**TERRACE (CODE 600)** - An earth embankment, or a combination ridge and channel, constructed across the field slope. This practice is applied as part of a resource management system for one or more of the following purposes: reduce erosion and trap sediment, or to retain runoff for moisture conservation. This practice applies where: soil erosion caused by water and excessive slope length is a problem, excess runoff is a problem, there is a need to conserve water, the soils and topography are such that terraces can be constructed and reasonably farmed, or a suitable outlet can be provided.

**GRASSED WATERWAY (CODE 412)** - A shaped or graded channel that is established with suitable vegetation to convey surface water at a non-erosive velocity using a broad and shallow cross section to a stable outlet. This practice is applied in areas where added water conveyance capacity and vegetative protection are needed to prevent erosion and

improve runoff water quality resulting from concentrated surface flow. The purpose of this practice is to: convey runoff from terraces, diversions, or other water concentrations without causing erosion or flooding; prevent gully erosion; protect and improve water quality.

**HEAVY USE AREA PROTECTION (CODE 561)** - Heavy Use Area Protection is used to stabilize a ground surface that is frequently and intensively used by people, animals, or vehicles. The purpose of a heavy use area protection practice is to provide a stable, non-eroding surface for areas frequently used by animals, people or vehicles; and to protect or improve water quality.

**RESIDUE AND TILLAGE MANAGEMENT (CODE 329)** - This practice should be applied as part of a conservation management system to: reduce sheet and rill erosion, improve soil organic matter content, reduce CO<sub>2</sub> losses from the soil, reduce soil particulate emissions, reduce energy use, increase plant-available moisture, and provide food and escape cover for wildlife. It applies to all cropland and other land where crops are grown and includes residue management methods practiced during the part of the year from harvest until spring planting.

**COVER CROP (CODE 340)** - Cover crops are grasses, legumes, and forbs planted for seasonal vegetative cover. This practice is applied to support one or more of the following purposes: reduce erosion from water, maintain or increase soil health and organic matter content, reduce water quality degradation by utilizing excessive soil nutrients, suppress excessive weed pressures and break pest cycles, improve soil moisture use efficiency, and to minimize soil compaction. This practice applies to all lands requiring seasonal vegetative cover for natural resource protection or improvement.

## Section IV

### SUMMARY

By converting the SEP farm from a conventional-tilled system to a soil health management system, Mr. O'Bryan intends to restore the farm to an environmentally friendly, sustainable ecosystem. The soil health management system that Mr. O'Bryan will be converting the farm to will consist of crop rotations, residue management, utilizing cover crops, and implementing a variety of conservation practices.

It has been well documented that soil health management systems increase soil organic carbon sequestration, improve the development of soil structure and soil aggregate stability, increase water infiltration and available water content, enhance water quality, increase drought resilience, reduce greenhouse gas emissions, and provide wildlife habitat. The residue management and cover crops will eliminate rain drop impact and subsequent erosion, reducing the amount of sediment, nutrient, and pesticide pollutants entering the waters of the Waters of the United States (WOTUS). Increasing soil organic carbon, and improving soil structure development and aggregate stability not only improve water infiltration and available water content in the soil, it enables the bacteria and fungi in soil to break down the contaminants in the soil, preventing contaminants from entering the WOTUS.

The conservation practices to be installed will reduce erosion, trap sediment, retain runoff for moisture conservation, improve runoff water quality, and to protect and improve water quality.

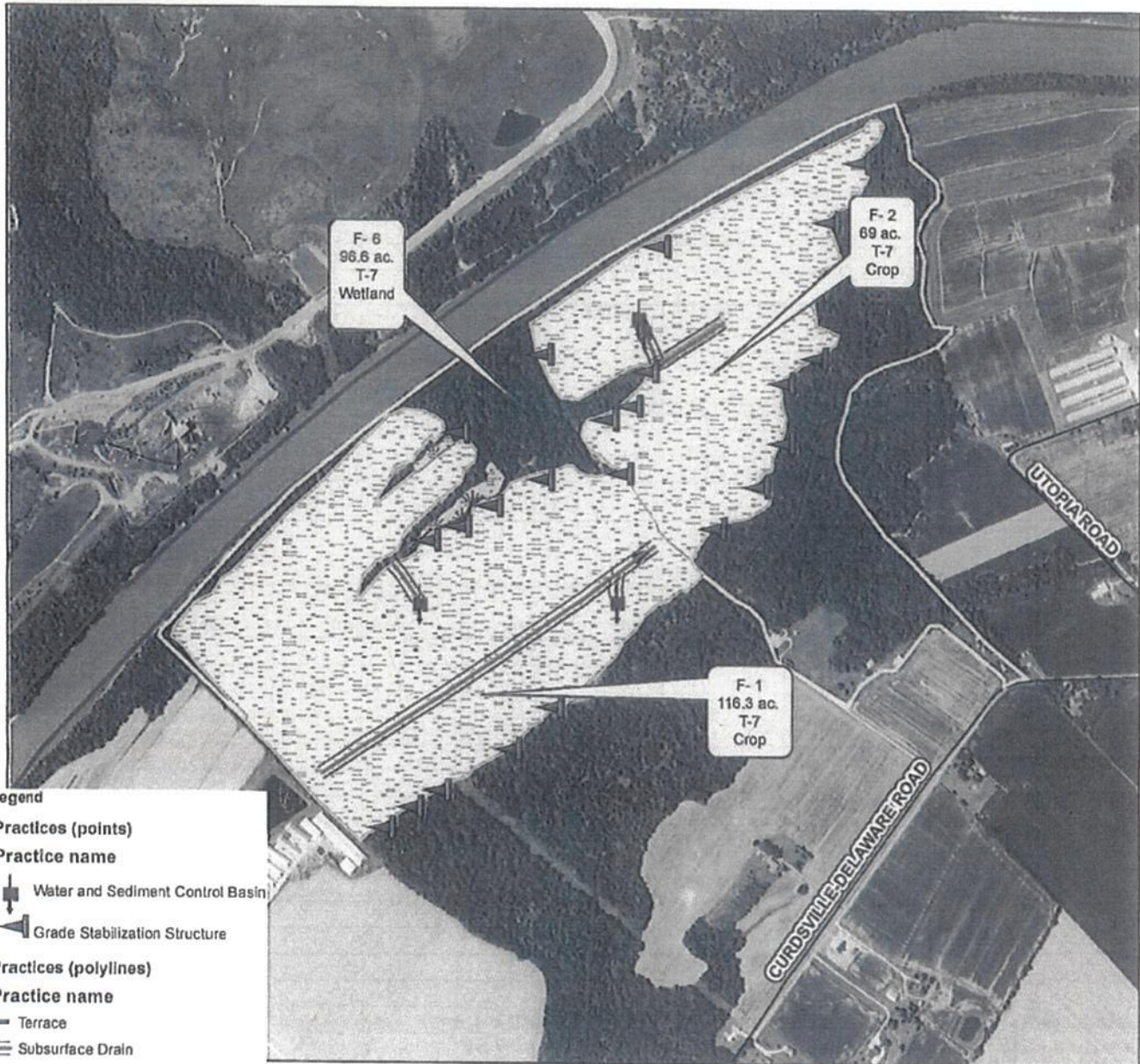
By implementing the sound conservation practices associated with a soil health management system, Mr. O'Bryan will significantly decrease the discharge of sediments and pollutants to the environment, thus reducing environmental hazards and protecting public health.

# Conservation Plan Map

Date: 10/11/2016

Customer(s): JERRY W OBRYAN  
 Approximate Acres: 281.9  
 Legal Description: F- 4844 T-7

Field Office: OWENSBORO SERVICE CENTER  
 Agency: USDA-NRCS  
 Assisted By: RACHEL Martin



Prepared with assistance from USDA-Natural Resources Conservation Service





Shape a natural or constructed channel and establish adapted vegetation for the stable conveyance of runoff water.

Field	Planned Amount	Month	Year	Applied Amount	Date
2	0.45 ac	11	2017		
Total:	0.45 ac				

**Heavy Use Area Protection(561)**

Protect heavily used areas by providing soil protection with vegetation, surfacing material or mechanical structures.

Field	Planned Amount	Month	Year	Applied Amount	Date
2	400. sq ft	11	2017		
Total:	400. sq ft				

**Residue and Tillage Management, No-Till/Strip Till/Direct Seed(329)**

Manage organic residue so maximum amounts are left on the soil surface on a year-round basis. Plant crops in narrow slots or narrow tilled strips in previously untilled soil.

Field	Planned Amount	Month	Year	Applied Amount	Date
1	116.3 ac	4	2017		
2	69. ac	4	2017		
Total:	185.3 ac				

**Subsurface Drain(606)**

Install a subsurface pipe or conduit to collect and/or convey drainage water.

Field	Planned Amount	Month	Year	Applied Amount	Date
1	3100. ft	11	2017		
1	317. ft	11	2017		
1	241. ft	11	2017		
2	800. ft	11	2017		
2	242. ft	11	2017		
Total:	4700. ft				

**Terrace(600)**

Install terrace(s) at design heights, grades and intervals.

Field	Planned Amount	Month	Year	Applied Amount	Date
1	3100. ft	11	2017		
Total:	3100. ft				

**Water and Sediment Control Basin(638)**

Install a structure(s) across the slope to trap sediment and detain water for safe release.

Field	Planned Amount	Month	Year	Applied Amount	Date
1	1. no	11	2017		
1	1. no	11	2017		
2	1. no	11	2017		
2	1. no	11	2017		
Total:	4. no				

Protected

Tract: 7

**Grade Stabilization Structure(410)**

Install a structure to control the grade and head cutting.

Field	Planned Amount	Month	Year	Applied Amount	Date
6	1. no	11	2017		
6	1. no	11	2017		
6	1. no	11	2017		
Total:	3. no				

**Wetland Restoration(657)**

Construct or restore the necessary facilities to provide the biological benefits of a wetland.

Field	Planned Amount	Month	Year	Applied Amount	Date
6	1.65 ac	11	2017		
6	0.45 ac	11	2017		
Total:	2.1 ac				

CERTIFICATION OF PARTICIPANTS

\_\_\_\_\_  
JERRY W OBRYAN                      DATE

CERTIFICATION OF:

SUPERVISORY NATURAL RESOURCE MANAGER  
\_\_\_\_\_  
DAN PORTER                      DATE

CONSERVATION DISTRICT  
\_\_\_\_\_  
OWENSBORO SOIL & WATER CO DATE

PUBLIC BURDEN STATEMENT

According to the Paperwork Reduction Act of 1995, an agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a valid OMB control number. The valid OMB control number for this information collections is 0578-0013. The time required to complete this information collection is estimated to average 45/0.75 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection information.

PRIVACY ACT

The above statements are made in accordance with the Privacy Act of 1974 (5 U.S.C 522a). Furnishing this information is voluntary; however failure to furnish correct, complete information will result in the withholding or withdrawal of such technical or financial assistance. The information may be furnished to other USDA agencies, the Internal Revenue Service, the Department of Justice, or other state or federal law enforcement agencies, or in response to orders of a court, magistrate, or administrative tribunal.

USDA NON-DISCRIMINATION STATEMENT

The U.S. Department of Agriculture (USDA) prohibits discrimination against its customers. If you believe you experienced discrimination when obtaining services from USDA, participating in a USDA program, or participating in a program that receives financial assistance from USDA, you may file a complaint with USDA. Information about how to file a discrimination complaint is available from the Office of the Assistant Secretary for Civil Rights. USDA prohibits discrimination in all its programs and activities on the basis of race, color, national origin, age, disability, and where applicable, sex (including gender identity and expression), marital status, familial status, parental status, religion, sexual orientation, political beliefs, genetic information, reprisal, or because all or part of an individual's income is derived from any public assistance program. (Not all prohibited bases apply to all programs.) To file a complaint of discrimination, complete, sign, and mail a program discrimination complaint form, available at any USDA office location or online at [www.ascr.usda.gov](http://www.ascr.usda.gov), or write to:

USDA Office of the Assistant Secretary for Civil Rights  
1400 Independence Avenue, SW.  
Washington, DC 20250-9410

Or call toll free at (866) 632-9992 (voice) to obtain additional information, the appropriate office or to request documents. Individuals who are deaf, hard of hearing, or have speech disabilities may contact USDA through the Federal Relay service at (800) 877-8339 or (800) 845-6136 (in Spanish). USDA is an equal opportunity provider, employer, and lender. Persons with disabilities who require alternative means for communication of program information (e.g., Braille, large print, audiotape, etc.) should contact USDA's TARGET Center at (202) 720-2600 (voice and TDD).



Jerry O'Bryan -- Mckay Farm  
Cost Estimate for Conservation Practices

1. Pipe Outlet Terrace = 3100 feet @ \$1.82/foot=	\$ 5,642.00
2. Grade Stabilization Structures 21 total cattle Panels-4 @ 15 sq ft = 60 sq ft; 17 Cattle Panels at 10 sq ft each = 170 Sq ft. 170 + 60 = 230 sq ft @\$66.37/sq ft	\$ 15,265.10
3. Grade Stabilization Structure (Rock Chute – 3 each) @ \$26.77/ton x 240 ton total	\$ 11,224.80
4. Grassed Waterway with erosion control blanket on 40% (1 each) = 0.45 acres @ \$2780.76/ac	\$ 1,251.34
5. Heavy Use Area (w/w crossing) 20 X 20 = 400 square feet @ 1.32/ sq foot	\$ 528.00
6. Water and Sediment Control Basins 4 total: 2 @ 450 cubic yards And 2 @ 300 cubic yards = 1500 cu yards x \$3.32/cu yd	\$ 4,980.00
7. Subsurface drain—Corrugated Plastic pipe, single wall= 6 inches—Terrace = 3100 feet, waterways = 1350 feet, And WASCOBs = 800 feet. Total 5250 feet X \$3.72/foot	\$ 19,530.00
Total:	\$ 58,421.24

## Summary of and Response to Public Comments

### Proposed Consent Agreement and Final Order In re Jerry O'Bryan, Docket No. CWA-04-2018-5501(b)

The United States Environmental Protection Agency, Region 4, proposed the above-referenced Consent Agreement and Final Order (CA/FO, or proposed Settlement Agreement) and public noticed it in accordance with the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits*, 40 C.F.R. Part 22 on May 30, 2018. The EPA received a total of six<sup>1</sup> comment letters, all opposed to the EPA's issuance of the proposed Settlement Agreement.

Comments were generally centered around several similar themes. Rather than address each comment individually, where multiple commenters focused on the same theme, the EPA has summarized and responded to those comments thematically. Where comments were unique the EPA addressed them individually. A summary of the comments received, and the EPA's response thereto, are included below.

#### ***ALLEGED IMPACTS TO WETLANDS***

1. **TOPIC:** Several commenters raised a concern with Respondent's alleged unauthorized fill of a water of the United States located on the Hardy Farm, and what enforcement measures, if anything, will be taken to remedy that unauthorized fill.

**RESPONSE:** The proposed Settlement Agreement relates only to the 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. Nothing in the proposed Settlement Agreement obviates the Respondent's obligations to comply with applicable federal, state, or local laws, including Section 404 of the Clean Water Act for any other properties or discharge areas. See Paragraph 39 of the proposed Settlement Agreement. Similarly, nothing in the proposed Settlement Agreement limits or prohibits the EPA's or the USACE's ability to seek any other remedies or sanctions related to other potential violations by the Respondent. See Paragraph 40 of the proposed Settlement Agreement.

Pursuant to Section 404 of the Clean Water Act, 33 U.S.C. § 1344, the United States Army Corps of Engineers (USACE) is the federal entity with the statutory authority to issue permits for discharge into navigable waters of the United States. Under the *Federal Enforcement for the Section 404 Program of the Clean Water Act Memorandum Between*

---

<sup>1</sup> The EPA received one additional comment letter, which lacked a return address. *See* 40 C.F.R. § 22.3 (defining a "commenter" as a person who timely: (i) submits in writing to the Regional Hearing Clerk that he or she is providing or intends to provide comments on the proposed assessment of penalties pursuant to, *inter alia*, section 309(g) of the Clean Water Act, and intends to participate in the proceeding; and (ii) provides the Regional Hearing Clerk with a return address.). Hence, while the EPA considered the issues raised in that letter, the person providing those comments is not considered a "commenter" for purposes of this proceeding.

