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ENVIRONMENTAL PROTECTION AGENCY-REGION VII  
REGIONAL HEARING CLERK

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 7  
901 NORTH 5<sup>th</sup> STREET  
KANSAS CITY, KANSAS 66101**

**BEFORE THE ADMINISTRATOR**

	)	
	)	Docket No. CWA-07-2007-0089
	)	
F & R SWINE, INC.	)	
GEARY COUNTY, KANSAS	)	
	)	
Respondent	)	FINDING OF VIOLATION
	)	ORDER FOR COMPLIANCE
	)	
	)	
Proceedings under	)	
Sections 308(a) and 309(a)(3)	)	
of the Clean Water Act,	)	
33 U.S.C. §§ 1318(a) and 1319(a)(3)	)	
_____	)	

**Preliminary Statement**

1. The following Findings of Violation are made and Order for Compliance (“Order”) issued pursuant to the authority of Section 309(a)(3) of the Clean Water Act (“CWA” or “Act”), 33 U.S.C. § 1319(a)(3). This authority has been delegated by the Administrator of the United States Environmental Protection Agency (“EPA”) to the Regional Administrator, EPA, Region 7, and redelegated to the Director of Region 7’s Water, Wetlands and Pesticides Division.
2. F & R Swine, Inc., (“Respondent”) owns and operates an animal feeding operation permitted to confine up to 5,700 head of swine weighing more than 55 pounds and 7,200 head of swine weighing 55 pounds or less near Dwight, Kansas (“Facility”). The animal feeding operation is located in Sections 1 and 13 of Township 13 South, Range 7 east in Geary County, Kansas.

**Statutory and Regulatory Authority**

3. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants except in compliance with, *inter alia*, Section 402 of the CWA, 33 U.S.C. § 1342.
4. Section 402 of the CWA, 33 U.S.C. § 1342, provides that pollutants may be discharged only in accordance with the terms of a National Pollutant Discharge Elimination System (“NPDES”) permit issued pursuant to that Section.
5. Section 504(12) of the CWA, 33 U.S.C. § 1362(12), defines the term “discharge of pollutant” to include “any addition of any pollutant to navigable waters from any point source.”
6. To implement Section 402 of the CWA, the EPA promulgated regulations codified at 40 C.F.R. § 122. Under C.F.R. § 122.1, a NPDES permit is required for the discharge of pollutants from any point source into waters of the United States.
7. “Pollutant” is defined by Section 502(6) of the CWA, 33 U.S.C. § 1362 to include, *inter alia*, biological materials and agricultural waste discharged to water.
8. “Point source” is defined by Section 502(14) of the CWA, 33 U.S.C. § 1362 to include “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation . . . from which pollutants are or may be discharged.”
9. “Animal feeding operation” or “AFO” is defined by 40 C.F.R. § 122.23(b)(1) as a lot or facility where animals have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any twelve month period, and where crops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility.
10. “Concentrated animal feeding operation” or “CAFO” is defined by 40 C.F.R. § 122.23(b)(2) as an animal feeding operation that is defined as a Large CAFO in accordance with 40 C.F.R. § 122.23(b)(3).
11. “Large CAFO” is defined according to 40 C.F.R. § 122.23(b)(4)(iv) as an animal feeding operation that stables or confines as many as or more than “2,500 swine each weighing 55 pounds or more.”

12. "Waters of the United States" are defined in 40 C.F.R. § 122.2 to include intrastate rivers and streams, and tributaries thereto.
13. The Kansas Department of Health and Environment ("KDHE") is the agency within the State of Kansas with the delegated authority to administer the federal NPDES Program pursuant to Section 402 of the Act, 33 U.S.C. § 1342, and a Memorandum of Understanding between EPA and KDHE. The EPA maintains concurrent enforcement authority with delegated state NPDES programs for violations of the CWA.

**Factual Background and Findings of Violation**

14. Respondent owns and operates a swine farrowing operation that is located in the Southwest ¼ of Section 1 and the Eastern ½ of Section 13, Township 13 South, and Range 7 East in Geary County, Kansas.
15. On June 5, 2007, EPA conducted a compliance evaluation inspection of the Facility.
16. Neither crops, vegetation, forage growth, nor post harvest residues are sustained over any portion of the Facility's feeding areas.
17. The Facility confines and feeds or maintains swine for a total of forty-five (45) days or more in any twelve month period.
18. At the time of the inspection, the Facility was confining approximately 4,200 head of swine weighing greater than 55 pounds. The number of swine confined and fed at the Facility is greater than 2,500, therefore the Facility is a large CAFO as that term is defined in 40 C.F.R. §122.23(b)(4).
19. Respondent was issued an NPDES permit (KS0116378) on February 6, 2003. This permit was reissued on March 9, 2007 and will expire on March 8, 2012.
20. Respondent's NPDES permit requires that all wastewater retention structures be maintained to insure structural stability and provide storage capacity for a two week period plus precipitation induced from a 25 year, 24 hour storm event.
21. On dates between December 2006 and June 2007, Respondent did not maintain the minimum operating levels required by their NPDES permit.
22. On or around May 6, 2007, as a result of not maintaining the required available storage capacity, Respondent discharged approximately 360,000 gallons of wastewater into Humboldt Creek and its tributaries.

