

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION VII

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ENVIRONMENTAL PROTECTION
AGENCY-REGION VII
REGIONAL HEARING CLERK

IN THE MATTER OF)


F & R Swine, Inc.)

Respondent)

Docket No. CWA-07-2008-0060

ORDER

Pursuant to 40 C.F.R. § 22.5(a)(1), facsimile filing of page 7 of the Consent Agreement and Final Order is authorized in this proceeding. Counsel for Complainant shall file the original page 7, which shall replace the facsimile of page 7, within one day of receipt of the document from Respondent.

Dated: September 29, 2008 
Robert L. Patrick
Regional Judicial Officer

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY 29 APR 10 04
REGION VII
901 N. 5th STREET
KANSAS CITY, KANSAS 66101
ENVIRONMENTAL PROTECTION
AGENCY-REGION VII
REGIONAL HEARING CLERK

IN THE MATTER OF:)

F & R SWINE, INC.)
GEARY COUNTY, KANSAS)

Respondent,)

Proceedings under Section 309(g) of the)
Clean Water Act, 33 U.S.C. § 1319(g))

) Docket No. CWA-07-2008-0060

) CONSENT AGREEMENT AND
) FINAL ORDER

CONSENT AGREEMENT AND FINAL ORDER

The United States Environmental Protection Agency, Region VII (EPA) and F&R Swine, Inc., (Respondent) have agreed to a settlement of the alleged violations set forth in this Consent Agreement and Final Order. Thus this action is simultaneously commenced and concluded pursuant to Rules 22.13(b) and 22.18(b)(2) of 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 (Consolidated Rules).

This Consent Agreement and Final Order completely and finally settles all civil and administrative penalty claims and causes of action set forth below for Respondent's alleged violations of the National Pollutant Discharge Elimination System (NPDES) permit for Respondent's animal feeding operation in Geary County, Kansas.

ALLEGATIONS

Jurisdictional Allegations

1. This is an administrative action for the assessment of civil penalties instituted pursuant to Section 309(g)(2)(B) of the Clean Water Act (CWA), 33 U.S.C. § 1319(g)(2)(B), and in accordance with the Consolidated Rules.

2. This Consent Agreement and Final Order serves as notice that EPA has reason to believe that Respondent violated Section 301 of the CWA, 33 U.S.C. § 1311, by discharging pollutants from a concentrated animal feeding operation into a water of the United States in a manner that was not in accordance with Respondent's National Pollutant Discharge Elimination System (NPDES) permit. This Consent Agreement and Final Order also serves as notice that EPA has reason to believe that Respondent violated certain conditions of a NPDES permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

Statutory and Regulatory Framework

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.

4. 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."

5. 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.

6. "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.

7. "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."

8. "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.

9. "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 CAFO in accordance with 40 C.F.R. § 122.23(b).

10. "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."

11. "Waters of the United States" are defined in 40 C.F.R. § 122.2 to include intrastate rivers and streams, and tributaries thereto.

12. The Kansas Department of Health and Environment ("KDHE") is the agency within the State of Kansas authorized 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 authorized state NPDES programs for violations of the CWA.

Factual Allegations

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 (Facility).

15. On June 5, 2007, EPA conducted a compliance evaluation inspection of the Facility.

16. Neither crops, vegetation, forage growth, nor post harvest residues were sustained over any portion of the Facility's feeding areas at any time pertinent to EPA's allegations of violation.

17. Respondent confines and feeds or maintains swine at the Facility 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). Respondent confined greater than 2,500 head of swine and met the definition of a large CAFO at all times pertinent to EPA's allegations of violation.

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 failing to maintain the required available storage capacity, Respondent discharged approximately 360,000 gallons of wastewater into Humboldt Creek and its tributaries.

23. Humboldt Creek and its tributaries are waters of the United States, as defined by 40 C.F.R. Part 122.2.

Alleged Violations

24. The allegations set forth in paragraphs 1 through 23 are incorporated herein.

25. On dates between December 2006 and June 2007, Respondent did not maintain the minimum operating levels required by their NPDES permit. This is a violation of the Facility's NPDES permit and a violation of Section 402 of the CWA and implementing regulations.

26. On or around May 6, 2007, Respondent discharged wastewater into Humboldt Creek and its tributaries. Respondent's discharge constituted an unauthorized discharge of pollutants from a point source to waters of the United States. The discharge is a violation of Sections 301 and 402 of the CWA, 33 U.S.C. §1311 and 1342, and implementing regulations and Respondent's NPDES Permit.

CONSENT AGREEMENT

27. Respondent admits the jurisdictional allegations in this Consent Agreement and Final Order and agrees not to contest EPA's jurisdiction in this proceeding or any subsequent proceeding to enforce the terms of this Consent Agreement and Final Order.

28. Respondent neither admits nor denies the factual allegations contained in this Consent Agreement and Final Order.

29. Respondent waives any right to contest the allegations as well as its right to appeal the proposed Final Order accompanying this Consent Agreement.

30. Respondent and Complainant each agree to bear their own costs and attorney's fees.

31. Nothing contained in the Consent Agreement and Final Order shall alter or otherwise affect Respondent's obligation to comply with all applicable federal, state, and local environmental statutes and regulations and applicable permits.

