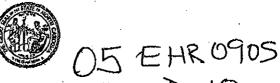
# SECTION IV

ROY COOPER MORNEY GENERAL A-174



State of North Carolina

Department of Justice

P. O. Box 629 RALEIGH 27602-0629

# FACSIMILE TRANSMITTAL SHEET

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STATE OF NORTH CAROLINA	IN THE OFFICE OF ADMINISTRATIVE HEARINGS			
COUNTY OF BLADEN	05 EHR 0905			
William Barry Freedman,				
Petitioner,	) ) RESFONDENT'S			
$\mathbf{v}_{\mathbf{v}_{i+1}} = \mathbf{v}_{i+1} + \mathbf{v}_{i+1$	) PROPOSED DECISION			
North Carolina Department of Environment and Natural Resources, Division of Water Quality,	) }			
Respondent,				

This contested case was heard before the Honorable Donald W. Overby, Administrative Law Judge, on August 22, 2007 and July 25, 2008 in the Bladen County Courthouse, 166 Courthouse Drive, Elizabethtown, North Carolina upon the Petition for Contested Case Hearing filed by William Barry Freedman ("Petitioner"). Petitioner appeared and was represented by counsel of record Gary A. Grady, Hester, Grady & Hester, PLLC, Elizabethtown, North Carolina. The North Carolina Department of Environment and Natural Resources, Division of Water Quality ("Respondent" or "DWQ") appeared and was represented by its counsel of record, Jane L. Oliver, N.C. Department of Justice, Raleigh, North Carolina.

#### ISSUE

Whether Respondent acted erroneously in assessing a civil penalty against Petitioner for: (1) violating N.C. Gen. Stat. § 143-215.1 by making an outlet to waters of the State without a permit and (2) violating Condition No. II. 20 of National Pollutant Discharge Elimination System ("NPDES") Permit No. NCA200000 by applying animal waste to land that was frozen. Petitioner did not challenge, in either his Petition for Contested Case Hearing or Prehearing Statement, that portion of the civil penalty which was assessed for Petitioner's violation of Condition No. III. 19 of the NPDES General Permit No. NCA200000 by failing to provide copies of all requested information and reports related to the operation of the animal waste management system at the Ronald Davis Farm in Bladen County.

#### witnesses

For Petitioner:

William Barry Freedman

For Respondent:

William Barry Freedman

Mark Brantley

Stephen Arthur Barnhardt Larry Clayton Baxley

#### EXHIBITS

# Respondent:

23.

Hand-drawn Diagram

Swine Waste Management System General NPDES Permit No. 1. NCA200000 Certificate of Coverage No. NCA209186 for the Ronald Davis Farm 2. Petitioner's Nutrient Management Plan for the Ronald Davis Farm Petitioner's Responses to Respondent's Request for Admissions DWQ Inspection Report for the 11/3/04 Inspection of the Ronald Davis 5. Farm Notice of Violation Mailed 11/23/04 6. Notice of Violation and Notice of Intent Mailed 12/29/04 7. Petitioner's Letter to Stephen Barnhardt with Cover Sheet, dated 1/12/05 8. DWQ Inspection Report for the 1/28/05 Inspection of the Ronald Davis 9. Photographs taken by Mark Brantley, 1/28/05 11A-11D Notice of Violation and Notice of Intent dated 2/7/08 with Certificate of 12. Service by Columbus County Sheriff's Department dated 03/21/05 Petitioner's Letter to Larry Baxley, dated 1/31/05 13. DWQ Inspection Report for the 3/22/05 Inspection of the Ronald Davis 14. Farm Civil Penalty Assessment against Petitioner with Cover Letter, dated 15. 5/5/05 16. Petitioner's Prehearing Statement Calculations Prepared by Stephen Arthur Barnhardt 18. 19A-19O Photographs taken by Larry Baxley, 1/28/03. Petitioner's Petitioner for Contested Case Hearing 20, 21. Aerial Photograph 22A-22D Photographs taken by Mark Brantley, 11/3/04.

#### APPLICABLE LAW

The Clean Water Act, 33 USC §1251 et seq., was enacted "to restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 USC 1251(a).

