



6560-50-P

## ENVIRONMENTAL PROTECTION AGENCY

[FRL-10013-70-Region 4]

### Order Denying Petition to Set Aside Consent Agreement and Proposed Final Order

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice of order denying petition to set aside consent agreement and proposed final order.

**SUMMARY:** In accordance with the Code of Federal Regulations and the Clean Water Act (“CWA or “Act”), notice is hereby given that an Order Denying Petition to Set Aside Consent Agreement and Proposed Final Order has been issued in the matter styled as *In the Matter of Jerry O’Bryan, Curdsville, Kentucky*, Docket No. CWA-04-2018-5501(b). This document serves to notify the public of the denial of the Petition to Set Aside Consent Agreement and Proposed Final Order filed in the matter and explain the reasons for such denial.

**ADDRESSES:** To access and review documents filed in the matter that is the subject of this document, please visit:

<https://yosemite.epa.gov/oa/rhc/epaadmin.nsf/07a828025febe17885257562006fff58/4a9eaf5114545a51852584b700740a38!OpenDocument>.

### FOR FURTHER INFORMATION CONTACT:

Patricia Bullock, Regional Hearing Clerk, Environmental Protection Agency, Region 4,  
61 Forsyth Street, Atlanta, Georgia 30303; telephone number:404-562-9511; email address:  
[bullock.patricia@epa.gov](mailto:bullock.patricia@epa.gov).

### SUPPLEMENTARY INFORMATION:

#### I. Legal Authority

Section 404 of CWA, 33 U.S.C. §1344(f)(2), requires a permit for "any discharge of dredged or fill material into 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. . . ." Section 301(a) of the CWA, 33 U.S.C. §1311, provides that, "the discharge of any pollutant into waters of the United States . . . except as in compliance with sections 301 . . . and 1344 shall be unlawful. Sections 309(g)(1) and (g)(2) of the CWA empower the Environmental Protection Agency ("EPA," "Complainant" or "Agency") to assess a Class 1 or Class 2 civil administrative penalty against any person found to have violated section 1311 . . . of the CWA or [who] has violated any permit limitation or condition implementing any such sections in a permit . . . issued under Section 1344.

Before issuing an order assessing a Class I civil penalty under Section 309(g) of the CWA, the EPA is required by the Act and "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits" (Consolidated Rules) 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); 40 CFR 22.45(b)).

Any person who comments on the proposed assessment of a Class I civil penalty under 33 U.S.C. § 1319(g)(4)(B) is entitled to receive notice of any hearing held under this Section and at such hearing is entitled to a reasonable opportunity to be heard and to present evidence. (33 U.S.C. 1319(g)(4)(B); 40 CFR 22.45(c)). If no hearing is held before issuance of an order assessing a Class I civil penalty under 33 U.S.C. §1319(g)(4)(C) of the CWA, such as where the administrative penalty action in question is settled pursuant to a consent agreement and final order (CAFO), any person who commented on the proposed assessment may petition to set aside

the order on the basis that material evidence was not considered and request a hearing be held on the penalty. (33 U.S.C. 1319(g)(4)(C); 40 C.F.R. 22.45(c)(4)(ii)).

The CWA requires that 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 Administrator shall immediately set aside such order and provide a hearing in accordance with Section 309(g)(4)(C) of the CWA, 33 U.S.C. § 1319(g)(4)(C). On the other hand, if the Administrator denies a hearing, the Administrator shall provide to the petitioner, and publish in the Federal Register notice of and reasons for such denial. *Id.*

Pursuant to Section 309 of the CWA, the authority to decide petitions by commenters to set aside final orders entered without a hearing and provide copies and/or notice of the decision has been delegated to Regional Administrators in administrative penalty actions brought by regional offices of EPA. (*See* EPA Administrator's Delegation of Authority 2-51). The Region 4 Administrator has delegated authority to decide such petitions to the Regional Judicial Officer. (*See* Region 4 Delegation of Authority 2-51, Class I Administrative Penalty Action).

The Consolidated Rules require that where a commenter petitions to set aside a CAFO in an administrative penalty action brought by a regional office of the EPA, the Regional Administrator shall assign a Petition Officer to consider and rule on the petition. (40 CFR 22.45(c)(4)(iii)). Upon review of the petition and any response filed by the Complainant, the Petition Officer shall then make written findings as to: (A) the extent to which the petition states an issue relevant and material to the issuance of the consent agreement and proposed final order; (B) whether the complainant adequately considered and responded to the petition; and (C) whether resolution of the proceeding by the parties is appropriate without a hearing. (40 CFR 22.45(c)(4)(v)).

