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BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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HEARINGS CLERK  
EPA--REGION 10

In the Matter of:	)	DOCKET NO. CWA-10-2011-0061
	)	
RSC Dairy, LLC	)	
Tillamook, Oregon	)	<b>CONSENT AGREEMENT AND</b>
	)	<b>FINAL ORDER</b>
	)	
Respondent	)	

**I. STATUTORY AUTHORITY**

1.1. This Consent Agreement and Final Order is issued under the authority vested in the Administrator of the United States Environmental Protection Agency ("EPA") by Section 309(g)(2)(B) of the Clean Water Act ("CWA"), 33 U.S.C. § 1319(g)(2)(B).

1.2. The Administrator has delegated the authority to issue the Final Order contained in Part V of this Consent Agreement and Final Order to the Regional Administrator of EPA Region 10, who has re delegated this authority to the Regional Judicial Officer in EPA Region 10.

1.3. Pursuant to Section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), and in accordance with the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties," 40 C.F.R. Part 22, EPA hereby issues, and RSC Dairy, LLC ("Respondent") hereby agrees to issuance of, the Final Order contained in Part V of this Consent Agreement and Final Order.

1 **II. PRELIMINARY STATEMENT**

2 2.1. In accordance with 40 C.F.R. §§ 22.13(b) and 22.45(b), issuance of this Consent  
3 Agreement and Final Order commences this proceeding, which will conclude when the Final  
4 Order contained in Part V of this document becomes effective.

5 2.2. The Director of the Office of Compliance and Enforcement, EPA Region 10  
6 (“Complainant”) has been delegated the authority pursuant to Section 309(g) of the CWA,  
7 33 U.S.C. § 1319(g), to sign consent agreements between EPA and the party against whom a  
8 Class II penalty is proposed to be assessed.

9 2.3. Part III of this Consent Agreement and Final Order contains a concise statement  
10 of the statutory and factual basis for the alleged violations of the CWA as well as the specific  
11 provisions of the CWA that Respondent is alleged to have violated.

12 **III. ALLEGATIONS**

13 3.1. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the “discharge of a  
14 pollutant” by any person into navigable waters of the United States, except, *inter alia*, as  
15 authorized by a National Pollutant Discharge Elimination System (“NPDES”) permit issued  
16 pursuant to Section 402 of the Act, 33 U.S.C. § 1342. Section 402(a) of the CWA, 33 U.S.C.  
17 § 1342(a), provides that a state with an approved NPDES program may issue permits for the  
18 discharge of pollutants into waters of the United States upon such specific terms and conditions  
19 as the state may prescribe.

20 3.2. Section 504(12) of the CWA, 33 U.S.C. § 1362(14), defines “discharge of a  
21 pollutant” to include “any addition of any pollutant to navigable waters from any point source.”  
22 “Navigable waters” are defined as “waters of the United States.”  
23  
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1           3.3.     Section 504(14) of the Clean Water Act, 33 U.S.C. § 1362(14), defines the term  
2 “point source” to include any “concentrated animal feeding operation ... from which pollutants  
3 are or may be discharged.”

4           3.4.     EPA’s regulations define “concentrated animal feeding operation” to include any  
5 “animal feeding operation” that: (a) confines more than 1,000 cattle; or (b) confines more than  
6 300 cattle and discharges pollutants to waters of the United States through a man-made ditch,  
7 flushing system, or similar man-made device. 40 C.F.R. § 122.23(b)(4), (6).

8           3.5.     EPA’s regulations define “animal feeding operation” to include any lot or facility  
9 where “(i) Animals ... have been, are, or will be stabled or confined and fed or maintained for a  
10 total of 45 days or more in any 12-month period, and (ii) Crops, vegetation forage growth, or  
11 post-harvest residues are not sustained in the normal growing season over any portion of the lot  
12 or facility.” 40 C.F.R. § 122.23(b)(1).

13           3.6.     In 2009, the State of Oregon issued Oregon Confined Animal Feeding Operation  
14 General Permit Number 1 (“CAFO General Permit”) pursuant to Section 402 of the CWA,  
15 33 U.S.C. § 1342. The CAFO General Permit became effective on June 29, 2009, and authorizes  
16 certain discharges of process wastewater from those Oregon CAFOs that subject themselves to  
17 its conditions and limitations.