The CWA addresses two possible sources of pollution to the Nation's waters: point sources and nonpoint sources. A "point source" is defined under the CWA to mean "any discernable, confined and discrete conveyance, including but not limited to, any pipe, ditch, channel, tunnel [or] conduit . .." 33 USC § 1362(14). The definition specifically includes concentrated animal feeding operations (CAFOs). *Id.* 

Point source pollution is regulated through a permitting process known as the National Pollution Discharge Elimination System (NPDES). 33 USC § 1311. Under the

NPDES permit program, the permittee is prohibited from discharging any pollutant unless the permittee's permit specifically authorizes the discharges and the permit meets the statutory and regulatory requirements of the CWA. 33 USC § 1342(a).

# 40 C.F.R. § 122.23 provides:

Concentrated animal feeding operations, as defined in paragraph (b) of this section, are point sources that require NPDES permits for discharges or potential discharges. Once an operation is defined as a CAFO, the NPDES requirements for CAFOs apply with respect to all animals in confinement at the operation and all manure, litter, and process wastewater generated by those animals or the production of those animals, regardless of the type of animal.

#### 40 C.F.R. § 122.23.

Under the CWA, states are allowed to administer permitting under the NPDES program upon EPA's approval of the state's NPDES permitting program. The state's program must provide the responsible state agency with the necessary authority to issue permits that ensure compliance with all applicable requirements of the CWA, as well as enforcement authority to abate permit violations, including the ability to seek civil and criminal penalties. North Carolina Department of Environment and Natural Resurces, Division of Water Quality is the permitting agency for the NPDES program. 33 USC §§ 1251(b) and 1342(b).

N.C. Gen. Stat. § 143-215.1(a)(1) provides that no person shall make any outlets to waters of the State unless that person has first obtained a permit from the Environmental Management Commission and has complied with all conditions in the permit.

N.C. Gen. Stat. § 143-215.1(a)(12) provides that no person shall construct or operate an animal waste management system, as defined in N.C. Gen. Stat. § 143-215,10B, without first obtaining a permit.

An "animal waste management system" is defined to mean "a combination of structures and nonstructural practices serving a feedlot that provide for the collection, treatment, storage, or land application of animal waste." N.C. Gen. Stat. § 143-215.10B(3).

# N.C. Gen. Stat. § 143-215.10C(a) provides:

No person shall construct or operate an animal waste management system for an animal operation or operate an animal waste management system for a dry litter poultry facility that is subject to regulation under 40 C.F.R. § 122,23 without first obtaining an individual permit or a general permit under this Article.

N.C. Gen. Stat. § 143-215.10C(a) (2005).

The General Assembly has indicated its intent that "most animal waste management systems be permitted under a general permit." Id.

The N.C. General Assembly has vested the authority to permit, inspect and take enforcement actions over animal waste management systems in the Division of Water Quality. N.C. Gen. Stat. § 143-215.10A.

N.C. Gen. Stat. § 143-215.10C(b) provides:

An animal waste management system shall be designed, constructed, and operated so that the animal operation served by the animal waste management system does not cause pollution in the waters of the State except as may result because of rainfall from a storm event more severe that the 25-year, 24-hour storm or if required by 40 C.F.R. § 122.23 from a storm event more severe than the 100-year, 24-hour storm.

N.C. Gen. Stat. § 143-215.10C(b) (2005).

North Carolina's Animal Waste Management Systems statutes set forth requirements that require testing of waste products prior to the time of land application and testing of the soil where the animal waste is to be applied. N.C. Gen. Stat. § 143-215.10C(e)(6). Waste utilization plans must "assure a balance between nitrogen application rates and nitrogen crop requirements. N.C. Gen. Stat. § 143-215.10C(e)(7). The permittee must maintain records documenting testing requirements as well as the dates and rates that wastes are applied to soils. These documents must be made available upon request by DWQ. N.C. Gen. Stat. § 143-215.10C(e)(8).