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 CFR 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 and stating reasons for the denial. (40 CFR 22.45(c)(4)(vii)). The Petition Officer shall then file the order with the Regional Hearing Clerk, serve copies of the order on the parties and the commenter, and provide public notice of the order. *Id.*

## **II. Procedural Background**

On or about May 10, 2018, the Director of the Water Division of EPA Region 4 and Jerry O'Bryan (Respondent) executed an Administrative Compliance Order on Consent (AOC) in the matter styled, *In the Matter of Jerry O'Bryan Curdsville, Kentucky*, Docket No. CWA-04-2018-5755. The AOC pertained to discharge of dredged and/or fill material using earth moving equipment by Respondent that resulted in the conversion of wetlands to agricultural land in or around June 2016. Respondent's discharge activities impacted 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. During the discharge, Respondent did not have a permit under section 404 of the CWA, 33 U.S.C. §1344, that authorized Respondent 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 of the CWA. Accordingly, the AOC determined Respondent's activities of discharging pollutants into navigable waters without a permit violated Section 301 of the CWA, 33 U.S.C §1311.

Under the authority of Section 309(a) of the CWA, 33 U.S.C. §1319(a), the EPA ordered, and Respondent agreed and consented to restore the impacted wetlands in accordance with a signed restoration plan prepared by the United States Department of Agriculture/Natural Resource Conservation Service on March 2, 2017. Respondent also agreed to comply with timelines concerning the construction start date, construction completion date, and inspection date of the restored site.

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 CAFO, titled Docket No.: CWA-04-2018-5501(b). The CAFO sought 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 his 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, EPA provided public notice of its intent to file the proposed CAFO and accept public comments thereon. The EPA received six timely filled comment letters during the public comment period. All commenters opposed issuance of the proposed CAFO. The Community Against Pig Pollution and Disease, Inc. (CAPPAD or Petitioner) was one of six commenters. Complainant subsequently prepared a Summary of and Response to Public Comments (Response to Comments), which indicated the EPA would proceed with the proposed

CAFO without amendment. The EPA mailed the Response to Comments together with a copy of the proposed CAFO to CAPPAD and other commenters on or about August 20, 2019.

Complainant subsequently corrected a ministerial error in Paragraph 35 of the CAFO, and mailed replacement pages to CAPPAD and the other commenters on August 23, 2019. CAPPAD received the documents on August 27, 2019. CAPPAD timely filed a Petition seeking to set aside the proposed CAFO on or about September 17, 2019.

The EPA Region 4 Administrator received the Petition on September 24, 2019. Pursuant to 40 C.F.R. §22.45(c)(4)(iii), Complainant considered the issues raised in the Petition and decided not to withdraw the CAFO. On October 24, 2019, the Region 4 Administrator assigned the undersigned as Petition Officer to preside over this matter. (40 C.F.R. §22.45 (c)(4)(iii)). The Region 4 Administrator directed Complainant to provide a copy of the CAFO and file a written response to the Petition with the Petition Officer within 30 days of the assignment. (40 C.F.R. §22.45(c)(iv)).

Complainant filed its Response to the Petition to Set Aside Consent Agreement and Proposed Final Order (Response to Petition) on November 19, 2019, with the Regional Hearing Clerk and served copies on Respondent and Petitioner. Complainant's filing with the Regional Hearing Clerk was erroneous since 40 C.F.R. §22.45(c)(4)(iv) states, "A copy of the response shall be provided to the parties and to the commenter, but not to the Regional Hearing Clerk or Presiding Officer." The Regional Hearing Clerk accepted the Response to Petition, but did not forward the file 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 with the Regional Hearing Clerk and sought to correct the matter 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).” On December 9, 2019, the Petition Officer granted the motion finding that no harm resulted to Petitioner since the Complainant timely served the Response to Petition on the Petitioner and Respondent. Additionally, the Regional Hearing Clerk accepted and retained the file but did not forward the file to the Petition Officer.

### **III. Denial of Petitioner’s Petition**

On July 24, 2020, the undersigned filed an “Order Denying the Petition to Set Aside Consent Agreement and Proposed Final Order” (Order) with the Regional Hearing Clerk (RHC), who served copies of the Order and enclosures on the Parties. On July 28, 2020, the undersigned filed a Corrected Order with the RHC for the purpose of correcting the title on page 21 to read “Petition Officer.” The undersigned also corrected numbers for topical headings on pages 17 and 18 to state, “5” and “6”, rather than “6” and “7”. In this Order, the undersigned denied the Petition without need for a hearing on the basis that Petitioner had failed to present any relevant and material evidence that had not been adequately considered and addressed by Complainant.