23. Humboldt Creek is a water of the United States, as defined by 40 C.F.R. Part 122.2.

### **Order for Compliance**

Based on the Findings of Violation set forth above, and pursuant to Sections 308(a) and 309(a)(3) of the CWA, 33 U.S.C. §§ 1318(a) and 1319(a)(3), Respondent is hereby ORDERED to take the following actions to eliminate its violations of the CWA:

24. Respondent shall ensure that waste water levels in all storage structures are in compliance with the operating levels specified in Respondent's NPDES permit. On an ongoing basis, Respondent shall remove waste water from the retention structures in a timely manner so that the facility remains in compliance with the NPDES permit requirements. A discharge from the Facility to waters of the United States resulting from a failure to maintain minimum operating levels is a violation of this Order. When removing waste water from retention structures, Respondent shall comply with all applicable requirements regarding proper land application of waste water.
25. On a monthly basis for a period of one year, Respondent shall submit to EPA copies of all lagoon level, precipitation and land application records that Respondent is required to keep pursuant to Respondent's NPDES permit. This information shall be submitted for each calendar month by the 10<sup>th</sup> day of the following month.
26. If Respondent exceeds the minimum operating levels for any of its waste retention structures, Respondent shall notify EPA within twenty-four (24) hours of the exceedance by telephone followed by written notification within five (5) days of the exceedance. Notification at a minimum shall include, retention structure(s) ID, current operating level(s), and a Plan of Action that identifies what activities the Respondent will undertake to return the retention structure(s) to the minimum permitted operating level(s). In the event suitable land application sites are not available for liquids disposal, Respondent shall immediately implement interim measures that will sufficiently reduce the amount of liquid wastes added to the non-compliant retention structure(s) to prevent discharges.

### **Effect of Order**

27. Compliance with the terms of this Order shall not relieve Respondent of liability for, or preclude the EPA from initiating an administrative or judicial enforcement action to recover penalties for any violations of the CWA, or seek additional injunctive relief, pursuant to Section 309 of the CWA, 42 U.S.C. § 1319.

28. This Order shall not constitute a permit under the CWA. Compliance with the terms of this Order shall not relieve Respondent of its responsibility to obtain any required local, state and/or federal permits.
29. Nothing in this Order shall limit the EPA's right to obtain access to, and/or inspect Respondent's Facility, and/or to request additional information from Respondent, pursuant to the authority of Section 308 of the CWA, 33 U.S.C. § 1318.
30. The EPA may subsequently amend this Order in accordance with the authority of the CWA. For example, the EPA may amend this Order to address any noncompliance with the CWA, including, but not limited to, any noncompliance with the requirements of Section 402 of the CWA. In the event of any such subsequent amendment to this Order, all requirements for performance of this Order not affected by the amendment shall remain as specified by this original Order.
31. If any provision or authority of this Order or the application of this Order to Respondent is held by federal judicial authority to be invalid, the application to Respondent of the remainder of this Order shall remain in full force and effect and shall not be affected by such a holding.
32. All submissions to the EPA required by this Order shall be sent to:  
  
Stephen Pollard  
CAFO Enforcement Program  
Water, Wetlands and Pesticides Division  
U.S. Environmental Protection Agency Region 7  
901 North 5<sup>th</sup> Street  
Kansas City, Kansas 66101.  
(913) 551-7582
33. Pursuant to 40 C.F.R. § 2.201-2.311, Respondent may assert a business confidentiality claim covering any portion of the submitted information which is entitled to confidential treatment and which is not effluent data. For any such claim, describe the basis for the claim under the applicable regulation. Any material for which business confidentiality is claimed should be placed in a separate envelope labeled, "Confidential Business Information." Failure to assert a claim in the manner described in 40 C.F.R. § 2.203(b) allows the EPA to release the submitted information to the public without further notice. The EPA may disclose information subject to the business confidentiality claim only to the extent set forth in the above-cited regulations. Special rules governing information obtained under the Clean Water Act appear in 40 C.F.R. § 2.302.

34. Notice is hereby given that violation of, or failure to comply with, any of the provisions of the foregoing Order may subject Respondent to (1) civil penalties of up to \$32,500 per day for each violation, pursuant to Section 309(d) of the Act, 33 U.S.C. § 1319(d); or (2) civil action in federal court for injunctive relief, pursuant to Section 309(b) of the Act, 33 U.S.C. § 1319(b).
35. The terms of this Order shall be effective and enforceable against Respondent upon its receipt of the Order.

Date 11/6/07

  
\_\_\_\_\_  
William A. Spratlin  
Director  
Water, Wetlands and Pesticides Division

  
\_\_\_\_\_  
J. Daniel Breedlove  
Assistant Regional Counsel

**CERTIFICATE OF SERVICE**

I certify that on the date noted below I filed the original and one true and correct copy of the signed original Findings of Violation and Order of Compliance with the Regional Hearing Clerk, Region 7.

I further certify that I sent by certified mail, return receipt requested, a true and correct copy of the signed original Findings of Violation and Order for Compliance together with cover letter and small business assistance information, to the following:

Kenneth J. Penner  
Registered Agent for F & R Swine, Inc.  
13652 NW Butler Road  
Whitewater, Kansas 67154

Mr. Robert Rahe  
F & R Swine, Inc.  
10610 Humbolt Creek Road  
Dwight, Kansas 66849

I further certify that on the date noted below, I sent by certified mail, return receipt requested, a true and correct copy of the signed original Findings of Violation and Order for Compliance to the following representative of the State of Kansas:

Karl Mueldener  
Bureau of Water  
Kansas Department of Health and Environment  
1000 S.W. Jackson, Suite 420  
Topeka, Kansas 66612-1367

Ender G. Wachtel

11/14/07  
Date