Based upon the preponderance of the admissible evidence, the undersigned makes the following:

#### FINDINGS OF FACT

- 1. At all times relevant to this proceeding, Petitioner William Barry Freedman (Petitioner) owned and operated the Ronald David Farm (RDF) located on Highway 210 North of State Road 1503 in Bladen County, North Carolina. (T vol I, pp 17, 31-32; Resp Exh 4, ¶ 1)
- 2. The RDF is a Concentrated Animal Feeding Operation ("CAFO") or swine finishing operation with a permitted design capacity for 3,200 swine. There are four finishing houses at the facility; each house has a permit limit of 800 swine. (T vol I, pp 32-33; Resp Exh 4, ¶ 2 and 3)

- 3. The RDF utilizes a lagoon and land application system to manage the animal waste produced at the facility. The waste is transported from the swine houses to a lagoon through pipes. To facilitate land application, a pump is located near the lagoon to pull the liquid waste out of the lagoon and then transfer the waste through pipes to an inlaid irrigation system that goes to a line with eight or nine hydrants. The field irrigation hose is connected to one of the hydrants depending on what section of field is to be sprayed. (T vol I, pp 44, 62-65; T vol II pp 266-69; Resp Exh 3)
- 4. The field irrigation equipment consists of a hose that attaches to a hydrant. The hose, which is several hundred feet in length, wraps around a reel, or spray cart, which has a gasoline motor. To set up the system for irrigation, the hose is pulled out to into the field. At the end of the hose is a spray gun. The spray gun oscillates slowing as the motorized reel pulls in the hose and spray gun. The spray gun can be set to oscillate at 90 degrees, 180 degrees or 360 degrees, depending on the amount of area to be sprayed, and the reel or spray cart can be adjusted to pull the gun in at different rates of speed. (T vol I, pp 64-65, 180, T vol II pp 267-71)
- 5. To operate the system, the hose must be attached to the hydrant and a valve on the hydrant is turned. The spray cart is pulled out to the far end of the hose with a tractor or truck. To start spraying, the pump, which runs on diesel fuel, must be switched on with a key and then primed by moving a lever up and down. Priming usually takes approximately ninety to one hundred fifty strokes. Priming creates a vacuum with sufficient force to pull the waste from the lagoon, through approximately ten feet of pipe, through the pump and a long distance into the field to the hydrant. In addition, the gasoline motor on the spray cart or reel must be cranked so that the reel can pull the spray gun in across the field. The spray cart holds approximately one and one-half gallons of gasoline. (T vol I, pp 65, 119-23; T vol II, pp 271-73)
- 6. In order to operate the lagoon and land application system, Petitioner was required to have an individual permit or a general permit. (T vol II, pp 261-62, 264) See also N.C. Gen. Stat. § 143-215.10C.
- 7. On February 14, 2003, Petitioner submitted an application for coverage under North Carolina's Swine Waste Management System General National Pollutant Discharge Elimination Permit ("General Permit for swine facilities"). The General Permit was developed "to enable swine facilities in North Carolina to obtain coverage under a single permit that addresses both State and Federal requirements." (Resp Exhs 1 and 2)
- 8. On April 9, 2003, DWQ issued a Certificate of Coverage (COC) authorizing Petitioner to operate the farm and the waste collection, treatment, storage, and land application system on the RDF in accordance with the terms and requirements of the General Permit. The COC required Petitioner to operate the animal waste management system on the RDF "in conformity with the conditions and limitations as specified in the General Permit, the facility's [Certified Animal Waste Management Plan], and this COC." The COC specifically required that Petitioner establish "an adequate system for

collecting and maintaining the required monitoring data and operational information." (T vol I, pp 59-60, 215; Resp Exh 2)