*the Department of the Army and the Environmental Protection Agency (Jan. 1989), the USACE generally serves as the lead enforcement agency for unpermitted discharge violations and typically conducts field investigations and undertakes appropriate enforcement actions, which may include issuance of after-the-fact permits. The EPA shared your concerns regarding alleged unauthorized discharge of fill material on the Hardy Farm with the USACE, which is the lead enforcement agency for the Hardy Farm matter. The USACE issued an after-the-fact Section 404 permit to the Respondent on October 5, 2018 for these activities.*

2. **TOPIC:** Several commenters alleged that Respondent impacted wetlands during the construction of his hog truck wash, in violation of the Clean Water Act.

**RESPONSE:** Similar to concerns raised with respect to alleged unauthorized discharge of fill material on the Hardy Farm, the EPA shared your concerns regarding impacts to wetlands associated with the Respondent's construction of the hog truck wash with our colleagues at the USACE, who served as the lead enforcement agency for the hog truck wash matter. In or around July 2015, the Natural Resources Conservation Service (NRCS) requested a wetland delineation verification from the USACE for the hog truck wash. The USACE subsequently conducted a site visit and found that jurisdictional wetlands were present at the site, thus requiring the Respondent to obtain a CWA Section 404 permit for his activities. The USACE issued the Respondent an after-the-fact Section 404 Nationwide Permit No. 40 for Agricultural Activities on September 21, 2015.

### ***CONCERNS WITH PROPOSED SETTLEMENT AGREEMENT***

3. **TOPIC:** One commenter requested that the proposed Settlement Agreement be modified to, "include [verbiage] to exclude the possibility of [Respondent] constructing and operating center pivots and/or any other type of agricultural irrigation system on the lands included in the [Supplemental Environmental Project]."

**RESPONSE:** The requested limiting language is outside of the scope of the EPA's authority. As discussed below, the Commonwealth of Kentucky sets the parameters for operation of AFOs, including appropriate land application limitations and requirements. To the extent that the Respondent constructs and operates such land application devices, the EPA would expect that it be done in a manner that complies with applicable federal, state, and local laws, regulations, and/or relevant permits. This is consistent with the expectation in Paragraph 39 of the proposed Settlement Agreement, which states, "This [proposed Settlement Agreement] shall not relieve Respondent of his obligation to comply with all applicable provisions of federal, state, or local law, nor shall it be construed to be a ruling on, or determination of, any issue related to any federal, state, or local permit."

4. **TOPIC:** One commenter requested that the proposed Settlement Agreement be modified to allow the EPA to “exercise oversight of the SEP construction effort and operations thereafter, making periodic unannounced inspections of the site to ensure compliance with the [proposed Settlement Agreement].”

**RESPONSE:** Consistent with the EPA’s *2015 Update to the 1998 United States Environmental Protection Agency’s Supplemental Environmental Projects Policy* (Mar. 10, 2015) (hereinafter, “2015 Update to SEP Policy”), the EPA may perform oversight to ensure that a SEP “is implemented pursuant to the provisions of the settlement and have legal recourse if the SEP is not adequately performed.” 2015 Update to SEP Policy at 8-9. This oversight, however, does not extend to management of the SEP following completion of the SEP (“[T]he EPA [may not] retain authority to manage or administer the SEP.”). 2015 Update to SEP Policy at 8. As previously discussed, the EPA expects that the SEP be managed in a manner that complies with applicable federal, state, and local laws, regulations, and/or relevant permits. See Paragraph 39 of proposed Settlement Agreement.

5. **TOPIC:** Three commenters expressed their opinion that the proposed civil penalty amount was not reflective of the gravity of the violations and/or high enough to serve as a deterrent against future noncompliance.

**RESPONSE:** In calculating the amount of civil penalties in an administrative CWA Section 404 settlement matter, such as the one at issue here, the EPA generally follows its *Clean Water Act Section 404 Penalty Policy* (Dec. 21, 2001). Pursuant to that Policy, the EPA calculates the penalty as follows:

Penalty = Economic Benefit + (Preliminary Gravity Amount +/- Gravity Adjustment Factors)  
- Litigation Considerations - Ability to Pay - Mitigation Credit for SEPs

The gravity component is based upon: (1) the environmental significance of the alleged violations (including the harm to human health and/or welfare, the extent of aquatic environment impacted, severity of impacts to the aquatic environment, the uniqueness and/or sensitivity of the affected resource, secondary or offsite impacts, and the duration of the violation); and (2) the significance of the noncompliance (including the Respondent’s degree of culpability in committing the alleged Section 404 violations, the Section 404 compliance history of the Respondent, and the need for deterrence).

Thus, in assessing its revised, proposed penalty in this matter, the EPA has considered the Respondent’s culpability, previous Section 404 compliance history, and deterrence effect.

6. **TOPIC:** Several commenters expressed the belief that Respondent has a general history of environmental noncompliance which should inform the EPA’s approach to this matter.

**RESPONSE:** As noted in the EPA's response to Comment No. 5 above, the EPA's *Clean Water Act Section 404 Penalty Policy* directs the EPA to review only a Respondent's noncompliance with Section 404 in assessing the significance of the noncompliance. As detailed above, the Respondent had no history of CWA Section 404 noncompliance prior to the alleged CWA Section 404 violation at the Simpson/McKay Farm, and the EPA is not aware of any ongoing CWA Section 404 noncompliance by the Respondent.

7. **TOPIC:** One commenter expressed the belief that the proposed civil penalty, including mitigation for Respondent's performance of the SEP, allows Respondent to increase the value of his property.

**RESPONSE:** Pursuant to the 2015 Update to SEP Policy, the EPA does not generally approve SEPs that are profitable within the first three-to-five years of implementation. The EPA uses its PROJECT model to forecast a SEP's profitability. See Memorandum from John Peter Suarez, Assistant Administrator for the Office of Enforcement and Compliance Assurance, on "Guidance for Determining Whether a Project is Profitable, When to Accept Profitable Projects as Supplemental Environmental Projects, and How to Value Such Projects" (Dec. 5, 2003). In this matter, the EPA's analysis did not reveal that this SEP would be profitable within the first five years of the project. The EPA does not consider whether a project might increase the value of a Respondent's property.

8. **TOPIC:** One commenter requested that the SEP component of the proposed Settlement Agreement be modified such that the Conservation Plan Map should reflect the present Daviess County PVA Owner's land holdings, which for the Simpson/McKay Farm are presently 317 acres in total.

**RESPONSE:** The EPA has verified with the Respondent and NRCS that the acreage identified on the Conservation Plan Map (281.9 acres) represents only the portions of the properties which will have SEP activities located on them; the remainder of the acreage (approximately 35 acres) is forested.

9. **TOPIC:** One commenter requested that the EPA hold a formal hearing on the matter.

**RESPONSE:** Consistent with the EPA's *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits*, 40 C.F.R. Part 22 (hereinafter *Consolidated Rules of Practice*), the EPA encourages settlement of matters without the need for formal hearings. See 40 C.F.R. §§ 22.13(b), 22.18(b). The EPA is not required to hold such a hearing where the EPA and the Respondent agree to settlement of the causes of action and embody the settlement in a CA/FO, as is the case with the revised, proposed Settlement Agreement in the instant matter.

Nevertheless, the *Consolidated Rules of Practice* do allow for persons who are not parties to the settlement (“third parties”) to provide comments on proposed Settlement Agreements. *See* 40 C.F.R. § 22.45(c). Should the EPA decide to proceed with the proposed Settlement Agreement without amendment, the EPA must provide each commenter a copy of the proposed consent agreement between the parties and the proposed final order. Within 30 days of receipt of the proposed consent agreement and proposed final order, a commenter may petition the Regional Administrator to set aside the consent agreement and proposed final order on the basis that material evidence was not considered. *See* 40 C.F.R. § 22.45(c)(4)(ii). Within 15 days of receipt of the petition, the EPA may, with notice to the Regional Administrator and the commenter, withdraw the consent agreement and proposed final order. If the EPA does not provide notice of withdrawal within 15 days of receipt of a petition, the Regional Administrator will assign a Petition Officer to consider and rule on the petition. *See* 40 C.F.R. § 22.45(c)(4)(iii). Within 30 days of assignment of a Petition Officer, the EPA must present to the Petition Officer a written response to the petition, and provide a copy of its response to the Respondent and commenter. *See* 40 C.F.R. § 22.45(c)(4)(iv). The Petition Officer reviews the petition and EPA’s response thereto, and makes findings as to: (1) the extent to which the petition states an issue relevant and material to the issuance of the proposed final order; (2) whether the EPA adequately considered and responded to the petition; and (3) whether a resolution of the proceeding is appropriate without a hearing. *See* 40 C.F.R. § 22.45(c)(4)(v). If the Petition Officer determines that a hearing is appropriate, he or she will order that the consent agreement and proposed final order be set aside and will establish a hearing schedule. *See* 40 C.F.R. § 22.45(c)(4)(vi).

10. **TOPIC:** Two commenters requested that the EPA litigate this matter in court.

**RESPONSE:** In general, the EPA prefers to attempt to resolve matters at an administrative level, both to expedite environmental compliance and to conserve limited Agency, DOJ, and judicial resources, on which litigation exerts a high demand. The EPA has administrative authority to compel noncompliant parties to perform measures to come into compliance with the Clean Water Act, as well as to settle for civil penalties up to \$274,159 in an administrative action. *See* 33 U.S.C. § 1319(g)(2)(B); 40 C.F.R. Part 19; Civil Monetary Penalty Inflation Adjustment Rule, 84 Fed. Reg. 2,056, 2,059 (Feb. 6, 2019).

#### ***RESPONDENT’S CONCENTRATED ANIMAL FEEDING OPERATIONS***

11. **TOPIC:** Respondent owns and/or operates several concentrated animal feeding operations (CAFOs) in the vicinity of the commenters, and commenters believe that Respondent’s CAFOs are not complying with the term(s) of relevant permits or regulations. Specifically, commenters complained of improper mortality management, odor and air quality concerns, discharge of contaminated effluent from CAFO wastewater

management system(s), depreciated home values, and water quality concerns for the Green River as a result of discharges from the CAFOs.

**RESPONSE:** As an initial matter, the EPA notes that the proposed Settlement Agreement relates only to the 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. Nothing in the proposed Settlement Agreement obviates the Respondent's obligations to comply with applicable federal, state, or local laws, including the terms of his Kentucky No Discharge Operating Permits (KNDOPs) for his animal feeding operations (AFOs).

Pursuant to Kentucky AFO regulations, if an AFO does not discharge or intend to discharge, regardless of size, the AFO is not considered a CAFO and is therefore not required to obtain a Kentucky Pollutant Discharge Elimination System (KPDES) Permit pursuant to KRS Chapter 224. Rather, AFOs that have liquid animal manure waste handling systems are required to have individual KNDOPs. *See* 401 KAR 5:005 Section (1)(3)(a)(2). The KNDOP is a permit issued for "operating a [wastewater treatment plant] that does not have a discharge to a stream, including agricultural waste handling systems and spray irrigation systems." 401 KAR 5:002 Section (84).

Under the KNDOP, an AFO is required to develop and implement a site-specific Agricultural Water Quality Plan (AWQP) and to have a comprehensive Nutrient Management Plan (NMP). The NMP should be designed to ensure appropriate agricultural utilization of the nutrients in the waste such that no discharge of agricultural wastes occurs. Absent a determination by the Commonwealth that an AFO is discharging to a water, the EPA lacks the authority to regulate such AFOs pursuant to Section 402 of the Clean Water Act, 33 U.S.C. § 1342(a).

To the extent that the Respondent's AFOs are discharging to waters of the United States such that issuance of a KPDES permit would be appropriate, the Commonwealth of Kentucky is the entity with the authority to administer the NPDES program within the Commonwealth. *See* National Pollutant Discharge Elimination System Memorandum of Agreement Between the Commonwealth of Kentucky and the United States Environmental Protection Agency Region 4 (Mar. 10, 2008), *available at* <https://www.epa.gov/sites/production/files/2013-09/documents/ky-moa-npdes.pdf>. Consistent with the EPA's 2018-2022 *Strategic Plan*, our commitment to the principles of cooperative federalism, and the July 11, 2019 Memorandum from Susan Parker Bodine, Assistant Administrator for the EPA's Office of Enforcement and Compliance Assurance, *Enhancing Effective Partnerships Between the EPA and the States in Civil Enforcement and Compliance Assurance Work*, "the EPA will generally defer to a state as the primary implementer of inspections and enforcement in authorized programs."

Nevertheless, the EPA takes seriously allegations of unauthorized discharge to water of the United States and has shared your concerns with our partners at the Kentucky Energy

and Environment Cabinet (Cabinet). The Cabinet inspected the Respondent's AFO facility in June 2018 and issued the Respondent a Notice of Violation for alleged violations of his KNDOP Permit No. 059114846 and KRS Chapter 224 on July 20, 2018. The Cabinet subsequently entered into an Agreed Order with the Respondent on February 22, 2019 to address such alleged violations. A copy of that Agreed Order is attached as Enclosure 1 hereto.

Furthermore, the EPA retains its authority to enforce violations of the Clean Water Act if the Commonwealth has not timely or appropriately addressed such violations, pursuant to Section 309 of the Clean Water Act.

12. **TOPIC:** Several commenters expressed concern with a perceived lack of oversight of the Respondent's CAFOs by the Commonwealth of Kentucky's Department of Water (KYDOW), and found KYDOW to be unresponsive to their concerns.

**RESPONSE:** As explained above, non-discharging AFOs in Kentucky are regulated pursuant to Commonwealth law, and, as previously stated, Kentucky is authorized to administer the NPDES program within the Commonwealth. The EPA has shared your concerns with KYDEP, and will support our Commonwealth partners in resolving any outstanding environmental compliance issues to the extent practicable.

13. **TOPIC:** Several commenters requested that the EPA assert regulatory oversight of Respondent's CAFOs and issue National Pollutant Discharge Elimination System (NPDES) permits to Respondent, as well as conduct unannounced compliance inspections at the CAFOs.

**RESPONSE:** As explained above, non-discharging AFOs in Kentucky are regulated pursuant to Commonwealth law. Additionally, to the extent that the Respondent's AFOs are discharging to waters of the United States such that issuance of a KPDES permit would be appropriate, the Commonwealth of Kentucky is the entity with the authority to administer the NPDES program within the Commonwealth. See National Pollutant Discharge Elimination System Memorandum of Agreement Between the Commonwealth of Kentucky and the United States Environmental Protection Agency Region 4 (Mar. 10, 2008), available at <https://www.epa.gov/sites/production/files/2013-09/documents/ky-moa-npdes.pdf>. Consistent with the EPA's 2018-2022 *Strategic Plan*, our commitment to the principles of cooperative federalism, and the July 11, 2019 Memorandum from Susan Parker Bodine, Assistant Administrator for the EPA's Office of Enforcement and Compliance Assurance, *Enhancing Effective Partnerships Between the EPA and the States in Civil Enforcement and Compliance Assurance Work*, "the EPA will generally defer to a state as the primary implementer of inspections and enforcement in authorized programs."