Penalty

32. Respondent consents to the issuance of the Final Order and consents to the payment of a mitigated civil penalty of nineteen thousand eight hundred and forty-five dollars (\$19,845).

33. Respondent shall submit payment of the penalty within thirty (30) days of the effective date of this Consent Agreement and Final Order. Payment of the penalty shall be by cashier or certified check made payable to "United States Treasury." The check must include the docket number and the name of the case. The check must be remitted to:

U.S. EPA Region VII
P.O. Box 371099M
Pittsburgh, PA 15251.

Copies of the transmittal letter and the check shall simultaneously be sent to:

Regional Hearing Clerk
U.S. Environmental Protection Agency - Region VII
901 N. 5th Street
Kansas City, Kansas 66101;

and

J. Daniel Breedlove
Assistant Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency - Region VII
901 N. 5th Street
Kansas City, Kansas 66101.

34. Respondent's failure to pay any portion of the civil penalty in accordance with the provisions of this Consent Agreement and Final Order may result in commencement of a civil action in Federal District Court to recover the total penalty, together with interest thereon at the applicable statutory rate.

35. Payment of the entire civil penalty shall resolve all civil and administrative claims of the United States alleged in the Alleged Violations.

36. Respondent certifies by the signing of this Consent Agreement and Final Order that the Facility is operating in compliance with the requirements of Sections 301 and 402 of the CWA, 33 U.S.C. §§ 1311 and 1342, and the Facility's NPDES permit. The effect of the settlement described in paragraph 35 above is conditional upon the accuracy of this certification.

In the Matter of F&R Swine Inc.
Consent Agreement/Final Order

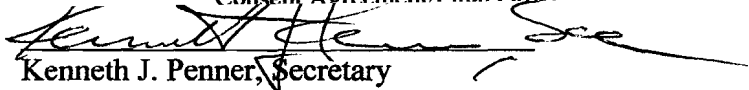
37. The EPA reserves the right to take any enforcement action with respect to any other violations of the CWA or any other applicable law and to enforce the terms and conditions of this Consent Agreement and Final Order. Respondent reserves the right to defend against such actions on any basis in law or fact.

38. The undersigned representative of Respondent certifies that he/she is fully authorized to enter the terms and conditions of this Consent Agreement and Final Order and to execute and legally bind Respondent to it.

39. This Final Order shall be entered and become effective only after the conclusion of the period of public notice and comment required pursuant to Section 309(g)(4), 33 U.S.C. § 1319(g)(4), and 40 C.F.R. § 22.45. The effective date shall be the date it is signed by the Regional Judicial Officer.

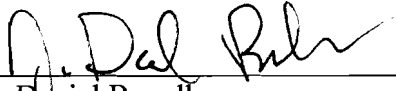
6-19-08
Date

In the Matter of F&R Swine Inc.
Consent Agreement/Final Order


Kenneth J. Penner, Secretary
F&R Swine, Inc.

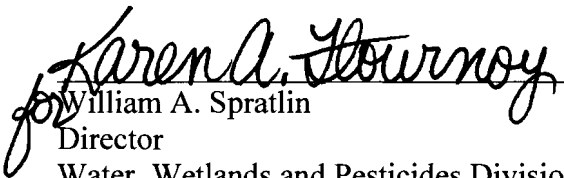
For the United States Environmental Protection Agency - Region VII

9/24/2008
Date



J. Daniel Breedlove
Assistant Regional Counsel
U.S. Environmental Protection Agency Region VII

9/24/2008
Date

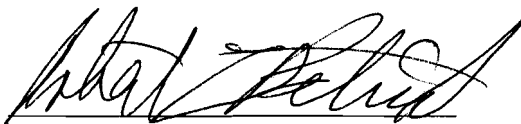


for William A. Spratlin
Director
Water, Wetlands and Pesticides Division
U.S. Environmental Protection Agency - Region VII

FINAL ORDER

The foregoing Consent Agreement is hereby approved and incorporated by reference into this Final Order. The Respondent is ordered to comply with the terms of the above Consent Agreement, effective immediately.

IT IS SO ORDERED.



ROBERT L. PATRICK
Regional Judicial Officer
U.S. Environmental Protection Agency
Region VII

Date: *September 29, 2008*

IN THE MATTER OF F&R Swine, Inc., Respondent
Docket No. CWA-07-2008-0060

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Consent Agreement and Final Order was sent this day in the following manner to the addressees:

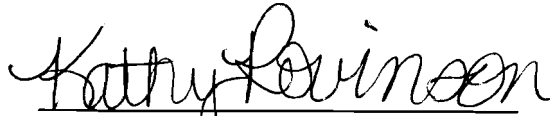
Copy hand delivered to
Attorney for Complainant:

J. Daniel Breedlove
Assistant Regional Counsel
Region VII
United States Environmental Protection Agency
901 N. 5th Street
Kansas City, Kansas 66101

Original by Certified Mail Return Receipt to:

Kenneth J. Penner, Secretary
F&R Swine, Inc.
10610 Humboldt Creek Road
Dwight, Kansas 66849

Dated: 9/30/08


Kathy Robinson
Hearing Clerk, Region 7