- 9. Under the General Permit, the permittee is required to properly operate and maintain at all times the collection, treatment and storage facilities and the land application equipment and fields. Waste is to be applied after sampling and at the appropriate agronomic rate in order to prevent pollution of either surface waters or groundwater. The appropriate agronomic rate is determined by soil type, the nutrient needs of the crops that are grown, and the nutrient content of the waste. (Resp Exh 1, 2, and 3)
- 10. The General Permit also requires the permittee to inspect equipment and document these inspections, monitor and record precipitation events, conduct soil testing and maintain records of soil analyses for a minimum of five years, conduct waste analyses according to specified parameters, and record all irrigation and land application events. These records, along with a copy of the General Permit and the facility's CAWMP, must "be maintained by the Permittee in chronological and legible form for a minimum of five years" and "readily available for inspection." The permittee is required to submit complete copies of the records to DWQ or EPA upon request. (T vol I, pp 217, 226; Resp Exh 1 and 2)
- 11. Petitioner also had a Nutrient Management Plan which provided that, before each land application, the sine waste would be tested to ensure that waste would be applied based on the nitrogen content of the waste and the nitrogen needs of the specific crop planted. Petitioner grew wheat and soybeans on the RDF and the limiting factor in Petitioner's nutrient management plan was nitrogen. (T vol I, pp 60-62, 181; Resp Exh 3)
- 12. The primary purpose of the requirements relating to land application which are set forth in the General Permit, the COC and the facility's CAWMP is to ensure that waste is applied in an environmentally safe manner and that no waste is discharged into surface waters. The waste must be applied in such a manner that the nutrients in the waste are taken up and used by the planted crops so that the nutrients are not being loaded into streams. (T vol I, pp 57T vol II, p 262, 264-65; Resp Exh 1 and 3)
- 13. The General Permit for swine facilities prohibits the discharge of animal waste into surface waters or wetlands with one exception. The General Permit specifically provides in part:

Any discharge of waste which reaches surface waters or wetlands is prohibited except as otherwise provided in this permit and associated statutory and regulatory provisions. Waste shall not reach surface waters or wetlands by run-off, drift, manmade conveyance, direct application, direct discharge or through ditches not otherwise classified as state waters.

The waste collection, treatment, storage and application system operated under this permit shall be effectively maintained and operated as a non-

discharge system to prevent the discharge of pollutants to surface waters or wetlands. . . .

Facilities must be designed, constructed and operated to contain all waste plus the run-off from a 25-year, 24-hour rainfall event for the location of the facility. A facility that has a discharge that results because of a storm event more severe that the 25-year, 24-hour storm will not be considered in violation of this permit if the facility is in compliance with its Certified Animal Waste Management Plan (CAWMP), the Clean Water Act, (Act) and its implementing regulations, and this permit.

(T vol I, p 224; T vol II, p 265; Resp Exh 1, p 1)

- 14. The April 9, 2003 COC explicitly advised Petitioner that "any violation of the terms and conditions specified in this COC, the General Permit, or the CAWMP may result in the revocation of this COC, or penalties in accordance with N.C.G.A. 143-215.6A through 143-215.6C, the Clean Water Act and 40 C.F.R. 122.41 including civil penalties, criminal penalties, and injunctive relief." (Resp Exh 2)
- 15. The permittee or the operator-in-charge is responsible for ensuring that waste is land applied properly and that no discharge of waste occurs. The Permit requires that, when land applying waste, they system must be checked as often as needed to ensure that waste is being applied in accordance with the CAWMP. The Permit provides that, in no instance, shall the time between these inspections be more than 120 minutes during an application. These inspections must be documented and the records maintained. (T vol I, pp 63, 174; T vol II, p 266; Resp Exh 1, p 1; Resp Exh 3)
- 16. The General Permit, as well as Petitioner's own Nutrient Management Plan, prohibits the application of waste "on land that is flooded, saturated with water, frozen or snow covered at the time of application." Application of waste on saturated soils, during rain events or when the land is frozen "may result in runoff to surface waters, which is not allowed under DWQ regulations." (Resp Exh 1, p 5, ¶ 20; Resp Exh 3, p 1, ¶ 4)
- 17. Waste may not be applied to saturated or frozen ground because it is less likely to be absorbed by the soil and more likely to move to groundwater or surface waters. If the waste reaches surface water, such as creeks, streams, wetlands and estuaries, the waste overloads the surface water with nutrients and it is highly detrimental to aquatic biological life and microorganisms, which in turn is detrimental to the entire ecosystem. Groundwater contamination gives rise to concerns about the safety of drinking water. (T vol I, pp 188-89; T vol II, pp 283-84) See N.C. Gen. Stat. § 143-212.
- 18. The General Permit requires that the permittee "consider pending weather conditions in making the decision to land apply waste and shall document the weather conditions at the time of land application on forms supplied or approved by the Division." (T vol I, p 188; Resp Exh 1, p 5,  $\P 21$ )