The Petitioner raised several issues in its Comments and Petition regarding Respondent’s animal feeding operations (AFOs) in Curdsville, Kentucky. The undersigned categorized these issues into six headings as addressed below. First, Petitioner argued Respondent owns and operates concentrated animal feeding operations (AFOs) in violation of environmental laws, and argued the Kentucky Department of Water (KDOW) refused to verify hog counts, and collect water and soil samples. Specifically, Petitioner argued Respondent owns and operates large concentrated AFOs that discharge into waters of the United States. Petitioner also argued Respondent’s operations meet the definition of large concentrated AFOs as stated in the Kentucky Administrative Regulation (KAR) 401 KAR 5.002 and 40 C.F.R. §122.23(b)(2). Petitioner asserted Respondent’s farms at Doby/Bumblebee, Iron Maiden and Hardy discharged

*E. Coli* with readings in excess of 4,4870 CFU/100 ml per sample into the Green River, and such readings violate the Ambient Water Rule. Petitioner opined KDOW should rescind the Kentucky No Discharge Operating Permits (KNDOPs) initially issued Respondent, and replace these permits with Kentucky Pollutant Discharge Elimination System (KPDES) permits. Petitioner also asserted that it provided information concerning the number of hogs on Respondent's farms, readings from water samples, and other unlawful activities committed by Respondent to KDOW. However, Petitioner contends KDOW has refused to verify the number of hogs, collect its own samples, and otherwise enforce compliance with the CWA.

The undersigned determined that Complainant considered and addressed issues raised by Petitioner in its Response to Comments and Response to Petition. The undersigned found that issues raised regarding Respondent's AFOs at properties other than the Simpson McKay farm, and activities allegedly committed by Respondent in violation of Section 402 of the CWA are not relevant or material to allegations raised in the proposed CAFO. The undersigned further found that Complainant addressed Petitioner's claims that KDOW did not exercise proper oversight of Respondent's operations. For instance, Complainant explained that the Kentucky Department for Environmental Protection (KDEP) has authority to issue KNDOPs and KPDES permits, and described conditions appropriate for issuance of such permits. The undersigned concluded that Petitioner did not meet its burden of demonstrating that matters concerning Respondent's AFOs and KDOW's alleged lack of oversight of Respondent's operations are material and relevant evidence that Complainant had not considered in agreeing to the CAFO. Thus, this claim was denied.

Second, Petitioner argued in its Petition that Respondent's AFOs lack necessary wastewater treatment facilities. In both its Comments and Petition, Petitioner asserted

Respondent added barns and hogs to his AFOs, exceeding what was authorized in initial permits issued by KDOW. Petitioner further asserted Respondent did not increase the volume of lagoons that would service the additional barns and hogs, resulting in Respondent spraying excess effluent. Petitioner stated in its Petition that Respondent does not have wastewater treatment plants for his large AFOs and described the sites as, “a large hole in the ground, not lined, not regulated or tested, and [not having] ground water monitoring wells at five locations.”

(Petitioner’s Petition, p. 2). The undersigned found that Complainant considered and addressed this issue and related allegations. Complainant explained that KDEP has authority to administer the National Pollutant Discharge Elimination System program, and thus KDEP issues KNDOPs for nondischarging AFOs and issues KPDES permits for AFOs that discharge into waters of the United States.<sup>1</sup> Complainant referred issues raised by Petitioner and commenters to KDEP and reported action taken by this agency. (Response to Comments, p. 000132 - 000133).

Additionally, Complainant argued in its Response to Petition that the lack of wastewater treatment facilities at Respondent’s AFOs is not related to allegations set forth in the proposed CAFO, and therefore is not material or relevant evidence. The undersigned concluded this issue, which concerns Respondent’s management of AFOs, did not constitute relevant and material evidence that Complainant had not considered in agreeing to the proposed CAFO. Thus, this claim was denied.