Enclosure



**ENCLOSURE 1**

Commonwealth of Kentucky  
Energy and Environment Cabinet  
Division of Enforcement  
Case No. DOW-180140  
Agreed Order  
In re O'Bryan Farms Hardy Hog Farm  
Feb. 22, 2019

Michael  
Kroeger

COMMONWEALTH OF KENTUCKY  
ENERGY AND ENVIRONMENT CABINET  
DIVISION OF ENFORCEMENT  
CASE NO. DOW-180140

FILED  
FEB 22 2019  
Office of Administrative Hearings

IN RE: O'Bryan Farms Harey Hog Farm  
6939 Curdsville-Delaware Rd.  
Owensboro, KY 42301  
AI No. 114846  
Activity ID No. ERF20180001

AGREED ORDER

WHEREAS, the parties to this Agreed Order, the Energy and Environment Cabinet (hereinafter "Cabinet") and Jerry O'Bryan (hereinafter "Responsible Party") state

STATEMENTS OF FACT

1. The Cabinet is charged with the statutory duty of enforcing KRS Chapter 224 and the regulations promulgated pursuant thereto.
2. The Responsible Party owns and operates a large animal feeding operation located at 6939 Curdsville-Delaware Rd., Owensboro, Kentucky 42301 (hereinafter "Facility"). The Facility holds Kentucky No Discharge Operational Permit (hereinafter "KNDOP") No. 059114846.
3. On June 12, 2018, the Cabinet responded to a complaint of an illicit discharge into the Green River. Upon inspection it was found to be emanating from the Facility referenced in paragraph 2.
4. On July 13, 2018, authorized representatives of the Cabinet identified the following alleged violations of KRS Chapter 224 and the regulations promulgated pursuant thereto at the facility described in paragraph 2 above:

DOW-180140

- a. KAR 5.005 Section 25(2)(c) Issuance of this permit does not relieve the permittee from the responsibility of obtaining any other permits or licenses required by this Cabinet and other state, federal, and local agencies.
- b. 401 KAR 5.005 Section 25(2) This permit shall not be construed as authorizing any operation which is otherwise in contravention of any law, regulation, ordinance or order of any governmental unit.
- c. 401 KAR 5.005 Section 25(2)(d) There shall be no point source discharge of wastewater from the facility.
- d. 401 KAR 5.005 Section 25(2) The land application shall be of a sufficiently low rate as to prevent any runoff to the stream.
- e. 401 KAR 5.013 Section 2 Whenever by reason of emergency or accident a spill or discharge occurs which results in pollution of the waters of the Commonwealth, the Division of Water shall be notified by the most rapid means available.
- f. 401 KAR 5.005 Section 25(2) This permit shall be subject at all times to revocation or modification by the Kentucky Environmental and Public Protection Cabinet as set forth in KRS 224. Commencement of a routine discharge would necessitate such a revocation and would require the issuance of a Kentucky Pollutant Discharge Elimination System permit.
- g. 401 KAR 5.005 Section 25(2) This permit authorizes operation only of the treated works disposal system described in the permit in the manner and under the conditions described in the "application for permit" plans and specifications and other data submitted by the permittee to obtain this permit.

- h. 401 KAR 5:005 Section 25(2)—The waste materials removed from the settling basin shall be disposed of in accordance with the requirements for the disposal of solid waste as set by Kentucky Administrative Regulations.
- i. 401 KAR 10:031 Section 2—Surface waters shall not be aesthetically or otherwise degraded.
- j. KRS 224.70-110—No person shall, directly or indirectly, throw, drain, run or otherwise discharge into any of the waters of the Commonwealth.

5. On July 20, 2018, the Cabinet issued the Responsible Party a Notice of Violation for the violations described in paragraph 4 above.

6. The Responsible Party attended an administrative conference with the Cabinet's Division of Enforcement (hereinafter "DENF") in Frankfort, Kentucky, on September 5, 2018, and while it neither admits nor denies violations described in this Agreed Order, has agreed to enter into this Agreed Order to resolve the alleged violations.

**NOW THEREFORE**, in the interest of settling all civil claims and controversies involving the violations described above, the parties hereby consent to the entry of this Agreed Order and agree as follows:

**REMEDIAL MEASURES**

7. The Cabinet acknowledges that on or about September 19, 2018, the Responsible Party submitted to the Daviess County Conservation District, and provided copies to the Cabinet, an updated Agricultural Water Quality Plan (AWQP) and Nutrient Management Plan (NMP);

8. On or about September 20, 2018, the Responsible Party submitted to the Cabinet a written Corrective Action Plan (CAP), outlining actions that the Responsible Party has taken and will implement onsite by December 31, 2019, to address potential releases from its waste water lagoon, specifically:

- a. Weekly inspections of lagoons as well as monitoring water levels on the staff gauges.
  - b. The installation of a security camera systems at entrances to the farms as well as various points on the farms including but not limited to KNIDOP ponds.
  - c. Outlining a more extensive surveillance program for the night watchman, and
  - d. The installation of door locks on all hog buildings
9. The Responsible Party shall fully implement the CAP by December 31, 2019, and provide a written response to the Cabinet when the items listed in Section 8 are completed.
10. At all times, the Responsible Party shall report to the Cabinet all spills, bypass discharges, upset condition discharges or the releases of substances from its facility identified above which would result in or contribute to the pollution of the waters of the Commonwealth including emergency and accidental releases, in accordance with KRS 224.07-400, 401 KAR 5:015, and 401 KAR 5:065. The Responsible Party shall make its initial report of the above discharges or releases to the DOW Madisonville Regional Office, 824-7529 during normal work hours and the Cabinet's 24-hour notification number, 800-928-2380 or 502-564-2380.
11. At all times, the Responsible Party shall provide for proper and regular operation and maintenance to its holding lagoon and in accordance with its permit conditions.
12. At all times, the Responsible Party shall maintain compliance with KNIDOP-059114846.
13. All submittals required by the terms of the Agreed Order shall be submitted to:

Division of Enforcement  
Attention: Director  
400 Sower Blvd  
Frankfort, KY 40601

PENALTIES

14. The Responsible Party is assessed a civil penalty in the amount of twenty seven thousand five hundred dollars (\$27,500), for the violations alleged above.

a. The Responsible Party shall pay the Cabinet seven thousand five hundred dollars (\$7,500) of the civil penalty, which shall be tendered by the Responsible Party to the Cabinet in four (4) quarterly payments of one thousand eight hundred seventy five dollars (\$1,875) each. The payments shall be due on the first day of each calendar quarter, beginning January 1, 2019. Failure to make timely payment of any installment shall be cause for the Cabinet to demand the outstanding balance of the civil penalty, due within 15 days of written notice of the Cabinet.

b. The remaining twenty thousand dollars (\$20,000) of the civil penalty shall be offset by the completion of a Supplemental Environmental Project (SEP) as described in paragraph 16 below.

15. Payment of penalties shall be by cashier's check, certified check, or money order, made payable to "Kentucky State Treasurer" and shall be sent to the attention of: Director, Division of Enforcement, 300 Sower Blvd., Frankfort, Kentucky 40601. Please note "Case No. DOW-180140" on the instrument of payment.

SUPPLEMENTAL ENVIRONMENTAL PROJECT

16. By December 31, 2019, the Responsible Party shall conduct a SEP to offset the outstanding balance of the assessed civil penalty. The SEP will address the available storage in the run-off lagoons at East Daviess County Landfill, which is owned and operated by Daviess County Fiscal Court. The Responsible Party shall remove approximately 400,000 gallons of dredging material from the lagoons, and properly dispose of the material.

a. Upon completion of the SEP, the Responsible Party shall submit to the Division of Enforcement, documentation certifying the completion of and invoices verifying the total expenditures by the Responsible Party for the completion of the SEP referenced above. If the Responsible Party fails to offset the penalty balance of twenty thousand dollar (\$20,000) on the completion of the SEP, then the Responsible Party shall tender the outstanding balance to the Cabinet. Failure to complete the SEP as described shall be cause for the Cabinet to demand the outstanding twenty thousand dollar (\$20,000) balance of the civil penalty, due within 15 days of written notice of the Cabinet.

**MISCELLANEOUS PROVISIONS**

17. This Agreed Order addresses only the violations alleged herein. Other than those matters resolved by entry of this Agreed Order, nothing contained herein shall be construed to waive or to limit any remedy or cause of action by the Cabinet based on statutes or regulations under its jurisdiction and the Responsible Party reserves its defenses thereto. The Cabinet expressly reserves its right at any time to issue administrative orders and to take any other action it deems necessary that is not inconsistent with this Agreed Order, including the right to order all necessary remedial measures, assess penalties for violations, or recover all response costs incurred, and the Responsible Party reserves its defenses thereto.

18. This Agreed Order shall not prevent the Cabinet from issuing, reissuing, renewing, modifying, revoking, suspending, denying, terminating, or reopening any permit to the Responsible Party. The Responsible Party reserves its defenses thereto, except that the Responsible Party shall not use this Agreed Order as a defense to those permitting actions.

19. The Responsible Party waives its right to any hearing on the matters addressed herein. However, failure by the Responsible Party to comply with any or all of the terms of this Agreed Order shall be grounds for the Cabinet to seek enforcement of this Agreed Order in Franklin Circuit Court and to pursue any other appropriate administrative or judicial action under KRS Chapter 224 and the regulations promulgated pursuant thereto.

20. The Agreed Order may not be amended except by a written order of the Cabinet's Secretary or his designee. The Responsible Party may request an amendment by writing the Director of the Division of Enforcement at 300 Sower Blvd., Frankfort, Kentucky 40601, and stating the reasons for the request. If granted, the amended Agreed Order shall not affect any provision of this Agreed Order unless expressly provided in the amended Agreed Order.

21. The Cabinet does not, by its consent to the entry of this Agreed Order, warrant or aver in any manner that the Responsible Party's complete compliance with this Agreed Order will result in compliance with the provisions of KRS Chapter 224 and the regulations promulgated pursuant thereto. Notwithstanding the Cabinet's review and approval of any plans formulated pursuant to this Agreed Order, the Responsible Party shall remain solely responsible for compliance with the terms of KRS Chapter 224 and the regulations promulgated thereto, this Agreed Order, and any permit and compliance schedule requirements.

22. The Responsible Party shall give notice of this Agreed Order to any purchaser, lessee or successor in interest prior to the transfer of ownership and/or operation of any part of the facility occurring prior to termination of this Agreed Order, shall notify the Cabinet that such notice has been given, and shall follow all statutory requirements for a transfer. Whether or not a transfer takes place, the Responsible Party shall remain fully responsible for payment of all civil penalties and for performance of all remedial measures identified in this Agreed Order.



23. The Cabinet agrees to allow the performance of the above listed remedial measures and payment of civil penalties by the Responsible Party to satisfy the Responsible Party's obligations to the Cabinet generated, resulting from the violations alleged above.

24. The Cabinet and the Responsible Party agree that the remedial measures agreed to herein are designed to comply with the statutes and regulations cited herein. This Agreed Order applies specifically and exclusively to the violations referenced herein and is inapplicable to any other incident, site or facility.

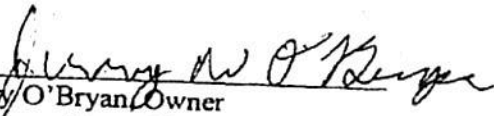
25. Compliance with this Agreed Order is not conditioned upon the receipt of any federal, state, or local funds.

26. This Agreed Order shall be of no force and effect unless and until it is entered by the Secretary or his designee as evidenced by his signature thereon. If this Agreed Order contains any date by which the Responsible Party is to take any action or cease any activity, and the Secretary enters the Agreed Order after that date, then the Responsible Party is nonetheless obligated to have taken the action or ceased the activity by the date contained in this Agreed Order.

#### TERMINATION

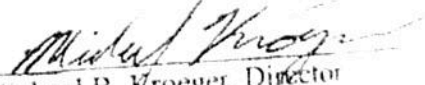
27. This Agreed Order shall terminate upon the Responsible Party's completion of all requirements described in this Agreed Order. The Responsible Party may submit written notice to the Cabinet when it believes all requirements have been performed. The Cabinet will notify the Responsible Party in writing of whether it intends to agree with or object to termination. The Cabinet reserves its right to enforce the Agreed Order, and the Responsible Party reserves its right to file a petition for hearing pursuant to KRS 224.10-420(2) contesting the Cabinet's determination.

**AGREED TO BY:**

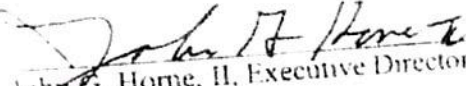
  
Jerry O'Bryan Owner  
O'Bryan Farms Hardy Hog Farm

01-11-2019  
Date

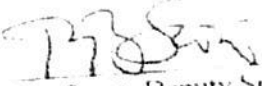
APPROVAL RECOMMENDED BY:

  
Michael B. Kroeger, Director  
Division of Enforcement

1/22/19  
Date

  
John G. Home, II, Executive Director  
Office of Legal Services

2/15/19  
Date

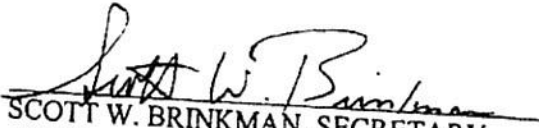
  
R. Bruce Scott, Deputy Secretary  
Energy and Environment Cabinet

2/15/19  
Date

**ORDER**

Wherefore, the foregoing Agreed Order is entered as the final Order of the Energy and Environment Cabinet this 20<sup>th</sup> day of February, 2019.

ENERGY AND ENVIRONMENT CABINET

  
SCOTT W. BRINKMAN, SECRETARY  
OF THE GOVERNOR'S EXECUTIVE CABINET

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing **AGREED ORDER** was mailed, postage prepaid, to the following this 20<sup>th</sup> day of February, 2019.

Mr. Jerry O'Bryan, Owner Permittee  
O'Bryan Farms Hardy Hog Farm  
6939 Curdsville-Delaware Rd  
Owensboro, KY 42301

And mailed, messenger to

Michael B. Kroeger, Director  
Division of Enforcement  
300 Sower Blvd  
Frankfort, Kentucky 40601

John G. Horne, II, Executive Director  
Office of Legal Services  
300 Sower Blvd  
Frankfort, KY 40601

*Marge Tetta*  
DOCKET COORDINATOR

1/20  
2/19  
FBT



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 4  
ATLANTA FEDERAL CENTER  
61 FORSYTH STREET  
ATLANTA, GEORGIA 30303-8960

AUG 20 2019

**CERTIFIED MAIL**  
**RETURN RECEIPT REQUESTED**

The Reverend Richard Powers  
10500 McIntyre Road  
Owensboro, Kentucky 42301

Re: In the Matter of Jerry O'Bryan  
Consent Agreement and Final Order  
Docket No. CWA-04-2018-5501(b)

Dear Mr. Powers:

The U.S. Environmental Protection Agency, Region 4 is in receipt of your comments regarding the above-referenced proposed Consent Agreement and Final Order for Mr. Jerry O'Bryan. The terms of the Consent Agreement and Final Order (CA/FO) were negotiated between the EPA and Mr. O'Bryan in settlement of alleged violations of the Clean Water Act. An enclosure, which provides information on common comments received during the public notice period, is attached for your reference.

Pursuant to regulations outlined in 40 C.F.R. § 22.45(c)(4), the EPA is also providing you a copy of the CA/FO. Should you wish to petition the Regional Administrator to set aside the CA/FO on the basis of the EPA's failure to consider material evidence in the case, you may do so by filing a petition within 30 days of receipt of this letter and the enclosed CA/FO. Please note that you are to send the petition directly to the EPA Regional Administrator, Mary S. Walker, and not to the Regional Hearing Clerk. You must also send copies of your petition to the parties, i.e., the EPA and Mr. O'Bryan. The addresses for each such recipient of the petition are:

Mary S. Walker  
Regional Administrator  
US EPA, Region 4  
61 Forsyth Street, S.W.  
Atlanta, Georgia 30303

With copies to:

Jerry O'Bryan  
6939 Curdsville Delaware Road  
Owensboro, Kentucky 42301

Suzanne K. Armor  
Office of Regional Counsel  
US EPA, Region 4  
61 Forsyth Street, S.W.  
Atlanta, Georgia 30303

If you do not timely file a petition to set aside the CA/FO, the EPA intends to issue the proposed CA/FO. Please contact Suzanne K. Armor, Associate Regional Counsel, at (404) 562-9701 if you have any questions.

Sincerely,



Suzanne G. Rubini  
Acting Director  
Enforcement and Compliance Assurance Division

Enclosures (2)

cc: Mr. Jerry O'Bryan

**U.S. Postal Service™**  
**CERTIFIED MAIL® RECEIPT**  
*Domestic Mail Only*

For delivery information, visit our website at [www.usps.com](http://www.usps.com)®.