18           3.7.     Among the conditions and limitations contained in the CAFO General Permit is a  
19 prohibition on the discharge of process waste water from the CAFO’s production area to surface  
20 waters of the state “except when rainfall events cause an overflow of waste management and  
21 storage facilities designed, constructed, operated, and maintained to contain all manure, litter,  
22 and process waste water including the contaminated runoff and direct precipitation from a 25-  
23 year, 24-hour rainfall event.” CAFO General Permit at S2.B.

1 3.8. Agricultural waste discharged into water is a “pollutant” as defined in Section  
2 502(6) of the CWA, 33 U.S.C. § 1362(6).

3 3.9. Section 309(g)(1) of the CWA, 33 U.S.C. § 1319(g)(1), authorizes EPA to assess  
4 administrative penalties against any person who has violated Section 301 or 308 of the CWA,  
5 33 U.S.C. § 1311 or 1318. Section 309(g)(1) of the CWA also authorizes EPA to assess  
6 administrative penalties against any person who has violated any permit condition or limitation  
7 in a permit issued under Section 402 of the CWA, 33 U.S.C. § 1342.

8 3.10. Respondent is a limited liability company and therefore a “person” as defined in  
9 Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

10 3.11. Respondent is a “concentrated animal feeding operation” as that term is defined in  
11 40 C.F.R. § 122.23(b) and a “confined animal feeding operation” as that term is defined in State  
12 law. At all times relevant to these allegations, the Respondent had coverage under the CAFO  
13 General Permit.

14 3.12. Hall Slough is a perennial body of water that flows into the Wilson River. The  
15 Wilson River flows into the Tillamook Bay. The Tillamook Bay is an interstate water  
16 susceptible to use in interstate or foreign commerce, and thus is a “navigable water” as defined in  
17 Section 502(7) of the CWA, 33 U.S.C. § 1362(7), and is a “water of the United States” as  
18 defined in 40 C.F.R. § 122.2. As a tributary to the Tillamook Bay, Hall Slough is a “navigable  
19 water” as defined in Section 502(7) of the CWA, 33 U.S.C. § 1362(7), and “waters of the United  
20 States” as defined in 40 C.F.R. § 122.2.

21 3.13. On January 12, 13, and 14, 2010, EPA and the Oregon State Department of  
22 Agriculture conducted an inspection of the RSC Dairy, LLC to determine compliance with the  
23 CAFO General Permit and the CWA.

1           3.14. On January 11, 2010, the Respondent discharged manure-contaminated process  
2 waste water to Hall Slough. This occurred during spraying of manure-contaminated process  
3 waste water onto a field at Respondent's facility. This discharge was not caused by a rainfall  
4 event and was not from a facility designed, constructed, operated, and maintained to contain all  
5 process-generated waste waters plus the runoff and direct precipitation from a 25-year, 24-hour  
6 rainfall event. This discharge was therefore not authorized by the CAFO General Permit and  
7 violated the CWA.

8           3.15. On January 13, 2010, manure-contaminated process waste water from  
9 Respondent's barn area was discharged into a storm drain. The storm drain is connected to Hall  
10 Slough. This discharge was not caused by a rainfall event and was not from a facility designed,  
11 constructed, operated, and maintained to contain all process-generated waste waters plus the  
12 runoff and direct precipitation from a 25-year, 24-hour rainfall event. This discharge was  
13 therefore not authorized by the CAFO General Permit and violated the CWA.

14           3.16. Pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), and 40 C.F.R. Part  
15 19, Respondent is liable for civil penalties not to exceed \$16,000 per day for each day during  
16 which these violations continued, up to a maximum amount of \$177,500.

1 **IV. CONSENT AGREEMENT**

2 4.1. Respondent agrees with the jurisdictional allegations contained in Paragraphs 3.1  
3 to 3.11 of this Consent Agreement and Final Order.

4 4.2. Respondent expressly waives any right to contest the allegations and to appeal the  
5 Final Order set forth in Part V.