- 19. At all times relevant to this proceeding, Petitioner was the operator-on charge for the RDF. As operator-in-charge, Petitioner was responsible for all pumping and maintenance of equipment. (T vol I, pp 31-32 124)
- On November 3, 2004, Mark Brantley, an inspector for the Concentrated Animal Farming Operation Unit in DWQ's Aquifer Protection Section, conducted an inspection of the RDF. Petitioner, his father and Geno Kennedy were present at the beginning of the inspection. Mr. Brantley reviewed what records were available but the records were incomplete. Brantley asked to see a copy of the General Permit and Certificate of Coverage. Petitioner stated that the Permit and COC were at his home office. Brantley asked Petitioner to keep a copy of these documents at the farm in the future, as required by the General Permit. Petitioner had signed document in which Petitioner stated that he would be present during all waste applications. In the document, Petitioner also stated that he intended to install a rain breaker, which would allow him to leave the farm briefly during waste applications. Brantley reminded Petitioner that he needed to keep rainfall records and to document his inspections of the facility after every 1-inch rain. (T vol I pp 173-74)
- 21. Brantley then did a field inspection. Petitioner did not have a rain gauge, as required by the General Permit. When Brantley walked through the fields, he observed ponding of waste in one field as well as evidence that the waste had moved off Petitioner's field and onto a neighbor's corn field. Petitioner had left the farm by that time so Brantley called Petitioner the next morning to discuss the ponding and the discharge of waste onto the neighbor's land. Petitioner admitted that he had problems with his irrigation gun when he had irrigated the day before. He had disked up the area which was oversaturated to try to facilitate absorption of the waste. Petitioner stated that he would be more careful in the future. (T vol I pp 170-73, 193, 205; Resp Exh 1, p 7, ¶ 3a; Resp Exh 5; Resp Exh 13; Resp Exh 22A-22D)
- 22. On November 23, 2004, Art Barnhardt, Aquifer Protection Supervisor for DWQ's Fayetteville Regional Office, mailed by certified mail, a Notice of Violation (NOV), informing Petitioner that he had violated Section II, Condition 4 in the General Permit by failing to apply waste in accordance with the facility's animal waste plan, as evidenced by the ponding and a previous discharge, as observed on November 3, 2004. (T vol I, pp 217-18; Resp Exh 5 and 6)
- 23. In the NOV, DWQ requested "copies of all the pumping records, lagoon levels, rainfall records, and waste analyses for [the RDF] from January 1, 2004 to the present along with a copy of the CAWMP." DWQ also requested that Petitioner, as operator-incharge, provide an explanation as to how the violation, identified on November 4, 2004, had occurred and what steps had been taken to correct the violation. Petitioner was asked to provide the requested information on or before December 8, 2004. Petitioner received the NOV on November 29, 2004. (T vol I, pp 49, 85; 82; Resp Exh 6)
- 24. Petitioner did not respond to the November 23, 2004 NOV. (T vol I, pp 166-67, 174-75, 187; Resp Exh 7)

- 25. On December 29, 2004, Barnhardt mailed by certified mail a second NOV along with a Notice of Intent to enforce. The second NOV cited Petitioner for his failure to respond, as required under the General Permit, to DWQ's request for information. Petitioner was instructed to provide the requested information on or before January 14, 2005. The second NOV further advised Petitioner that DWQ had authority to assess a civil penalty against Petitioner in an amount not to exceed \$25,000.00 per day as a result of his having violated the General Permit requirements. Petitioner received that second NOV on January 3, 2005 but dated the receipt January 3, 2004. The certified mail receipt which had been signed by Petitioner was received in the Fayetteville Office on January 5, 2005. (T vol I, pp 46, 89-90, 218, 234-35, 245; Resp Exh 7)
- 25. On January 12, 2005, Petitioner's wife faxed a letter signed by Petitioner to the Fayetteville Regional Office. The letter stated in part:

This is in response to the Notice of Violation issued due to ponding on the Ronald Davis Farm. The violation occurred due to the fact that the person watching the pump was probably inside the swine facility working with the animals. The reel came in approximately 30 minutes before the pumping unit at the lagoon cut off. I have addressed this with my personnel and they will be onsite and more alert to the timing that the lagoon pump is to be shut off. We have also replaced the timer on the pumping unit.

This should eliminate any future problems.