**OFFICIAL USE**

7019 0700 0000 6131 5167

Certified Mail Fee  
 \$ \_\_\_\_\_

Extra Services & Fees (check box, add fee as appropriate)

Return Receipt (hardcopy) \$ \_\_\_\_\_

Return Receipt (electronic) \$ \_\_\_\_\_

Certified Mail Restricted Delivery \$ \_\_\_\_\_

Adult Signature Required \$ \_\_\_\_\_

Adult Signature Restricted Delivery \$ \_\_\_\_\_

Postmark  
 Here

Postage  
 \$ \_\_\_\_\_

Reverend Richard Powers  
 10500 McIntyre Road  
 Owensboro, Kentucky 42301

For Instructions

**SENDER: COMPLETE THIS SECTION**

- Complete items 1, 2, and 3.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Reverend Richard Powers  
 500 McIntyre Road  
 Owensboro, Kentucky 42301

2. Article Number (Transfer from service label)

0700 0000 6131 5167

**COMPLETE THIS SECTION ON DELIVERY**

A. Signature  
 X *Richard Powers*  Agent  Addressee

B. Received by (Printed Name) C. Date of Delivery  
*RICHARD POWERS* 8/24/14

D. Is delivery address different from item 1?  Yes  No  
 If YES, enter delivery address below:

3. Service Type
- |  |   |
|--|---|
| <input type="checkbox"/> Adult Signature                               | <input type="checkbox"/> Priority Mail Express®                     |
| <input type="checkbox"/> Adult Signature Restricted Delivery           | <input type="checkbox"/> Registered Mail™                           |
| <input type="checkbox"/> Certified Mail®                               | <input type="checkbox"/> Registered Mail Restricted Delivery        |
| <input type="checkbox"/> Certified Mail Restricted Delivery            | <input type="checkbox"/> Return Receipt for Merchandise             |
| <input type="checkbox"/> Collect on Delivery                           | <input type="checkbox"/> Signature Confirmation™                    |
| <input type="checkbox"/> Collect on Delivery Restricted Delivery       | <input type="checkbox"/> Signature Confirmation Restricted Delivery |
| <input type="checkbox"/> Insured Mail                                  |   |
| <input type="checkbox"/> Insured Mail Restricted Delivery (over \$500) |   |





UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 4  
ATLANTA FEDERAL CENTER  
61 FORSYTH STREET  
ATLANTA, GEORGIA 30303-8960

AUG 20 2019

**CERTIFIED MAIL**  
**RETURN RECEIPT REQUESTED**

Mr. Timothy Mulligan  
10405 McIntyre Road  
Owensboro, Kentucky 42301

Re: In the Matter of Jerry O'Bryan  
Consent Agreement and Final Order  
Docket No. CWA-04-2018-5501(b)

Dear Mr. Mulligan:

The U.S. Environmental Protection Agency, Region 4 is in receipt of your comments regarding the above-referenced proposed Consent Agreement and Final Order for Mr. Jerry O'Bryan. The terms of the Consent Agreement and Final Order (CA/FO) were negotiated between the EPA and Mr. O'Bryan in settlement of alleged violations of the Clean Water Act. An enclosure, which provides information on common comments received during the public notice period, is attached for your reference.

Pursuant to regulations outlined in 40 C.F.R. § 22.45(c)(4), the EPA is also providing you a copy of the CA/FO. Should you wish to petition the Regional Administrator to set aside the CA/FO on the basis of the EPA's failure to consider material evidence in the case, you may do so by filing a petition within 30 days of receipt of this letter and the enclosed CA/FO. Please note that you are to send the petition directly to the EPA Regional Administrator, Mary S. Walker, and not to the Regional Hearing Clerk. You must also send copies of your petition to the parties, i.e., the EPA and Mr. O'Bryan. The addresses for each such recipient of the petition are:

Mary S. Walker  
Regional Administrator  
US EPA, Region 4  
61 Forsyth Street, S.W.  
Atlanta, Georgia 30303

With copies to:

Jerry O'Bryan  
6939 Curdsville Delaware Road  
Owensboro, Kentucky 42301

Suzanne K. Armor  
Office of Regional Counsel  
US EPA, Region 4  
61 Forsyth Street, S.W.  
Atlanta, Georgia 30303

If you do not timely file a petition to set aside the CA/FO, the EPA intends to issue the proposed CA/FO. Please contact Suzanne K. Armor, Associate Regional Counsel, at (404) 562-9701 if you have any questions.

Sincerely,



Suzanne G. Rubini  
Acting Director  
Enforcement and Compliance Assurance Division

Enclosures (2)

cc: Mr. Jerry O'Bryan

**U.S. Postal Service™**  
**CERTIFIED MAIL® RECEIPT**  
 Domestic Mail Only

For delivery information, visit our website at [www.usps.com](http://www.usps.com)®.

**OFFICIAL USE**

7019 0700 0000 6131 5150

Certified Mail Fee  
 \$ \_\_\_\_\_

Extra Services & Fees (check box, add fee as appropriate)

Return Receipt (hardcopy) \$ \_\_\_\_\_

Return Receipt (electronic) \$ \_\_\_\_\_

Certified Mail Restricted Delivery \$ \_\_\_\_\_

Adult Signature Required \$ \_\_\_\_\_

Adult Signature Restricted Delivery \$ \_\_\_\_\_

Postmark  
 Here

Postage  
 \$ \_\_\_\_\_

Total P&C  
 \$ \_\_\_\_\_

Sent To  
 Street a  
 City, Sta

Mr. Timothy Mulligan  
 10405 McIntyre Road  
 Owensboro, Kentucky 42301

PS Form 3800, April 2015 PSN 7530-02-000-9053 See Reverse for Instructions

**SENDER: COMPLETE THIS SECTION**

- Complete items 1, 2, and 3.
  - Print your name and address on the reverse so that we can return the card to you.
  - Attach this card to the back of the mailpiece, or on the front if space permits.
1. Article Addressed to:

Mr. Timothy Mulligan  
 0405 McIntyre Road  
 Owensboro, Kentucky 42301

Article Number (Transfer from service label)  
 7019 0700 0000 6131 5150

PS Form 3811, July 2015 PSN 7530-02-000-9053

**COMPLETE THIS SECTION ON DELIVERY**

A. Signature  Agent  
 Addressee

B. Received by (Printed Name)  Agent  
 Addressee

C. Date of Delivery  
 8-24-11

D. Is delivery address different from item 1?  Yes  
 If YES, enter delivery address below:  No

3. Service Type

Adult Signature  Priority Mail Express®

Adult Signature Restricted Delivery  Registered Mail™

Certified Mail®  Registered Mail Restricted Delivery

Certified Mail Restricted Delivery  Return Receipt for Merchandise

Collect on Delivery  Signature Confirmation™

Collect on Delivery Restricted Delivery  Signature Confirmation Restricted Delivery

Insured Mail  Signature Confirmation Restricted Delivery

Insured Mail Restricted Delivery (over \$500)

Domestic Return Receipt



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 4  
ATLANTA FEDERAL CENTER  
61 FORSYTH STREET  
ATLANTA, GEORGIA 30303-8960

AUG 20 2019

**CERTIFIED MAIL**  
**RETURN RECEIPT REQUESTED**

Mr. and Mrs. Ben Lattus  
10165 McIntyre Road  
Owensboro, Kentucky 42301

Re: In the Matter of Jerry O'Bryan  
Consent Agreement and Final Order  
Docket No. CWA-04-2018-5501(b)

Dear Mr. and Mrs. Lattus:

The U.S. Environmental Protection Agency, Region 4 is in receipt of your comments regarding the above-referenced proposed Consent Agreement and Final Order for Mr. Jerry O'Bryan. The terms of the Consent Agreement and Final Order (CA/FO) were negotiated between the EPA and Mr. O'Bryan in settlement of alleged violations of the Clean Water Act. An enclosure, which provides information on common comments received during the public notice period, is attached for your reference.

Pursuant to regulations outlined in 40 C.F.R. § 22.45(c)(4), the EPA is also providing you a copy of the CA/FO. Should you wish to petition the Regional Administrator to set aside the CA/FO on the basis of the EPA's failure to consider material evidence in the case, you may do so by filing a petition within 30 days of receipt of this letter and the enclosed CA/FO. Please note that you are to send the petition directly to the EPA Regional Administrator, Mary S. Walker, and not to the Regional Hearing Clerk. You must also send copies of your petition to the parties, i.e., the EPA and Mr. O'Bryan. The addresses for each such recipient of the petition are:

Mary S. Walker  
Regional Administrator  
US EPA, Region 4  
61 Forsyth Street, S.W.  
Atlanta, Georgia 30303

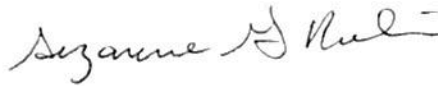
With copies to:

Jerry O'Bryan  
6939 Curdsville Delaware Road  
Owensboro, Kentucky 42301

Suzanne K. Armor  
Office of Regional Counsel  
US EPA, Region 4  
61 Forsyth Street, S.W.  
Atlanta, Georgia 30303

If you do not timely file a petition to set aside the CA/FO, the EPA intends to issue the proposed CA/FO. Please contact Suzanne K. Armor, Associate Regional Counsel, at (404) 562-9701 if you have any questions.

Sincerely,



Suzanne G. Rubini  
Acting Director  
Enforcement and Compliance Assurance Division

Enclosures (2)

cc: Mr. Jerry O'Bryan

**U.S. Postal Service™  
CERTIFIED MAIL® RECEIPT**  
Domestic Mail Only

For delivery information, visit our website at [www.usps.com](http://www.usps.com)™.

**OFFICIAL USE**

7019 0700 0000 6131 5143

Certified Mail Fee  
\$ \_\_\_\_\_

Extra Services & Fees (check box, add fee as appropriate)

<input type="checkbox"/> Return Receipt (hardcopy)	\$ _____
<input type="checkbox"/> Return Receipt (electronic)	\$ _____
<input type="checkbox"/> Certified Mail Restricted Delivery	\$ _____
<input type="checkbox"/> Adult Signature Required	\$ _____
<input type="checkbox"/> Adult Signature Restricted Delivery	\$ _____

Postmark  
Here

Postage  
\$ \_\_\_\_\_

Total Postage  
\$ \_\_\_\_\_

Sent To  
Street and Apt.  
City, State, ZIP

Mr. and Mrs. Ben Lattus  
10165 McIntyre Road  
Owensboro, Kentucky 42301

PS Form 3800, April 2015 PSN 7530-02-000-9047 See Reverse for Instructions

**SENDER: COMPLETE THIS SECTION**

- Complete items 1, 2, and 3.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Mr. and Mrs. Ben Lattus  
10165 McIntyre Road  
Owensboro, Kentucky 42301

Article Number (Transfer from service label)  
019 0700 0000 6131 5143

PS Form 3811, July 2015 PSN 7530-02-000-9053

**COMPLETE THIS SECTION ON DELIVERY**

A. Signature  
 *Ben Lattus*  Agent  
 Addressee

B. Received by (Printed Name)  
BLATTUS

C. Date of Delivery  
8-24-19

D. Is delivery address different from item 1?  Yes  
 If YES, enter delivery address below:  No

3. Service Type

<input type="checkbox"/> Adult Signature	<input type="checkbox"/> Priority Mail Express®
<input type="checkbox"/> Adult Signature Restricted Delivery	<input type="checkbox"/> Registered Mail™
<input type="checkbox"/> Certified Mail®	<input type="checkbox"/> Registered Mail Restricted Delivery
<input type="checkbox"/> Certified Mail Restricted Delivery	<input type="checkbox"/> Return Receipt for Merchandise
<input type="checkbox"/> Collect on Delivery	<input type="checkbox"/> Signature Confirmation™
<input type="checkbox"/> Collect on Delivery Restricted Delivery	<input type="checkbox"/> Signature Confirmation Restricted Delivery
<input type="checkbox"/> Insured Mail	
<input type="checkbox"/> Insured Mail Restricted Delivery (over \$500)	

Domestic Return Receipt



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 4  
ATLANTA FEDERAL CENTER  
61 FORSYTH STREET  
ATLANTA, GEORGIA 30303-8960

AUG 20 2019

**CERTIFIED MAIL**  
**RETURN RECEIPT REQUESTED**

Mr. George Schadler  
6335 KY 500  
Owensboro, Kentucky 42301

Re: In the Matter of Jerry O'Bryan  
Consent Agreement and Final Order  
Docket No. CWA-04-2018-5501(b)

Dear Mr. Schadler:

The U.S. Environmental Protection Agency, Region 4 is in receipt of your comments regarding the above-referenced proposed Consent Agreement and Final Order for Mr. Jerry O'Bryan. The terms of the Consent Agreement and Final Order (CA/FO) were negotiated between the EPA and Mr. O'Bryan in settlement of alleged violations of the Clean Water Act. An enclosure, which provides information on common comments received during the public notice period, is attached for your reference.

Pursuant to regulations outlined in 40 C.F.R. § 22.45(c)(4), the EPA is also providing you a copy of the CA/FO. Should you wish to petition the Regional Administrator to set aside the CA/FO on the basis of the EPA's failure to consider material evidence in the case, you may do so by filing a petition within 30 days of receipt of this letter and the enclosed CA/FO. Please note that you are to send the petition directly to the EPA Regional Administrator, Mary S. Walker, and not to the Regional Hearing Clerk. You must also send copies of your petition to the parties, i.e., the EPA and Mr. O'Bryan. The addresses for each such recipient of the petition are:

Mary S. Walker  
Regional Administrator  
US EPA, Region 4  
61 Forsyth Street, S.W.  
Atlanta, Georgia 30303

With copies to:

Jerry O'Bryan  
6939 Curdsville Delaware Road  
Owensboro, Kentucky 42301

Suzanne K. Armor  
Office of Regional Counsel  
US EPA, Region 4  
61 Forsyth Street, S.W.  
Atlanta, Georgia 30303

If you do not timely file a petition to set aside the CA/FO, the EPA intends to issue the proposed CA/FO. Please contact Suzanne K. Armor, Associate Regional Counsel, at (404) 562-9701 if you have any questions.

Sincerely,



Suzanne G. Rubini  
Acting Director  
Enforcement and Compliance Assurance Division

Enclosures (2)

cc: Mr. Jerry O'Bryan



**U.S. Postal Service™  
CERTIFIED MAIL® RECEIPT**  
Domestic Mail Only

For delivery information, visit our website at [www.usps.com](http://www.usps.com)®

**OFFICIAL USE**

7019 0700 0000 6131 5198

Certified Mail Fee \$ \_\_\_\_\_

Extra Services & Fees (check box, add fee as appropriate)

Return Receipt (hardcopy) \$ \_\_\_\_\_

Return Receipt (electronic) \$ \_\_\_\_\_

Certified Mail Restricted Delivery \$ \_\_\_\_\_

Adult Signature Required \$ \_\_\_\_\_

Adult Signature Restricted Delivery \$ \_\_\_\_\_

Postmark  
Here

Postage \$ \_\_\_\_\_

To \$ \_\_\_\_\_

City \$ \_\_\_\_\_

St \$ \_\_\_\_\_

Zip \$ \_\_\_\_\_

Mr. George Schadler  
6335 KY 500  
Owensboro, Kentucky 42301

PS Form 3800, April 2015 PSN 7530-02-000-9047 See Reverse for Instructions

**SENDER: COMPLETE THIS SECTION**

- Complete items 1, 2, and 3.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Mr. George Schadler  
6335 KY 500  
Owensboro, Kentucky 42301

2. Article Number (Transfer from envelope label)  
69 0700 0000 6131 5198

**COMPLETE THIS SECTION ON DELIVERY**

A. Signature  Agent  Addressee  
*X Shirley Schadler*

B. Received by (Printed Name)  Agent  Addressee  
*Shirley Schadler*

C. Date of Delivery  
*8-28-19*

D. Is delivery address different from item 1?  Yes  
 If YES, enter delivery address below:  No

3. Service Type

Adult Signature  Priority Mail Express®

Adult Signature Restricted Delivery  Registered Mail™

Certified Mail®  Registered Mail Restricted Delivery

Certified Mail Restricted Delivery  Return Receipt for Merchandise

Collect on Delivery  Signature Confirmation™

Collect on Delivery Restricted Delivery  Signature Confirmation Restricted Delivery

Insured Mail

Insured Mail Restricted Delivery (over \$500)

Domestic Return Receipt

PS Form 3811, July 2015 PSN 7530-02-000-9053



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 4  
ATLANTA FEDERAL CENTER  
61 FORSYTH STREET  
ATLANTA, GEORGIA 30303-8960

AUG 20 2019

**CERTIFIED MAIL**  
**RETURN RECEIPT REQUESTED**

Mr. Donald L. Peters  
CAPPAD, Inc.  
P.O. Box 122  
Maple Mount, Kentucky 42356

Re: In the Matter of Jerry O'Bryan  
Consent Agreement and Final Order  
Docket No. CWA-04-2018-5501(b)

Dear Mr. Peters:

The U.S. Environmental Protection Agency, Region 4 is in receipt of your comments regarding the above-referenced proposed Consent Agreement and Final Order for Mr. Jerry O'Bryan. The terms of the Consent Agreement and Final Order (CA/FO) were negotiated between the EPA and Mr. O'Bryan in settlement of alleged violations of the Clean Water Act. An enclosure, which provides information on common comments received during the public notice period, is attached for your reference.