Third, Petitioner argued in its Comments and Response that Respondent constructed a dam on Hardy Farm that floods a landowner’s adjacent property during heavy rainfall. Petitioner opined this construction was a clear violation of the CWA. Petitioner stated KDOW inspected

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<sup>1</sup> This authority is pursuant to National Pollutant Discharge Elimination System Memorandum of Agreement Between the Commonwealth of Kentucky and United States Environmental Protection Agency region 4 (March 10, 2008).

the construction, and in the inspection report, merely suggested that Respondent obtain a stream construction permit. Dissatisfied with KDOW, Petitioner referred the matter to the U.S. Army Corps of Engineers (USACE). In the Petition, Petitioner referred to this construction as “the Hardy Sow Farm Black Water illegal bypass” and stated water samples collected in 2018 from the lagoon revealed *E. coli* counts greater than 173,300 C.F.U./100 ML sample and ammonia nitrogen concentration greater than 950 mg/L. See Petitioner’s Comment, p. 000175 - 000176. In Complainant’s Response to Comments and Response to Petition, Complainant explained that the proposed CAFO only resolves allegations against Respondent for the unauthorized discharge of dredged and/or fill material at the Simpson/McKay farm in or about June 2016 in violation of Section 404 of the CWA, 33 U.S.C. §1344. (Response to Comments, p. 000127). Complainant also explained the role of USACE as the lead enforcement agency for unpermitted discharges, and referred Petitioner’s allegations to USACE. *Id.* In its Response to Petition, Complainant emphasized that allegations pertaining to Hardy Farm, which is not the Farm identified in the CAFO, are not relevant or material to allegations raised in the proposed CAFO. The undersigned determined, as argued by Complainant, that allegations raised concerning the dam at Hardy Farm does not constitute relevant and material evidence, and that Complainant thoroughly addressed allegations raised by Petitioner. The undersigned also determined that Petitioner did not offer any evidence that refutes, or casts doubt on evidence and assertions presented by Complainant. Therefore, this claim was denied.

Fourth, Petitioner argued Respondent’s AFOs have adversely impacted the community. Specifically, Petitioner stated their property values have declined because of contaminated water and depleted air quality caused by Respondent’s activities. Petitioner further stated that “taxpayers have footed the bills for highway repair due to hog trucks wrecking and hog trucks

spilling manure onto highways.” (Petitioner’s Petition, p. 000176). The undersigned found that the Petitioner had not demonstrated that the alleged adverse impact upon the community was caused or related to Respondent’s unauthorized discharge of dredged and/or fill material at the Simpson/McKay Farm, as alleged in the proposed CAFO. Thus, this issue does not constitute relevant and material evidence. The undersigned also found that Complainant considered and responded to this issue. Therefore, this claim was denied.

Fifth, Petitioner recommended that several conditions be added to the proposed CAFO and that the penalty be enhanced to deter Respondent from engaging in similar behavior in the future. (Petitioner’s Comments p. 000052). As an example, Petitioner recommended that EPA exercise oversight of Respondent’s operations after the SEP is completed and that EPA conduct unannounced inspections and review permits issued by KDOW at five farms owned and operated by Respondent. The undersigned determined that Complainant adequately considered and responded to Petitioner’s recommendations, and explained its actions were consistent with Agency policies, statutes and regulations. Specifically, Complainant explained that its actions were consistent with or mandated by the EPA Clean Water Act Section 404 Settlement Penalty Policy and EPA Supplemental Environmental Projects Policy. Complainant further explained that actions taken by EPA were in accordance with applicable regulations and statutes. The undersigned, therefore, denied Petitioner’s recommendations to modify the proposed CAFO.

Sixth, Petitioner requested a hearing, arguing the proposed settlement and penalty are inadequate. At such hearing, Petitioner proposed presenting evidence of Respondent’s prior infractions, Respondent’s behavior as a habitual violator, and demonstrate that a severe penalty is warranted. The undersigned determined that the Consolidated Rules and Section 309(g)(4)(C) of the CWA do not provide for a hearing of this nature. Rather, evidence would be presented for

the purpose of determining whether Complainant met its burden of proving that Respondent committed the violations as alleged in the CAFO and that the penalty is appropriate based on applicable law and policy. The undersigned noted that Petitioner did not offer material or relevant evidence, either documentary or testimonial, that it would present at such hearing. The undersigned further noted that Petitioner did not offer any evidence or arguments in its Comments or Petition that had not adequately been addressed by Complainant. For these reasons, the undersigned found that resolution of the proceeding by the Parties without a hearing would be appropriate.

The undersigned therefore issued the Order Denying Petition to Set Aside Consent Agreement and Proposed Final Order.

Dated: August 19, 2020.

**Robin Allen,**

*Petition Officer,*

*Region 4.*

[FR Doc. 2020-18649 Filed: 8/24/2020 8:45 am; Publication Date: 8/25/2020]