6 4.3. Respondent neither admits nor denies the specific factual allegations contained in  
7 Part III of this Consent Agreement and Final Order.

8 4.4. As required by Section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3), EPA has  
9 taken into account the nature, circumstances, extent, and gravity of the alleged violations, as well  
10 as the Respondent's economic benefit of noncompliance, ability to pay, and such other matters as  
11 justice may require. After considering all of these factors, EPA has determined and Respondent  
12 agrees that an appropriate penalty to settle this action is \$12,000.00.

13 4.5. Respondent consents to the issuance of the Final Order set forth in Part V, below,  
14 and agrees to pay the total civil penalty set forth in Paragraph 4.4, above within 30 days of the  
15 effective date of the Final Order.

16 4.6. Payment under this Consent Agreement and Final Order shall be made by  
17 cashier's check or certified check, payable to the order of "Treasurer, United States of America"  
18 and delivered via United States mail to the following address:

19 U.S. Environmental Protection Agency  
20 Fines and Penalties  
21 Cincinnati Finance Center  
22 PO Box 979077  
23 St. Louis, MO 63197-9000

24 Respondent shall note on the check the title and docket number of this action.  
25

1           4.7. Respondent must deliver via United States mail a photocopy of the check  
2 described in Paragraph 4.6 to the Regional Hearing Clerk and to the EPA Region 10 Office of  
3 Compliance and Enforcement at the following addresses:

4                           Regional Hearing Clerk  
5                           U.S. Environmental Protection Agency  
6                           Region 10, MS ORC-158  
7                           1200 Sixth Avenue, Suite 900  
8                           Seattle, WA 98101

9                           Office of Compliance and Enforcement  
10                          Attn: Chae Park  
11                          U.S. Environmental Protection Agency  
12                          Region 10, MS OCE-133  
13                          1200 Sixth Avenue, Suite 900  
14                          Seattle, WA 98101

15           4.8. If Respondent fails to pay the penalty assessed by this Consent Agreement and  
16 Final Order in full by the due date set forth in Paragraph 4.5, above, the entire unpaid balance of  
17 penalty and accrued interest shall become immediately due and owing. If Respondent fails to  
18 pay the penalty assessed, Respondent may be subject to a civil action to collect the assessed  
19 penalty under the CWA, together with interest, fees, costs, and additional penalties described  
20 below. In any collection action, the validity, amount and appropriateness of the penalty shall not  
21 be subject to review.

22           4.9. If Respondent fails to pay any portion of the penalty assessed by this Consent  
23 Agreement and Final Order in full by the due date set forth in Paragraph 4.5, above, Respondent  
24 shall be responsible for payment of the amounts described below:

25                   4.9.1. Interest. Pursuant to Section 309(g)(9) of the CWA, 33 U.S.C.  
§ 1319(g)(9), any unpaid portion of the assessed penalty shall bear interest at a rate  
established by the Secretary of Treasury pursuant to 31 U.S.C. § 3717(a)(1) from the  
effective date of the Final Order set forth in Part V, below, provided, however, that no

1 interest shall be payable on any portion of the assessed penalty that is paid within 30 days  
2 of the effective date of the Final Order.

3 4.9.2. Attorneys Fees, Collection Costs, Nonpayment Penalty. Pursuant to  
4 Section 309(g)(9) of the CWA, 33 U.S.C. § 1319(g)(9), if Respondent fails to pay on a  
5 timely basis the amount of the penalty set forth in Paragraph 4.4, above, Respondent shall  
6 pay (in addition to any assessed penalty and interest) attorneys fees and costs for  
7 collection proceedings and a quarterly nonpayment penalty for each quarter during which  
8 such failure to pay persists. Such nonpayment penalty shall be in an amount equal to  
9 twenty percent (20%) of the aggregate amount of Respondents' penalties and nonpayment  
10 penalties which are unpaid as of the beginning of such quarter.

11 4.10. The penalty described in Paragraph 4.4, above, including any additional costs  
12 incurred under Paragraph 4.9, above, represents an administrative civil penalty assessed by EPA  
13 and shall not be deductible for purposes of federal taxes.