Pursuant to regulations outlined in 40 C.F.R. § 22.45(c)(4), the EPA is also providing you a copy of the CA/FO. Should you wish to petition the Regional Administrator to set aside the CA/FO on the basis of the EPA's failure to consider material evidence in the case, you may do so by filing a petition within 30 days of receipt of this letter and the enclosed CA/FO. Please note that you are to send the petition directly to the EPA Regional Administrator, Mary S. Walker, and not to the Regional Hearing Clerk. You must also send copies of your petition to the parties, i.e., the EPA and Mr. O'Bryan. The addresses for each such recipient of the petition are:

Mary S. Walker  
Regional Administrator  
US EPA, Region 4  
61 Forsyth Street, S.W.  
Atlanta, Georgia 30303

With copies to:

Jerry O'Bryan  
6939 Curdsville Delaware Road  
Owensboro, Kentucky 42301

Suzanne K. Armor  
Office of Regional Counsel  
US EPA, Region 4  
61 Forsyth Street, S.W.  
Atlanta, Georgia 30303

If you do not timely file a petition to set aside the CA/FO, the EPA intends to issue the proposed CA/FO. Please contact Suzanne K. Armor, Associate Regional Counsel, at (404) 562-9701 if you have any questions.

Sincerely,



Suzanne G. Rubini  
Acting Director  
Enforcement and Compliance Assurance Division

Enclosures (2)

cc: Mr. Jerry O'Bryan

**U.S. Postal Service™  
CERTIFIED MAIL® RECEIPT**  
Domestic Mail Only

For delivery information, visit our website at [www.usps.com](http://www.usps.com)®.

**OFFICIAL USE**

7019 0700 0000 6131 5174

Certified Mail Fee	\$
Extra Services & Fees (check box, add fee as appropriate)	
<input type="checkbox"/> Return Receipt (hardcopy)	\$
<input type="checkbox"/> Return Receipt (electronic)	\$
<input type="checkbox"/> Certified Mail Restricted Delivery	\$
<input type="checkbox"/> Adult Signature Required	\$
<input type="checkbox"/> Adult Signature Restricted Delivery	\$
Postage	\$

Postmark  
Here

Mr. Donald L. Peters  
CAPPAD, Inc.  
P.O. Box 122  
Maple Mount, Kentucky 42356

PS Form 3811, July 2015 PSN 7530-02-000-9053 See Reverse for Instructions

SENDER: COMPLETE THIS SECTION	COMPLETE THIS SECTION ON DELIVERY																
<ul style="list-style-type: none"> <li>Complete items 1, 2, and 3.</li> <li>Print your name and address on the reverse so that we can return the card to you.</li> <li>Attach this card to the back of the mailpiece, or on the front if space permits.</li> </ul>	<p>A. Signature  <input checked="" type="checkbox"/> <i>Cecelia Olinger</i> <input type="checkbox"/> Agent  <input type="checkbox"/> Addressee</p> <p>B. Received by (Printed Name)  <i>Cecelia Olinger</i></p> <p>C. Date of Delivery</p> <p>D. Is delivery address different from item 1? <input type="checkbox"/> Yes            If YES, enter delivery address below: <input type="checkbox"/> No</p>																
<p>1. Article Addressed to:</p> <p>Mr. Donald L. Peters CAPPAD, Inc. P.O. Box 122 Maple Mount, Kentucky 42356</p>	<p>3. Service Type</p> <table border="0"> <tr> <td><input type="checkbox"/> Adult Signature</td> <td><input type="checkbox"/> Priority Mail Express®</td> </tr> <tr> <td><input type="checkbox"/> Adult Signature Restricted Delivery</td> <td><input type="checkbox"/> Registered Mail™</td> </tr> <tr> <td><input type="checkbox"/> Certified Mail®</td> <td><input type="checkbox"/> Registered Mail Restricted Delivery</td> </tr> <tr> <td><input type="checkbox"/> Certified Mail Restricted Delivery</td> <td><input type="checkbox"/> Return Receipt for Merchandise</td> </tr> <tr> <td><input type="checkbox"/> Collect on Delivery</td> <td><input type="checkbox"/> Signature Confirmation™</td> </tr> <tr> <td><input type="checkbox"/> Collect on Delivery Restricted Delivery</td> <td><input type="checkbox"/> Signature Confirmation Restricted Delivery</td> </tr> <tr> <td><input type="checkbox"/> Insured Mail</td> <td></td> </tr> <tr> <td><input type="checkbox"/> Insured Mail Restricted Delivery (over \$500)</td> <td></td> </tr> </table>	<input type="checkbox"/> Adult Signature	<input type="checkbox"/> Priority Mail Express®	<input type="checkbox"/> Adult Signature Restricted Delivery	<input type="checkbox"/> Registered Mail™	<input type="checkbox"/> Certified Mail®	<input type="checkbox"/> Registered Mail Restricted Delivery	<input type="checkbox"/> Certified Mail Restricted Delivery	<input type="checkbox"/> Return Receipt for Merchandise	<input type="checkbox"/> Collect on Delivery	<input type="checkbox"/> Signature Confirmation™	<input type="checkbox"/> Collect on Delivery Restricted Delivery	<input type="checkbox"/> Signature Confirmation Restricted Delivery	<input type="checkbox"/> Insured Mail		<input type="checkbox"/> Insured Mail Restricted Delivery (over \$500)	
<input type="checkbox"/> Adult Signature	<input type="checkbox"/> Priority Mail Express®																
<input type="checkbox"/> Adult Signature Restricted Delivery	<input type="checkbox"/> Registered Mail™																
<input type="checkbox"/> Certified Mail®	<input type="checkbox"/> Registered Mail Restricted Delivery																
<input type="checkbox"/> Certified Mail Restricted Delivery	<input type="checkbox"/> Return Receipt for Merchandise																
<input type="checkbox"/> Collect on Delivery	<input type="checkbox"/> Signature Confirmation™																
<input type="checkbox"/> Collect on Delivery Restricted Delivery	<input type="checkbox"/> Signature Confirmation Restricted Delivery																
<input type="checkbox"/> Insured Mail																	
<input type="checkbox"/> Insured Mail Restricted Delivery (over \$500)																	
<p>Transfer from service label</p> <p>0700 0000 6131 5174</p>																	

PS Form 3811, July 2015 PSN 7530-02-000-9053

Domestic Return Receipt



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 4  
ATLANTA FEDERAL CENTER  
61 FORSYTH STREET  
ATLANTA, GEORGIA 30303-8960

AUG 23 2019

**CERTIFIED MAIL**  
**RETURN RECEIPT REQUESTED**

Mr. Rick Murphy  
Vice President  
CAPPAD, Inc.  
P.O. Box 122  
Maple Mount, Kentucky 42356

Re: In the Matter of Jerry O'Bryan  
Consent Agreement and Final Order  
Docket No. CWA-04-2018-5501(b)

Dear Mr. Murphy:

The U.S. Environmental Protection Agency, Region 4 recently sent you a copy of the above-referenced proposed Consent Agreement and Final Order (CA/FO) for Mr. Jerry O'Bryan and a summary of and response to public comments received on the CA/FO. The EPA subsequently noticed an error in Paragraph 35 of the CA/FO, which stated that, "[A]ll aspects of the [Supplemental Environmental Project] should be implemented by January 1, 2019." This portion of Paragraph 35 has been corrected to accurately reflect the three-year anticipated timeline for completion of the Supplemental Environmental Project. A copy of the replacement page 5 for the CA/FO is enclosed for your review.

Please contact me at (404) 562-9701 if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Suzanne K. Armor".

Suzanne K. Armor  
Associate Regional Counsel  
Office of Regional Counsel  
Water Law Office

Enclosure

cc: Mr. Jerry O'Bryan

7017 1450 0000 7972 3388

U.S. Postal Service™  
**CERTIFIED MAIL® RECEIPT**  
Domestic Mail Only

For delivery information, visit our website at [www.usps.com](http://www.usps.com)®.

**OFFICIAL USE**

Certified Mail Fee	\$
Extra Services & Fees (check box, add fee as appropriate)	
<input type="checkbox"/> Return Receipt (hardcopy)	\$
<input type="checkbox"/> Return Receipt (electronic)	\$
<input type="checkbox"/> Certified Mail Restricted Delivery	\$
<input type="checkbox"/> Adult Signature Required	\$
<input type="checkbox"/> Adult Signature Restricted Delivery	\$
Postage	\$
Total Postage and Fees	\$

Postmark  
Here

Sent To \_\_\_\_\_  
Street and Apt. No., or P.O. \_\_\_\_\_  
City, State, ZIP+4® \_\_\_\_\_

Mr. Rick Murphy  
Vice President  
CAPPAD, Inc.  
P.O. Box 122  
Maple Mount, Kentucky 42356

PS Form 3800, April 2015 PSN 7530-02-000-9047 See Reverse for Instructions

**SENDER: COMPLETE THIS SECTION**

- Complete items 1, 2, and 3.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:  
Mr. Rick Murphy  
Vice President  
CAPPAD, Inc.  
P.O. Box 122  
Maple Mount, Kentucky 42356



2. Article Number (Transfer from service label)  
7017 1450 0000 7972 3388

**COMPLETE THIS SECTION ON DELIVERY**

A. Signature  Agent  Addressee  
*Sister Ann P. Cecil*

B. Received by (Printed Name) *Sister Ann P. Cecil* C. Date of Delivery *08-27-19*

D. Is delivery address different from item 1?  Yes  No  
If YES, enter delivery address below:

3. Service Type

<input type="checkbox"/> Adult Signature	<input type="checkbox"/> Priority Mail Express®
<input type="checkbox"/> Adult Signature Restricted Delivery	<input type="checkbox"/> Registered Mail™
<input type="checkbox"/> Certified Mail®	<input type="checkbox"/> Registered Mail Restricted Delivery
<input type="checkbox"/> Certified Mail Restricted Delivery	<input type="checkbox"/> Return Receipt for Merchandise
<input type="checkbox"/> Collect on Delivery	<input type="checkbox"/> Signature Confirmation™
<input type="checkbox"/> Collect on Delivery Restricted Delivery	<input type="checkbox"/> Signature Confirmation Restricted Delivery
<input type="checkbox"/> Mail Restricted Delivery	

PS Form 3811, April 2015 PSN 7530-02-000-9053

Domestic Return Receipt

Regional Hearing Clerk  
U.S. Environmental Protection Agency - Region 4  
Atlanta Federal Center  
61 Forsyth Street, S.W.  
Atlanta, Georgia 30303-8960

and

Ms. Mary Mattox  
U.S. Environmental Protection Agency, Region 4  
Enforcement and Compliance Assurance Division  
61 Forsyth Street, S.W.  
Atlanta, Georgia 30303-8960

33. Civil penalty payments under this CAFO are penalties within the meaning of Section 162(f) of the Internal Revenue Code, 26 U.S.C. § 162(f), or of 26 C.F.R. § 1.162-21 and are not tax deductible expenditures for purposes of federal law.

34. Under Section 309(g)(9) of the CWA, 33 U.S.C. § 1319(g)(9), failure by Respondent to pay the penalty assessed by the CAFO in full by its due date may subject Respondent to a civil action to collect the assessed penalty plus interest (at currently prevailing rates from the effective date of this CAFO), attorney's fees, costs for collection proceedings and a quarterly nonpayment penalty for each quarter during which such failure to pay persists. Such nonpayment penalty shall be in an amount equal to twenty percent (20%) of the aggregate amount of such penalty and nonpayment penalty which are unpaid as of the beginning of such quarter. In any such collection action, the validity, amount and appropriateness of the penalty and of this CAFO shall not be subject to review.

35. In addition, Respondent has proposed a Supplemental Environmental Project (SEP) which 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 that will significantly reduce the sediment, nutrient, and pesticide runoff from the farm to the Green River. Construction of the SEP will begin within 30 days of the Effective Date of this CAFO and all aspects of the SEP should be implemented within three (3) years of the Effective Date of this CAFO. The SEP is attached to this CAFO as Exhibit C and incorporated by reference.

With regard to the SEP, Respondent certifies the truth and accuracy of each of the following:

- a. That all cost information provided to the EPA in connection with the EPA's approval of the SEP is complete and accurate and that Respondent in good faith estimates that the cost to implement the SEP is \$58,421.24;



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 4  
ATLANTA FEDERAL CENTER  
61 FORSYTH STREET  
ATLANTA, GEORGIA 30303-8960

AUG 23 2019

**CERTIFIED MAIL**  
**RETURN RECEIPT REQUESTED**

Mr. Donald L. Peters  
CAPPAD, Inc.  
P.O. Box 122  
Maple Mount, Kentucky 42356

Re: In the Matter of Jerry O'Bryan  
Consent Agreement and Final Order  
Docket No. CWA-04-2018-5501(b)

Dear Mr. Peters:

The U.S. Environmental Protection Agency, Region 4 recently sent you a copy of the above-referenced proposed Consent Agreement and Final Order (CA/FO) for Mr. Jerry O'Bryan and a summary of and response to public comments received on the CA/FO. The EPA subsequently noticed an error in Paragraph 35 of the CA/FO, which stated that, "[A]ll aspects of the [Supplemental Environmental Project] should be implemented by January 1, 2019." This portion of Paragraph 35 has been corrected to accurately reflect the three-year anticipated timeline for completion of the Supplemental Environmental Project. A copy of the replacement page 5 for the CA/FO is enclosed for your review.

Please contact me at (404) 562-9701 if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Suzanne K. Armor".

Suzanne K. Armor  
Associate Regional Counsel  
Office of Regional Counsel  
Water Law Office

Enclosure

cc: Mr. Jerry O'Bryan



**U.S. Postal Service™  
CERTIFIED MAIL® RECEIPT**  
Domestic Mail Only

For delivery information, visit our website at [www.usps.com](http://www.usps.com)®.

**OFFICIAL USE**

Certified Mail Fee  
\$ \_\_\_\_\_

Extra Services & Fees (check box, add fee as appropriate)

Return Receipt (hardcopy) \$ \_\_\_\_\_

Return Receipt (electronic) \$ \_\_\_\_\_

Certified Mail Restricted Delivery \$ \_\_\_\_\_

Adult Signature Required \$ \_\_\_\_\_

Adult Signature Restricted Delivery \$ \_\_\_\_\_

Postmark  
Here

Postage  
\$ \_\_\_\_\_

Total Postage and Fees  
\$ \_\_\_\_\_

Sent To **Mr. Donald L. Peters**

Street and Apt. No., or P.O. Box 122

City, State, ZIP+4® **Maple Mount, Kentucky 42356**

PS Form 3800, April 2015 PSN 7530-02-000-9047 See Reverse for Instructions

7017 1450 0000 7972 3395

**SENDER: COMPLETE THIS SECTION**

- Complete items 1, 2, and 3.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Mr. Donald L. Peters  
CAPPAD, Inc.  
P.O. Box 122  
Maple Mount, Kentucky 42356



2. Article Number (Transfer from service label)

7017 1450 0000 7972 3395

PS Form 3811, April 2015 PSN 7530-02-000-9053

**COMPLETE THIS SECTION ON DELIVERY**

A. Signature  
 Agent  
 Addressee  
*Sister Ann P. Cecil*

B. Received by (Printed Name) **Sister Ann P. Cecil**

C. Date of Delivery **08-27-19**

D. Is delivery address different from item 1?  Yes  
 If YES, enter delivery address below:  No

3. Service Type

Adult Signature

Adult Signature Restricted Delivery

Certified Mail®

Certified Mail Restricted Delivery

Collect on Delivery

Collect on Delivery Restricted Delivery

Priority Mail Express®

Registered Mail™

Registered Mail Restricted Delivery

Return Receipt for Merchandise

Signature Confirmation™

Signature Confirmation Restricted Delivery

Domestic Return Receipt



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 4  
ATLANTA FEDERAL CENTER  
61 FORSYTH STREET  
ATLANTA, GEORGIA 30303-8960

AUG 23 2019

**CERTIFIED MAIL**  
**RETURN RECEIPT REQUESTED**

Mr. and Mrs. Ben Lattus  
10165 McIntyre Road  
Owensboro, Kentucky 42301

Re: In the Matter of Jerry O'Bryan  
Consent Agreement and Final Order  
Docket No. CWA-04-2018-5501(b)

Dear Mr. and Mrs. Lattus:

The U.S. Environmental Protection Agency, Region 4 recently sent you a copy of the above-referenced proposed Consent Agreement and Final Order (CA/FO) for Mr. Jerry O'Bryan and a summary of and response to public comments received on the CA/FO. The EPA subsequently noticed an error in Paragraph 35 of the CA/FO, which stated that, "[A]ll aspects of the [Supplemental Environmental Project] should be implemented by January 1, 2019." This portion of Paragraph 35 has been corrected to accurately reflect the three-year anticipated timeline for completion of the Supplemental Environmental Project. A copy of the replacement page 5 for the CA/FO is enclosed for your review.