(T vol I, p 90; Resp Exh 8)

- 26. At the time, no other records were provided in response to DWQ's request for information even though he was required to provide the requested records under the terms of the General Permit. (T vol I, pp 47, 49, 210; Resp Exh 1 and 13)
- At approximately 4:00 p.m. on January 27, 2005, Brantley and Larry Baxley were driving together on Highway 210 in Bladen County. Baxley was also an inspector for DWQ's CAFO Unit. Brantley and Baxley drove past the RDF and noticed that the spray gun was pulled all the way out into the back field, which ordinarily means that the farmer is preparing to irrigate. The system is set up ahead of time and is ready to go whenever the farmer decides to irrigate. (T vol I pp 180, 196; T vol II pp 275-76, 318)
- 28. On the afternoon of January 27, 2005, the application system on the Ronald Davis Farm had been set up in preparation for irrigation. Brantley and Baxley commented at the time that the seeing the system set up was unusual because both of then had driven by the RDF many times and neither had ever seen irrigation taking place. Also, at this point, they had not seen pumping records to indicate the dates, times and rates of land application. Baxley had been by the farm hundreds of times and had never once seen any spraying. (T vol II, pp 274-75, 309, 313, 323)

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- On the night of January 27-28, 2005, Petitioner, or someone acting on his behalf, started the irrigation system and began irrigating the back spray field. The spray system was set up properly but the temperature dropped to the twenties during the night and the ground froze. During the irrigation event, the spray cart out off and stopped reeling in the spray gun. The spray gun became stationary but continued spraying waste onto the spray filed through the night and until the pump was cut off by a neighbor at approximately 8:00 a.m. The filed was saturated and waste flowed out of the field into a ditch. The waste flowed a distance of approximately three quarters of a mile and entered a wetland. The discharge was discovered at approximately 7:45 a.m. on January 28, 2005, when Baxley drove past the RDF on his way to Fayetteville. The temperature at the time was approximately 26 degrees. (T vol I, p 181; T vol II, pp 276, 279; Resp Exh 9)
- DWQ staff had scheduled a meeting with Petitioner at the Fayetteville office that morning to discuss the November 3, 2004 inspection, Petitioner's record-keeping issues and other matters. (T vol I, pp185-86, 228-29; T vol II pp 318-19)
- As he rode by the farm, Baxley saw that the spray cart on the RDF was in operation and was spraying waste. Baxley thought this was odd because, while there is no requirement about spraying at a particular time of day as long as the land application is properly monitored, under the General Permit, all permittees are prohibited from spraying on frozen ground. (T vol II, pp 276-77; Resp Exh 9)
- Baxley pulled off the road p so that he could stop to get a good look. The spray 32. gun was spraying but it was stationary and was not being pulled in. The gun had moved from where it had been set up the day before but it had stopped and was spraying in one place. Also, the gun was not oscillating. However, the spray gun had clearly been oscillating earlier at the 180 degree setting as evidenced by the pattern of frozen waste in the field. At the time, however, all the waste was being sprayed in one area and there was a pool of waste around the reel. Baxley tried to call Petitioner on his cell phone but was unsuccessful. Baxley drove toward the driveway of the RDF and saw hog waste flowing in the ditch. (T vol I, pp 123, 125, 197-98, 210; T vol II, pp 277-78, 295, 297, 306; Resp Exh 21, Resp Exh 19A-19O)
- Baxley drove past the farm to a small church and, again, tried to call Petitioner but could not reach him. Baxley then called the Fayetteville office and spoke with Brantley. Baxley asked Brantley to contact Petitioner to notify him that his irrigation equipment was running and that waste was being discharged off the farm property. (T vol I p 182; T vol II p 278) Brantley telephoned Petitioner and notified him of the discharge. (T vol I, pp 39, 182)
- Baxley asked Brantley to come out to the farm to assist with the situation. Baxley then went to the swine houses to see if he could find anyone working at the facility. He walked behind the houses and saw the pump. It was leaking badly in several places and there was a lot of foam and some ice. The pump had leicles hanging off of it. Parts of the ground were hard where the ground were frozen. Baxley then walked out into the field and saw icicles on the spray cart. There was a white foam all over the fields. Foam