14 4.11. Except as described in Subparagraph 4.9.2, above, each party shall bear its own  
15 costs in bringing and defending this action.

16 4.12. The provisions of this Consent Agreement and Final Order shall bind Respondent  
17 and his agents, servants, employees, successors, and assigns.



1 4.13. The above provisions are STIPULATED AND AGREED upon by Respondent  
2 and EPA.

3  
4 DATED:

FOR RESPONDENT:

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6  
7 4/7/11

Signature: RSC Dairy LLC, R. Chelone, Jr.

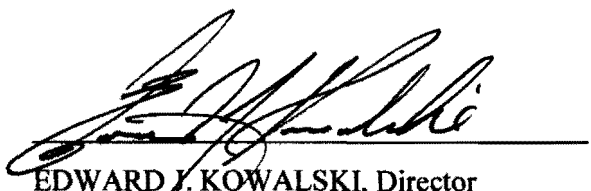
8 Print Name: RSC Dairy LLC, R. Chelone

9 Title: Manager

10  
11 DATED:

FOR COMPLAINANT:

12  
13 4/10/2011

14   
EDWARD J. KOWALSKI, Director  
Office of Compliance and Enforcement

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**V. FINAL ORDER**

5.1. The terms of the foregoing Parts I-IV are hereby ratified and incorporated by reference into this Final Order. Respondent is hereby ordered to comply with the foregoing terms of settlement.

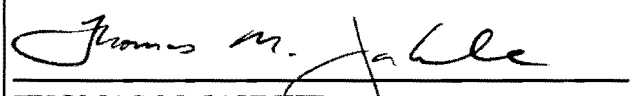
5.2. This Consent Agreement and Final Order shall constitute a settlement by EPA of all claims for civil penalties pursuant to the CWA for the violations alleged in Part III, above. In accordance with 40 C.F.R. § 22.31(a), nothing in this Consent Agreement and Final Order shall affect the right of EPA or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law. This Consent Agreement and Final Order does not waive, extinguish, or otherwise affect Respondent's obligations to comply with all applicable provisions of the CWA, applicable CWA regulations, and/or any permits issued thereunder.

5.3. In accordance with Section 309(g)(1) of the CWA, 33 U.S.C. § 1319(g)(1), and 40 C.F.R. § 22.38(b), the State of Oregon has been given the opportunity to consult with EPA regarding the assessment of the administrative civil penalty against Respondent.

5.4. Pursuant to Section 309(g)(4)(A) of the CWA, 33 U.S.C. § 1319(g)(4)(A), EPA has published public notice of its intent to assess an administrative penalty against Respondent and to invite public comment in accordance with 40 C.F.R. § 22.45. More than 40 days have elapsed since the issuance of this public notice, and EPA has received no petition to set aside the Consent Agreement contained herein.

1           5.5.    This Final Order shall become effective upon filing.

2  
3    SO ORDERED this 20<sup>th</sup> day of June, 2011.

4  
5    

6    THOMAS M. JAHNKE  
7    Regional Judicial Officer  
8    U.S. Environmental Protection Agency  
9    Region 10

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CERTIFICATE OF SERVICE

The undersigned certifies that the original of the attached **CONSENT AGREEMENT AND FINAL ORDER** in **In the Matter of: RSC Dairy, LLC, DOCKET NO.: CWA-10-2011-0061** was filed with the Regional Hearing Clerk on June 20, 2011.


On June 20, 2011 the undersigned certifies that a true and correct copy of the document was delivered to:

Jennifer Byrne, Esquire  
US Environmental Protection Agency  
1200 Sixth Avenue, ORC-158  
Suite 900  
Seattle, WA 98101

Further, the undersigned certifies that a true and correct copy of the aforementioned document was placed in the United States mail certified/return receipt on June 20, 2011, to:

Richard Chelone, Owner/Operator  
RSC Dairy, LLC  
4845 Sunset Drive  
Tillamook, Oregon 97141

DATED this 20<sup>th</sup> day of June 2011.

  
\_\_\_\_\_  
Carol Kennedy  
Regional Hearing Clerk  
EPA Region 10