Please contact me at (404) 562-9701 if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "S.K.A.", written over a horizontal line.

Suzanne K. Armor  
Associate Regional Counsel  
Office of Regional Counsel  
Water Law Office

Enclosure

cc: Mr. Jerry O'Bryan

7017 1450 0000 7972 3371

U.S. Postal Service™  
CERTIFIED MAIL® RECEIPT  
Domestic Mail Only

For delivery information, visit our website at [www.usps.com](http://www.usps.com)®.

OFFICIAL USE

Certified Mail Fee  
\$ \_\_\_\_\_

Extra Services & Fees (check box, add fee as appropriate)

Return Receipt (hardcopy) \$ \_\_\_\_\_

Return Receipt (electronic) \$ \_\_\_\_\_

Certified Mail Restricted Delivery \$ \_\_\_\_\_

Adult Signature Required \$ \_\_\_\_\_

Adult Signature Restricted Delivery \$ \_\_\_\_\_

Postage  
\$ \_\_\_\_\_

Total Postage and Fees  
\$ \_\_\_\_\_

Postmark  
Here

Sent To  
Street and Apt. No., or PO Box  
City, State, ZIP+4®

Mr. and Mrs. Ben Lattus  
10165 McIntyre Road  
Owensboro, Kentucky 42301

PS Form 3800, April 2015 PSN 7530-02-000-9047 See Reverse for Instructions

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Mr. and Mrs. Ben Lattus  
10165 McIntyre Road  
Owensboro, Kentucky 42301



9590 9401 0004 5205 4756 89

7017 1450 0000 7972 3371

PS Form 3811, April 2015 PSN 7530-02-000-9053

COMPLETE THIS SECTION ON DELIVERY

A. Signature  
X Ben Lattus  Agent  Addressee

B. Received by (Printed Name) C. Date of Delivery  
BEN LATTUS 8.26.19

D. Is delivery address different from item 1?  Yes  
If YES, enter delivery address below:  No

3. Service Type

Adult Signature  Priority Mail Express®

Adult Signature Restricted Delivery  Registered Mail™

Certified Mail®  Registered Mail Restricted Delivery

Certified Mail Restricted Delivery  Return Receipt for Merchandise

Collect on Delivery  Signature Confirmation™

Collect on Delivery Restricted Delivery  Signature Confirmation Restricted Delivery

Registered Mail Restricted Delivery (5500)

Domestic Return Receipt



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 4  
ATLANTA FEDERAL CENTER  
61 FORSYTH STREET  
ATLANTA, GEORGIA 30303-8960

AUG 23 2018

**CERTIFIED MAIL**  
**RETURN RECEIPT REQUESTED**

Mr. Timothy Mulligan  
10405 McIntyre Road  
Owensboro, Kentucky 42301

Re: In the Matter of Jerry O'Bryan  
Consent Agreement and Final Order  
Docket No. CWA-04-2018-5501(b)

Dear Mr. Mulligan:

The U.S. Environmental Protection Agency, Region 4 recently sent you a copy of the above-referenced proposed Consent Agreement and Final Order (CA/FO) for Mr. Jerry O'Bryan and a summary of and response to public comments received on the CA/FO. The EPA subsequently noticed an error in Paragraph 35 of the CA/FO, which stated that, "[A]ll aspects of the [Supplemental Environmental Project] should be implemented by January 1, 2019." This portion of Paragraph 35 has been corrected to accurately reflect the three-year anticipated timeline for completion of the Supplemental Environmental Project. A copy of the replacement page 5 for the CA/FO is enclosed for your review.

Please contact me at (404) 562-9701 if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Suzanne K. Armor".

Suzanne K. Armor  
Associate Regional Counsel  
Office of Regional Counsel  
Water Law Office

Enclosure

cc: Mr. Jerry O'Bryan

7017 1450 0000 7972 3456

U.S. Postal Service™  
CERTIFIED MAIL® RECEIPT  
Domestic Mail Only

For delivery information, visit our website at [www.usps.com](http://www.usps.com)®.

OFFICIAL USE

Certified Mail Fee	\$
Extra Services & Fees (check box, add fee as appropriate)	
<input type="checkbox"/> Return Receipt (hardcopy)	\$
<input type="checkbox"/> Return Receipt (electronic)	\$
<input type="checkbox"/> Certified Mail Restricted Delivery	\$
<input type="checkbox"/> Adult Signature Required	\$
<input type="checkbox"/> Adult Signature Restricted Delivery	\$
Postage	\$
Total Postage and Fees	\$

Postmark  
Here

Sent To	Mr. Timothy Mulligan
Street and Apt. No., or PO Box No.	10405 McIntyre Road
City, State, ZIP+4®	Owensboro, Kentucky 42301
PS Form 3800, April 2015 PSN 7530-02-000-9047 See Reverse for Instructions	

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, on the front if space permits.

1. Article Addressed to:

Mr. Timothy Mulligan  
10405 McIntyre Road  
Owensboro, Kentucky 42301



7017 1450 0000 7972 3456

PS Form 3811, April 2015 PSN 7530-02-000-9053

COMPLETE THIS SECTION ON DELIVERY

A. Signature	<input type="checkbox"/> Agent
<input checked="" type="checkbox"/> Donna Mulligan	<input type="checkbox"/> Addressee
B. Received by (Printed Name)	E. Date of Delivery
DONNA MULLIGAN	8-28-19
D. Is delivery address different from item 1? <input type="checkbox"/> Yes	
If YES, enter delivery address below: <input type="checkbox"/> No	

3. Service Type

<input type="checkbox"/> Adult Signature	<input type="checkbox"/> Priority Mail Express®
<input type="checkbox"/> Adult Signature Restricted Delivery	<input type="checkbox"/> Registered Mail™
<input type="checkbox"/> Certified Mail®	<input type="checkbox"/> Registered Mail Restricted Delivery
<input type="checkbox"/> Certified Mail Restricted Delivery	<input type="checkbox"/> Return Receipt for Merchandise
<input type="checkbox"/> Collect on Delivery	<input type="checkbox"/> Signature Confirmation™
<input type="checkbox"/> Collect on Delivery Restricted Delivery	<input type="checkbox"/> Signature Confirmation Restricted Delivery
<input type="checkbox"/> Insured Mail (over \$500)	

Domestic Return Receipt



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 4  
ATLANTA FEDERAL CENTER  
61 FORSYTH STREET  
ATLANTA, GEORGIA 30303-8960

AUG 23 2019

**CERTIFIED MAIL**  
**RETURN RECEIPT REQUESTED**

The Reverend Richard Powers  
10500 McIntyre Road  
Owensboro, Kentucky 42301

Re: In the Matter of Jerry O'Bryan  
Consent Agreement and Final Order  
Docket No. CWA-04-2018-5501(b)

Dear Mr. Powers:

The U.S. Environmental Protection Agency, Region 4 recently sent you a copy of the above-referenced proposed Consent Agreement and Final Order (CA/FO) for Mr. Jerry O'Bryan and a summary of and response to public comments received on the CA/FO. The EPA subsequently noticed an error in Paragraph 35 of the CA/FO, which stated that, "[A]ll aspects of the [Supplemental Environmental Project] should be implemented by January 1, 2019." This portion of Paragraph 35 has been corrected to accurately reflect the three-year anticipated timeline for completion of the Supplemental Environmental Project. A copy of the replacement page 5 for the CA/FO is enclosed for your use and review.

Please contact me at (404) 562-9701 if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Suzanne K. Armor".

Suzanne K. Armor  
Associate Regional Counsel  
Office of Regional Counsel  
Water Law Office

Enclosure

cc: Mr. Jerry O'Bryan

7017 1450 0000 7972 3449

**U.S. Postal Service™**  
**CERTIFIED MAIL® RECEIPT**  
Domestic Mail Only

For delivery information, visit our website at [www.usps.com](http://www.usps.com)®.

**OFFICIAL USE**

Certified Mail Fee	\$
Extra Services & Fees (check box, add fee as appropriate)	
<input type="checkbox"/> Return Receipt (hardcopy)	\$
<input type="checkbox"/> Return Receipt (electronic)	\$
<input type="checkbox"/> Certified Mail Restricted Delivery	\$
<input type="checkbox"/> Adult Signature Required	\$
<input type="checkbox"/> Adult Signature Restricted Delivery	\$

Postmark  
Here

Postage	\$
Total Postage and Fees	\$

Sent To \_\_\_\_\_  
 Street and Apt. No., or PO Box \_\_\_\_\_  
 City, State, ZIP+4® \_\_\_\_\_  
**The Reverend Richard Powers** .....  
**10500 McIntyre Road** .....  
**Owensboro, Kentucky 42301** .....

PS Form 3800, April 2015 PSN 7530-02-000-9047 See Reverse for Instructions

**SENDER: COMPLETE THIS SECTION**

- Complete items 1, 2, and 3.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:  
**The Reverend Richard Powers**  
**10500 McIntyre Road**  
**Owensboro, Kentucky 42301**



9590 9401 0004 5205 4756 27

2. Article Number (Transfer from service label)  
**7017 1450 0000 7972 3449**

PS Form 3811, April 2015 PSN 7530-02-000-9053

**COMPLETE THIS SECTION ON DELIVERY**

A. Signature  
*Richard Powers*  Agent  
 Addressee

B. Received by (Printed Name)  
**RICHARD POWERS**

C. Date of Delivery  
**AUG 28 2019**

D. Is delivery address different from item 1?  Yes  
 If YES, enter delivery address below.  No

3. Service Type

<input type="checkbox"/> Adult Signature	<input type="checkbox"/> Priority Mail Express®
<input type="checkbox"/> Adult Signature Restricted Delivery	<input type="checkbox"/> Registered Mail™
<input type="checkbox"/> Certified Mail®	<input type="checkbox"/> Registered Mail Restricted Delivery
<input type="checkbox"/> Certified Mail Restricted Delivery	<input type="checkbox"/> Return Receipt for Merchandise
<input type="checkbox"/> Collect on Delivery	<input type="checkbox"/> Signature Confirmation™
<input type="checkbox"/> Collect on Delivery Restricted Delivery	<input type="checkbox"/> Signature Confirmation Restricted Delivery
<input type="checkbox"/> Mail Restricted Delivery	

(over 3500)

Domestic Return Receipt



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 4  
ATLANTA FEDERAL CENTER  
61 FORSYTH STREET  
ATLANTA, GEORGIA 30303-8960

AUG 23 2019

**CERTIFIED MAIL**  
**RETURN RECEIPT REQUESTED**

Mr. George Schadler  
6335 KY 500  
Owensboro, Kentucky 42301

Re: In the Matter of Jerry O'Bryan  
Consent Agreement and Final Order  
Docket No. CWA-04-2018-5501(b)

Dear Mr. Schadler:

The U.S. Environmental Protection Agency, Region 4 recently sent you a copy of the above-referenced proposed Consent Agreement and Final Order (CA/FO) for Mr. Jerry O'Bryan and a summary of and response to public comments received on the CA/FO. The EPA subsequently noticed an error in Paragraph 35 of the CA/FO, which stated that, "[A]ll aspects of the [Supplemental Environmental Project] should be implemented by January 1, 2019." This portion of Paragraph 35 has been corrected to accurately reflect the three-year anticipated timeline for completion of the Supplemental Environmental Project. A copy of the replacement page 5 for the CA/FO is enclosed for your review.

Please contact me at (404) 562-9701 if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Suzanne K. Armor".

Suzanne K. Armor  
Associate Regional Counsel  
Office of Regional Counsel  
Water Law Office

Enclosure

cc: Mr. Jerry O'Bryan



**U.S. Postal Service™**  
**CERTIFIED MAIL® RECEIPT**  
 Domestic Mail Only

For delivery information, visit our website at [www.usps.com](http://www.usps.com)®.

**OFFICIAL USE**

7017 1450 0000 7972 3432

Certified Mail Fee  
 \$ \_\_\_\_\_

Extra Services & Fees (check box, add fee as appropriate)

Return Receipt (hardcopy) \$ \_\_\_\_\_

Return Receipt (electronic) \$ \_\_\_\_\_

Certified Mail Restricted Delivery \$ \_\_\_\_\_

Adult Signature Required \$ \_\_\_\_\_

Adult Signature Restricted Delivery \$ \_\_\_\_\_

Postage  
 \$ \_\_\_\_\_

**Total Postage and Fees**  
 \$ \_\_\_\_\_

Postmark  
 Here

Sent To  
 Street and Apt. No., or P.O.  
 City, State, ZIP+4®

Mr. George Schadler  
 6335 KY 500  
 Owensboro, Kentucky 42301

PS Form 3800, April 2015 PSN 7530-02-000-9047 See Reverse for Instructions

**SENDER: COMPLETE THIS SECTION**

- Complete items 1, 2, and 3.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Mr. George Schadler  
 6335 KY 500  
 Owensboro, Kentucky 42301



2. Article Number (Transfer from service label)

7017 1450 0000 7972 3432

**COMPLETE THIS SECTION ON DELIVERY**

A. Signature

X *George Schadler*  Agent  Addressee

B. Received by (Printed Name) C. Date of Delivery

*George Schadler*

D. Is delivery address different from item 1?  Yes  No  
 If YES, enter delivery address below:



3. Service Type

- Adult Signature
- Adult Signature Restricted Delivery
- Certified Mail
- Certified Mail Restricted Delivery
- Collect on Delivery
- Collect on Delivery Restricted Delivery
- Mail Restricted Delivery
- Priority Mail Express®
- Registered Mail™
- Registered Mail Restricted Delivery
- Return Receipt for Merchandise
- Signature Confirmation™
- Signature Confirmation Restricted Delivery

# CAPPAD, INC

P.O. Box 122

Maple Mount, Kentucky 42356

9-17-2019

Mary S. Walker  
Regional Administrator  
USEPA, Region 4  
61 Forsyth Street, S.W.  
Atlanta, Georgia 30303

Re: In the matter of Jerry O'Bryan  
Consent Agreement and final order  
Docket No. CWA-04-2018-5501 (b)

Dear Mary S. Walker:

Community Against Pig Pollution and Disease, located in Daviess county, Kentucky is in receipt of your comments regarding the above-referenced proposed Consent Agreement and final order. The terms of the consent agreement and final (CA/FO) were negotiated between the EPA and Mr. Jerry O'Bryan in settlement of alleged violations of the Clean Water Act. I received the documents sent by certified mail on 8-26-2019, and a correction letter followed on 8-30-2019. This petition will be filed within the 30 days' receipt of the Consent Agreement and final order.

The CAFOs owned and operated by Mr. Jerry O'Bryan, Curdsville, Kentucky were permitted, "Kentucky No Discharge Operational Permit" by the Department for Environmental Protection, Division of Water. They are listed as Small to Medium Animal Feeding Operations. The CAFO's are Concentrated Animal Feeding operations, not AFO's. 40 CFR 122:23 defines a large CAFO. A AFO is defined as a large CAFO if it stables or confines as many as 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. 401 KAR 5:002 Section (84) KNDOP a permit issued pursuant to 401 KAR 5:005 for operating a Waste Water Treatment Plant that does not have a discharge to a stream, including agriculture waste handling systems and spray irrigation systems. Mr. O'Bryan's large Concentrated Animal Feeding Operations have no Wastewater Treatment Plants, just a large hole in the ground, not lined, not regulated, not tested, no ground water monitoring wells at the black water lagoons totaling five (5) at different locations. The Kentucky Division of Water has refused to perform a hog count which would prove the combined number

of swine at the locations. The KDOW refuses to test the black water lagoons contents, which are nothing more than incubators for Bacteria and Viruses. The Black Water Lagoons are not covered, and as mentioned have no liner. They create Hydrogen Sulfide Gas and Ammonia gas. The past water samples from the Hardy Sow Farm Black Water Lagoon illegal bypass discovered in July, 2018 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.

40 C.F.R. 22.45 ( c ) (4)(ii) We petition EPA to withdraw the consent agreement and proposed final order, with notice to the Regional Administrator and the commenter. The CAFOs operated by Mr. O'Bryan have no Waste Water Treatment Plants misrepresented by the KDOW as having small to medium size AFO's.

The EPA prefers to attempt to resolve matters at an administrative level, both to expedite environmental compliance and to conserve limited Agency, DOJ, and judicial resources. Does the EPA take into consideration our property values declining, contaminated water, depleted air quality, tax payers footing the bills for highway repair due to hog trucks wrecking, hog trucks spilling manure onto highways? We did not invade his (Mr. O'Bryan's) area, he invaded our area. Our community is over 30 years old. In the Consent Agreement and final order, the response states Pursuant to Kentucky AFO regulations, if a AFO does not discharge or intend to discharge, regardless of size, the AFO is not considered a CAFO and is therefore not required to obtain a KPDES permit pursuant to KRS Chapter 224. Once again we state our case. As defined by KAR 5.002 Chapter 5 section 91(c) ( e) the hog operations of Mr. O'Bryan's are large Concentrated Animal Feeding Operations. The respondent CAFOs are discharging to waters of the United States.

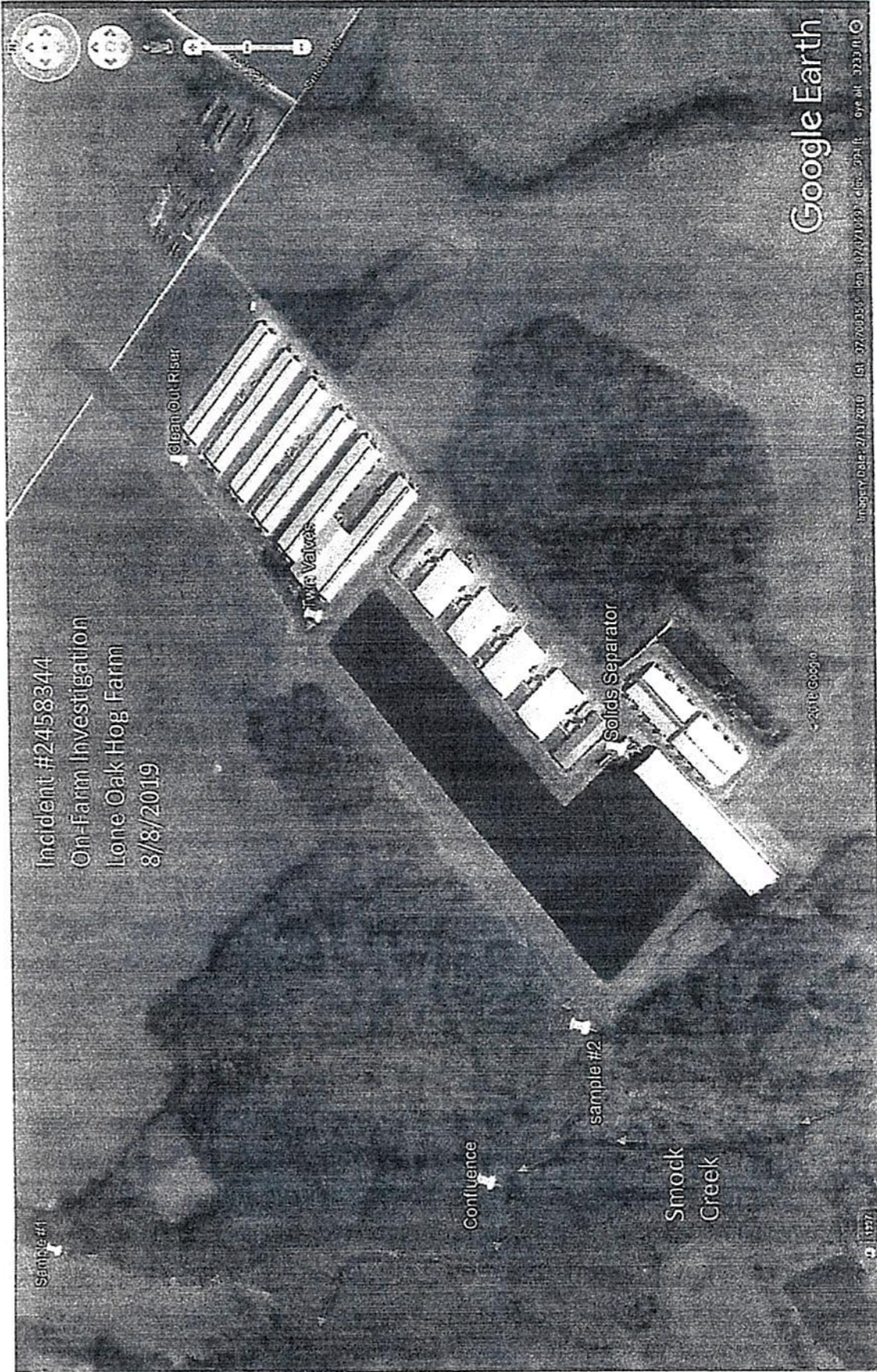
The EPA Strategic Plan Overview states the following; The nation's water resources are the life blood of our communities, supporting our economy and way of life. Across most of the country, we enjoy and depend upon reliable sources of clean and safe water. We have made significant progress since enactment of the landmark Clean Water Act (CWA), Safe Drinking Water Act (SDWA, and Marine Protection, Research, and Sanctuaries Act approximately 40 years ago. The first priority EPA will continue to work with the states to improve their capacity development. EPA core water programs help issue and enforce discharge permits. We ask representatives of EPA Region 4, Atlanta, Georgia to visit our area and show us the Wastewater Treatment Plants treating the waste from Mr. O'Bryan's Large Concentrated Animal Feeding Operations. We also ask EPA Region 4, Atlanta Georgia to investigate why the KDOW issued the CAFOs owned and operated by Jerry O'Bryan Small to Medium AFO Kentucky No Discharge Operational Permits.

Sincerely,

  
Rick Murphy

CAPPAD Vice President

cc: Jerry O'Bryan  
Mr. Rayan Quarles  
Mr. Warren Beeler  
Mr. Andy Beshear  
Mr. Matt Bevin  
Mr. Andrew Wheeler  
Ms. Suzanne K. Armor  
Mr. Keith Rodgers



Incident #24158344  
On-Farm Investigation  
Lone Oak Hog Farm  
8/8/2019

Lone Oak C/AFO Discharge To Smock Creek

Route  
**EPA Atlanta**  
Delivery Point  
**13T119 W**

**SUZANNE ARMOR**



*Rice Murphy*  
10361 NEWTYPE RD  
OWENSBORO, KY 40301

7019 0160 0000 2017 1467



*SUZANNE R. ARMOR*  
*OFFICE OF Regional COUNSEL*  
*U.S. EPA, Region 4*  
*61 FURSYTH STREET S.W.*  
*ATLANTA, Georgia 30303*

0000000000



U.S. POSTAGE  
METRO LETTER  
CENTERS  
42801  
SEP 19, 19  
AMOUNT  
**\$6.4**  
R2305K14179E



USPS REGION 4  
OFFICE OF REGIONAL  
COUNSEL

2019 SEP 24 AM 10:39

© USPS 2016

PLACE STICKER AT TOP OF ENVELOPE TO THE RIGHT  
OF THE RETURN ADDRESS. FOLD AT DOTTED LINE  
**CERTIFIED MAIL**

THIS ENVELOPE IS RECYCLABLE AND MADE WITH 30% POST CONSUMER CONTENT

PAID :  
KY  
51  
05



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 4  
ATLANTA FEDERAL CENTER  
61 FORSYTH STREET  
ATLANTA, GEORGIA 30303-8960

**SUBJECT:** Assignment of Petition Officer Pursuant to 40 C.F.R. § 22.45(c)(4)(iii)  
In the Matter of Jerry O'Bryan, Consent Agreement and Final Order,  
Docket No. CWA-04-2018-5501(b)  
Petitioner: CAPPAD, Inc.

**FROM:** Mary S. Walker  
Regional Administrator

**TO:** Robin Allen  
Petition Officer

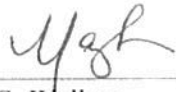
On September 24, 2019, the U.S. Environmental Protection Agency, Region 4, received a letter from CAPPAD, Inc. (dated September 17, 2019) petitioning the Regional Administrator to set aside the above-referenced Clean Water Act Class I Consent Agreement and Final Order (CA/FO) in the matter of Jerry O'Bryan. Pursuant to 40 C.F.R. § 22.45(c)(4)(iii), if the Complainant does not withdraw the CA/FO within 15 days of receipt of the petition, the RA shall assign a Petition Officer to consider and rule on the Petition. The 15-day deadline for the Complainant to withdraw the CA/FO expired on October 9, 2019, and the Complainant has advised that she will not be withdrawing the CA/FO.

Accordingly, I am hereby assigning you as the Petition Officer for this matter, consistent with 40 C.F.R. § 22.45(c)(4)(iii). Within 30 days of this assignment, Complainant shall present the Petition Officer a copy of the CA/FO and a written response to the Petition.

Notice of this assignment is also being provided to the following parties:

- Mr. Jerry O'Bryan, Respondent, via certified mail, return receipt requested
- CAPPAD, Inc., Petitioner, via certified mail, return receipt requested
- Ms. Suzanne Armor, EPA Region 4 Office of Regional Counsel, Attorney for Complainant, via internal mail
- Ms. Tanya Floyd, Regional Judicial Officer/Presiding Officer, via internal mail

10/24/2019  
Date

  
Mary S. Walker  
Regional Administrator





UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 4  
ATLANTA FEDERAL CENTER  
61 FORSYTH STREET  
ATLANTA, GEORGIA 30303-8960

AUG 13 2019

CERTIFIED MAIL 7017 1450 0000 7972 1926  
RETURNED RECEIPT REQUESTED

Mr. Jerry O'Bryan  
6939 Curdsville Delaware Road  
Owensboro, Kentucky 42301

Re: Clean Water Act, Section 404 Inspection Report, Docket No.: CWA-04-2018-5755

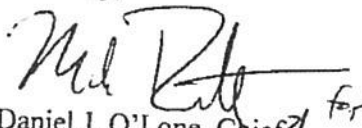
Dear Mr. O'Bryan:

On April 17, 2019, the U.S. Environmental Protection Agency Region 4, conducted a Clean Water Act (CWA), Section 404 inspection at your property located near latitude 37.731169° N and longitude - 87.382159° W, Daviess County, Kentucky. The purpose of the inspection was to evaluate your compliance with the requirements of the above referenced Administrative Order on Consent.

Enclosed is a copy of the EPA's Inspection Report.

If you have any questions, please contact Mr. Joel Strange at (404) 562-9455 or via email at [strange.joel@epa.gov](mailto:strange.joel@epa.gov).

Sincerely,

  
Daniel J. O'Lone, Chief <sup>for</sup>  
Surface Water and Groundwater Section  
Water Enforcement Branch

Enclosure

7017 1450 0000 7972 1926

U.S. Postal Service™  
**CERTIFIED MAIL® RECEIPT**  
Domestic Mail Only

For delivery information, visit our website at [www.usps.com](http://www.usps.com)®.

**OFFICIAL USE**

Certified Mail Fee	\$
Extra Services & Fees (check box, add fee as appropriate)	
<input type="checkbox"/> Return Receipt (hardcopy)	\$
<input type="checkbox"/> Return Receipt (electronic)	\$
<input type="checkbox"/> Certified Mail Restricted Delivery	\$
<input type="checkbox"/> Adult Signature Required	\$
<input type="checkbox"/> Adult P	\$

Postmark  
Here

**AUG 13 2019**

Postage

\$

Total Post

\$

Sent To

Street an

City, State, ZIP+4®

Mr. Jerry O'Bryan  
6939 Curdsville Delaware Road  
Owensboro, Kentucky 42301

## Clean Water Act Section 404 National Inspection Report

For inspections authorized pursuant to Clean Water Act Sections 308 and 404

This inspection report includes only factual information gained by documentation, onsite observations, and/or onsite interviews.

Inspector Name(s) Joel Strange	Time In: 11am Time Out: 2pm	Date: April 17, 2019				
Inspector Organization USEPA						
Organization Requesting Inspection (if different from Inspector's Organization)						
Inspection Type e.g. CEI Compliance Check						
Inspection Status: Follow up						
Original (add check box option for all) Revised Amended						
Site Name: O'Bryan Farm (if applicable)						
Site Location* :						
Address	City: Curdsville					
Latitude/ Longitude: 37.731169° N, -87.382159° W	Estimated Size of Site (acres):2.1					
Zip Code:	County: Daviess	State: KY				
<table style="width: 100%; border: none;"> <tr> <td style="width: 60%; border: none;">INSPECTOR SIGNATURE: </td> <td style="width: 40%; border: none;">DATE: <u>8-5-17</u></td> </tr> <tr> <td style="border: none;">SUPERVISOR SIGNATURE: </td> <td style="border: none;">DATE: <u>8/9/19</u></td> </tr> </table>			INSPECTOR SIGNATURE:	DATE: <u>8-5-17</u>	SUPERVISOR SIGNATURE:	DATE: <u>8/9/19</u>
INSPECTOR SIGNATURE:	DATE: <u>8-5-17</u>					
SUPERVISOR SIGNATURE:	DATE: <u>8/9/19</u>					

<b>INSPECTION PURPOSE</b> (e.g. initial site visit, follow-up site visit, post AO/AOC, etc): Compliance inspection of restoration area.
<b>STANDARD OPERATING PROCEDURE(S) USED</b>
OECA Standard Operating Procedure for Field Documentation OECA Standard Operating Procedure for Sampling and Environmental Data Management OECA Standard Operating Procedure for Field Equipment Management OECA Standard Operating Procedure for Inspections and Field Investigations Click here to enter text
<b>OPENING CONFERENCE</b>
<input checked="" type="checkbox"/> Presentation of inspector credentials – name and title (Mark N/A if owner/operator were not available to join the inspection)
<input checked="" type="checkbox"/> Opening Conference: I met Mr. O'Bryan at the entrance to the farm. While there, I discussed the reason for the visit, which was to look at the restoration area to determine if he had met the conditions of the AOC.
<input type="checkbox"/> Access Issue (if any)
<b>SITE OWNER*</b> (name, title and contact information) Jerry O'Bryan
<b>ADDITIONAL PERSONS PRESENT AT INSPECTION</b> (name, title and contact information)
<b>SITE OVERVIEW</b> (past enforcement, site description, permits, etc) This Site is under an AOC (Docket # CWA-04-2018-5755) which require the restoration of approximately 2.1 acres of wetlands that are adjacent to the Green River. The owner had reported to the EPA that the restoration activities had been completed.
<b>SCORE OF INSPECTION</b> (areas inspected or not inspected) The area inspected was only the 2.1 acres that had been impacted by the discharge of the dredged and fill material
<b>ENVIRONMENTAL CONDITIONS</b> (e.g., wind, rain, smoke, dust, temperature, snow)
Clear and sunny, 79 degrees
<b>SAMPLING CONDUCTED</b> locations, explanation of any deviations, lab results, etc
N/A

<b>DOCUMENTS RECEIVED AND/OR REQUESTED DURING THE INSPECTION</b> (if any)
N/A
<b>COMPLIANCE ASSISTANCE PROVIDED</b> (if any)
N/A
<b>OBSERVATIONS RELAYED TO SITE OWNER/OPERATOR</b>
I accompanied Mr. O'Bryan to the restoration area where I observed that the trees had been planted in accordance with the AOC. The flow in the larger wetland had re-established into a single channel through the middle of the wetland. There were a few areas where Salix nigra (black willow) has started to dominate the vegetation. I advised Mr. O'Bryan that he should attempt to control the growth of the willows to avoid the wetlands becoming a mono-culture of willows. He stated that he would have them removed. I advised Mr. O'Bryan to make sure that he was aware of any monitoring requirements in his plan and that I was satisfied with his restoration.
<b>ACTION TAKEN BY OWNER/OPERATOR TO RETURN TO COMPLIANCE DURING THE INSPECTION</b> (if any)
N/A
<b>POTENTIAL ISSUES OF CONCERN INCLUDING REGULATORY CITATIONS</b>
N/A
<b>ATTACHMENTS*</b>
<input checked="" type="checkbox"/> Maps and Sketches (See Below)
<input checked="" type="checkbox"/> Photographs (including location) and Photo Log
<input type="checkbox"/> Other - Specify
<b>ADDITIONAL NOTES</b>



**USEPA - Water  
Enforcement Branch**

**PHOTOGRAPHIC LOG**

Site Location: O'Bryan, Daviess County, KY

<b>Photo No.</b> 1	<b>Date:</b> 4/17/19
-----------------------	-------------------------

**Direction Photo  
Taken:**

Southwest

**Description:**

Wetland area 1. Stream channel has re-established, planting completed.



<b>Photo No.</b> 2	<b>Date:</b> 4/17/19
-----------------------	-------------------------

**Direction Photo  
Taken:**

West

**Description:**

Wetland area 2. Planting has been completed.



**USEPA - Wetlands  
Enforcement Section**

**PHOTOGRAPHIC LOG**

Site Location: O'Bryan, Daviess County, KY

Photo  
No.  
3

Date:  
4/17/19

Direction Photo  
Taken:

North

Description:

Wetland area 1.







# TAB 5

**ATTACHMENT B**

**RETURN RECEIPTS EVIDENCING SERVICE OF COMPLAINANT'S RESPONSE  
TO PETITIONER AND RESPONDENT**

SENDER: COMPLETE THIS SECTION	COMPLETE THIS SECTION ON DELIVERY
<ul style="list-style-type: none"> <li>Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.</li> <li>Print your name and address on the reverse so that we can return the card to you.</li> <li>Attach this card to the back of the mailpiece, or on the front if space permits.</li> </ul> <p>1. Article Addressed to:</p> <p><b>CAPPAD, Inc.</b>  <b>PO Box 122</b>  <b>Maple Mount, KY 42356</b></p>	<p>A. Signature <input type="checkbox"/> Agent <input checked="" type="checkbox"/> Addressee  <i>Sister Ann P. Cecil</i></p> <p>B. Received by (Printed Name) <input type="checkbox"/> Agent <input checked="" type="checkbox"/> Addressee  <i>Sister Ann P. Cecil</i></p> <p>C. Date of Delivery  <i>11-23-19</i></p> <p>D. Is delivery address different from item 1? <input type="checkbox"/> Yes  If YES, enter delivery address below: <input type="checkbox"/> No</p>
<p>2. Article Number  (Transfer from service label)</p>	<p>7005 1160 0001 9899 9416</p>
<p>PS Form 3811, July 2013 Domestic Return Receipt</p>	

SENDER: COMPLETE THIS SECTION	COMPLETE THIS SECTION ON DELIVERY
<ul style="list-style-type: none"> <li>Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.</li> <li>Print your name and address on the reverse so that we can return the card to you.</li> <li>Attach this card to the back of the mailpiece, or on the front if space permits.</li> </ul> <p>1. Article Addressed to:</p> <p><b>Mr. Jerry O'Bryan</b>  <b>6939 Curdsville-Delaware Rd</b>  <b>Owensboro, KY 42301</b></p>	<p>A. Signature <input type="checkbox"/> Agent <input checked="" type="checkbox"/> Addressee  <i>Jerry O'Bryan</i></p> <p>B. Received by (Printed Name) <input type="checkbox"/> Agent <input checked="" type="checkbox"/> Addressee</p> <p>C. Date of Delivery</p> <p>D. Is delivery address different from item 1? <input type="checkbox"/> Yes  If YES, enter delivery address below: <input type="checkbox"/> No</p>
<p>2. Article Number  (Transfer from service label)</p>	<p>7005 1160 0001 9899 9409</p>
<p>PS Form 3811, July 2013 Domestic Return Receipt</p>	

## TABLE OF CONTENTS

- Tab 1 Order Denying Petition to Set Aside Consent Agreement and Proposed Order
- Tab 2 Letter - Granting Motion for Leave to File Petition to Set Aside Consent Agreement and Final Order, Docket No. CWA-04-2018-5501(b)
- Tab 3 Complainant's Memorandum in Support of Motion for Leave to File Response to Petition Under 40. C.R.F. §22.45(c)(4)(iv)
- Tab 4 Attachment A - Complainants Response to Petition to Set Aside Consent Agreement and Final Order (Pages 1 through 10) and Enclosures, pp. 000001 through 000189
- Tab 5 Attachment B - Return Receipts Evidencing Service of Complainant's Response to Petitioner and Respondent

**TAB 1**

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 4

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

**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.<sup>1</sup>

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

---

<sup>1</sup> 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](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).<sup>2</sup> 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).

---

<sup>2</sup> 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 Officer to consider and rule on the petition. *Id.*<sup>3</sup>

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).

---

<sup>3</sup> 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."<sup>4</sup> 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

---

<sup>4</sup> 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)*.<sup>5</sup>

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

---

<sup>5</sup> 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.<sup>6</sup> *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

---

<sup>6</sup> 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**.

## 6. 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.<sup>7</sup> *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

---

<sup>7</sup> 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-penalty-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.<sup>8</sup> *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.<sup>9</sup> *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**.

#### 7. 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

---

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

<sup>9</sup>National 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 22nd day of July.



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

**CERTIFICATE OF SERVICE**

I, Robin B. Allen, certify that a true and correct copy of this Order and Enclosed Documents were served on this date in the manner stated below on July 22, 2020, to the following individuals:

Filed with Regional Hearing Clerk  
via email

R4\_Regional\_Hearing\_Clerk@epa.gov  
U.S. Environmental Protection Agency, Region 4  
61 Forsyth Street, S.W.  
Atlanta, Georgia 30303

Filed with Agency Counsel/Complainant  
via email

Armor.Suzanne@epa.gov  
Suzanne K. Armor  
Associate Regional Counsel  
U.S. Environmental Protection Agency, Region 4  
61 Forsyth Street, S.W.  
Atlanta, Georgia 30303

Bragan.Maryjo@epa.gov  
Marj Jo Bragan  
Chief, Water Enforcement Branch  
Enforcement and Compliance Assurance Division  
U.S. Environmental Protection Agency, Region 4  
61 Forsyth Street, S.W.  
Atlanta, Georgia 30303


Copy by Certified Mail, Petitioner:

CAPPAD, Inc.  
P.O. Box 122  
Maple Mount, Kentucky 42356

Copy by Certified Mail, Respondent:

Jerry O'Bryan  
6939 Curdsville Delaware Road  
Owensboro, Kentucky 42301

Date: July 22, 2020

  
\_\_\_\_\_  
Robin B. Allen  
Petition Officer  
U.S. Environmental Protection Agency  
61 Forsyth Street, S.W.  
Atlanta, Georgia 30303

## TAB 2



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 4  
ATLANTA FEDERAL CENTER  
61 FORSYTH STREET  
ATLANTA, GEORGIA 30303-8960

December 9, 2019

Suzanne K. Armor  
Associate Regional Counsel  
Office of Regional Counsel  
U.S. Environmental Protection Agency  
Region 4  
61 Forsyth Street, S.W.  
Atlanta, Georgia 30303

Subject: Complainant's Memorandum in Support of Motion for Leave to File Response to Petition Under 40 C.F.R. §22.45(c)(4)(iv)

Dear Ms. Armor:

The purpose of this letter is to acknowledge receipt of the subject Memorandum and copy of Complainant's initial filing of Complainant's Response to the Petition to Set-Aside Consent Agreement and Final Order (CAFO), Docket No. CWA-04-2018-5501(b), In the Matter of Jerry O'Bryan (hereafter Complainant's Response).

I am granting Complainant's Motion, as good cause has been shown and Petitioner has not been prejudiced. Although the Petition Officer did not receive a copy of Complainant's Response until December 3, 2019, the Petitioner and Respondent were timely served copies of Complainant's Response on November 19, 2019. Pursuant to 40 C.F.R. §22.45(c)(4), the undersigned will review the Petition, Complainant's Responses and file with the Regional Hearing Clerk, with copies to appropriate parties, written findings regarding this matter.

Sincerely,

A handwritten signature in black ink that reads "Robin B. Allen".

Robin B. Allen  
Petition Officer  
Office of Regional Counsel  
U.S. Environmental Protection Agency

**CERTIFICATE OF SERVICE**

I **CERTIFY** that a true and correct copy of this Letter has been served on this date, December 9, 2019, by regular mail on the following individuals:

Original by EPA Interoffice Mail:

Suzanne K. Armor  
Associate Regional Counsel  
U.S. Environmental Protection Agency, Region 4  
61 Forsyth Street, S.W.  
Atlanta, Georgia 30303


Copy by Regular Mail, Petitioner:

CAPPAD, Inc.  
P.O. Box 122  
Maple Mount, Kentucky 42356

Copy by Regular Mail, Respondent:

Jerry O'Bryan  
6939 Curdsville Delaware Road  
Owensboro, Kentucky 42301

Date: December 9, 2019

  
\_\_\_\_\_  
Robin B. Allen  
Petition Officer  
Office of Regional Counsel  
U.S. Environmental Protection Agency  
Region 4  
61 Forsyth Street, S.W.  
Atlanta, Georgia 30303

## TAB 3



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 4

In the Matter of	)	
	)	Docket No. CWA-04-2018-5501(b)
JERRY O'BRYAN,	)	
CURDSVILLE, KENTUCKY,	)	Administrative Consent Agreement and
	)	Final Order Under Section 309(g)(2)(A),
Respondent.	)	of the Clean Water Act, 33 U.S.C.
_____	)	§ 1319(g)(2)(A)

**COMPLAINANT'S MEMORANDUM IN SUPPORT OF**  
**MOTION FOR LEAVE TO FILE RESPONSE TO PETITION UNDER 40 C.F.R. §**  
**22.45(c)(4)(iv)**

COMES NOW the Complainant, the United States Environmental Protection Agency, Region 4 (EPA), by and through its counsel in the above-styled action, and respectfully requests the Petition Officer in the above-captioned matter to allow Complainant to file its Response to Petition to Set Aside Consent Agreement and Final Order ("Response"). The Response is attached as Attachment A hereto.

As ground therefore states as follows:

**I. Facts**

On September 24, 2019, Complainant received a timely Petition to Set Aside the Consent Agreement and Final Order ("Petition") from Community Against Pig Pollution and Disease, Inc. ("CAPPAD") on the basis that material evidence was not considered under Section 309(g)(4)(C) of the CWA, 33 U.S.C. § 1319(g)(4)(C) and 40 C.F.R. § 22.45(c)(4)(ii). After carefully considering the issues raised in the Petition, Complainant determined that the Petitioner did not raise any relevant and material issues that had not already been considered with respect to issuance of the CA/FO. Therefore, Complainant declined to withdraw the CA/FO under 40 C.F.R. § 22.45(c)(4)(iii).

On October 24, 2019, the Regional Administrator for EPA Region 4 (RA) assigned a Petition Officer to consider and rule on the Petition under 40 C.F.R. § 22.45(c)(4)(iii).

Pursuant to 40 C.F.R. § 22.45(c)(4)(iv) of the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits* (Rules of Practice), and the EPA Region 4 Regional Administrator's October 24, 2019 Assignment of Petition Officer Pursuant to 40 C.F.R. § 22.45(c)(4)(iii), Complainant was required to present to the Petition Officer a copy of the CA/FO and a written response to the Petition within 30 days of assignment of the Petition Officer, and to provide a copy of the Response to the Petitioner and Respondent.

On November 19, 2019, Complainant erroneously filed its Response and a copy of the CA/FO with the Regional Hearing Clerk, and appropriately served copies of the Response on the Petitioner and Respondent. Complainant was not aware that its filing of the Response and CA/FO with the Regional Hearing Clerk was done in error until December 3, 2019, when the Petition Officer inquired into its whereabouts.

## **II. Basis for Filing Amended Complaint**

Pursuant to 40 C.F.R. § 22.16, parties may file motions if they are: (1) in writing; (2) state the grounds therefor, with particularity; (3) set forth the relief sought; and (4) be accompanied by any affidavit, certificate, other evidence, or legal memorandum relied upon. Section 22.16 does not provide any guidance as to the circumstances under which a motion should be granted. However, the Rules of Practice are modeled the Federal Rules of Civil Procedure (FRCP). Rule 15(a)(2) of the FRCP adopts a liberal stance toward amending pleadings, stating that, "leave shall be freely given when justice so requires." The United States Supreme Court has expressed this liberality in interpreting FRCP Rule 15 and has held that

“leave . . . ‘shall be freely given when justice so requires.’ . . . In the absence of any apparent or declared reason, such as undue delay, bad faith, or dilatory motive on the movant’s part, repeated failure to cure deficiencies by previous amendment, undue prejudice, or futility of amendment, . . . the leave sought should, as the rules require, be ‘freely given’.” See Foman v. Davis, 371 U.S. 178, 182 (1962).

“The Environmental Appeals Board has ‘expressly adopted’ the liberal policy regarding pleadings and amendments found in [FRCP] 15 and described in Foman v. Davis.” In re Chem-Solv, Inc., Docket No. RCRA-03-2011-0068, 2014 EPA ALJ LEXIS 14, 16-17 (June 5, 2014), citing In re Lazarus, Inc., 7 E.A.D. 318, 333 (EAB 1997) and In re Carroll Oil Co., 10 E.A.D. 635, 649 (EAB 2002). As the Environmental Appeals Board has stated, “This policy is rooted in the principle that pleading is not ‘a game of skill in which one misstep by counsel may be decisive to the outcome,’ and ‘the purpose of a complaint is to give adequate notice of the alleged charge so that the charged party has an opportunity to prepare a defense.’” In re Chem-Solv at 17, citing Carroll Oil Co., 10 E.A.D. at 649; In re Yaffe Iron & Metal Co., 1 E.A.D. 719, 721-22 (JO 1982).

### **III. Analysis**

In the present case, the Complainant’s Motion for Leave to File its Response is not the result of any undue delay, bad faith, dilatory motive, or repeated failures to cure deficiencies by previous amendment on the EPA’s part. This Motion is being filed on the same day of the EPA’s discovery of the error. Counsel for the EPA, mistakenly reviewing Section 22.15 of the Rules of Practice (Answer to the Complaint), believed that the Regional Hearing Clerk would transmit the Response to the Petition Officer and was the appropriate conduit to receive the Response. In

view of the above, there is no evidence of any undue delay, bad faith, or dilatory motives on the part of the Complainant in filing this Motion.

Nor is there any basis upon which to conclude that the Petitioner would suffer any prejudice or hardship if the Motion to File is granted. Complainant has already properly served its Response on Petitioner and Respondent, which both parties have received. See Attachment B.

#### **IV. Conclusion**

In view of the foregoing, Complainant respectfully requests that the Petition Officer grant the EPA's Motion for Leave to File Response to Petition Under 40 C.F.R. § 22.45(c)(4)(iv).

Date: 12/3/19

Respectfully submitted,

  
\_\_\_\_\_  
Suzanne K. Armor  
Counsel for Complainant  
U.S. Environmental Protection Agency  
Region 4  
(404) 562-9701  
Armor.Suzanne@epa.gov

**ATTACHMENT A**

**COMPLAINANT'S RESPONSE TO PETITION TO SET ASIDE CONSENT  
AGREEMENT AND FINAL ORDER AND FINAL ORDER**

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the date noted below, I have served to the Petition Officer the original and one copy of the foregoing Motion for Leave to File Response to Petition Under 40 C.F.R. § 22.45(c)(4)(iv) and Memorandum in Support, in *In re Jerry O'Bryan*, Docket No. CWA-04-2018-5501(b). I also certify that I have served a true and correct copy of the same on the parties listed below in the manner specified.

Copy by Certified mail,  
Return receipt requested,  
to Petitioner

CAPPAD, Inc.  
P.O. Box 122  
Maple Mount, Kentucky, 42356


Copy by Certified mail,  
Return receipt requested,  
to Respondent

Jerry O'Bryan  
6939 Curdsville Delaware Road  
Owensboro, Kentucky 42301

Copy by email  
to Attorney for Complainant

Suzanne Armor  
Associate Regional Counsel  
U.S. EPA, Region 4  
Atlanta Federal Center  
61 Forsyth Street, S.W.  
Atlanta, Georgia 30303

Dated: 12/3/2019

  
\_\_\_\_\_  
Suzanne K. Armor  
Associate Regional Counsel  
U. S. Environmental Protection Agency, Region 4  
Atlanta Federal Center  
61 Forsyth Street, S.W.  
Atlanta, Georgia 30303  
(404) 562-9701