19A-19O)

is generated from turbidity. Where the sunlight the filed, the foam was brown and white. It looked like a moonscape. Baxley could see that the spray gun had travelled approximately three to four hundred feet before it stopped. The motor was not running and the reel appeared to have run out of gas. If the gun had been pulled all the way in, the system should have cut off automatically. Baxley estimated that the waste flowed approximately one-half mile from the field through the ditches to the road. The waste

stream in the ditch was approximately one foot wide and at least eight inches deep. (T. vol I, p 189; T vol II, pp 279, 282, 291-92, 298, 306, 314, 333; Resp Exh 9, Resp Exh

- 35. Baxley then walked around the edge of the field and found where the waste was entering the ditch. He followed the waste stream as it moved behind a small pond, came back to the ditch, then flowed for several hundred feet along the access road to the highway, then along the side of Highway 210 for several hundred feet, underneath the highway and into a ditch that led into some woods behind the neighbor's house and into some wetlands. (T vol I, pp 40-42; T vol II, pp 279-81, 299; Resp Exh 19A-19O)
- 36. When Baxley was near the pond, he saw a car coming down the access road. A man got out and went over to the pump and shut it off. On January 12, 2005, Petitioner had written a letter to DWQ indicating that he had problems with the timer on the pump. During the November 2, 2004 spray event, the reel pulled the spray gun in until it stopped but the timer had not out off the pump. (T vol I, pp 94-98; T vol II, p 281)
- 37. Baxley went back to the field to take some photographs and the man who cut off the pump came over. Baxley asked the man if he was an employee of the RDF and the man said he was not. Baxley thanked the man for cutting the pump off because, as a State inspector, he was not allowed to do that. (T vol II, pp 282, 300, 327; Resp Exh 19A-19O) See also N.C. Gen. Stat. § 143-215.10E(a).
- 38. Petitioner arrived approximately forty-five minutes later at 8:45 a.m. Petitioner appeared nervous. The equipment had already been turned off but Petitioner could see that the fields were saturated with wastewater and that the ditches were full, in some areas as deep as eighteen to twenty inches. It was still extremely cold and the wind was blowing. The spray gun was in one of the spray fields. Petitioner saw that ice had formed around the reel because the temperature had dropped into the twenties during the night. When Brantley arrived, he, too, saw waste flowing out of the field and through the ditches and natural waterways for approximately three-quarters of a mile before entering the wetland. (T vol I, pp 39-40, 42-43, 182-85; T vol II, pp 320-22; Resp Exh 11)
- 39. Petitioner and Baxley walked to an area behind the neighbor's house and began working together to build a dam where the farm ditch emptied into flat water. They had difficulty in building a dam due to the heavy volume of flow. After Brantley arrived, he worked with Petitioner and Baxley to try to stop the flow of waste. (T vol I, pp 42, 199; T Vol II, pp 284-85)

09/29/2008

**D13** 

- Late in the morning, when the initial work to address the situation has been 40. completed, at approximately 11:00 a.m., Petitioner told Baxley that he had not started the pump and Petitioner speculated that vandalism was a possible explanation for the discharge. (T vol II, pp 320-21, 330)
  - Petitioner called a company to help with the cleanup. Employees of the 41. company vacuumed wastewater out of the ditches. They also built a catch basin and put what was recovered into the lagoon. The workers actually had to put the sump pump in the wetlands to remove waste. They worked from approximately 4 p.m. until 11:00 p.m. At some point during the day, Petitioner called the Bladen County Sheriff's Department and made a report of vandalism. He told the Sheriff's Department that someone had turned the irrigation system on during the night. DWQ staff informed Petitioner that he was required under the General Permit to submit a written report concerning the discharge to DWQ within five days. (T vol I, pp 42, 50-52, 185, 198-200; T vol II, pp 286-87, 305; Resp Exh 12)
  - The following day. Petitioner and others continued to pump the sump areas as 42. needed. They also disked the field to try to keep more waste from seeping out of the fields. Waste continued to flow from the field for approximately one week following the initial discharge. (T vol I, pp 52, 102-04, T vol II, pp 285-86; Resp Exh 13)
  - Barnhardt, a hydrogeologist who had worked as Program Manager for the Aquifer Protection Section since 1996, did calculations to determine the volume of waste that had been discharged from the RDF on January 28, 2005. Barnhardt did two sets of calculations by which he estimated that between 151,200 gallons and 207,930 gallons of waste had been discharged. (T vol I, pp 214-16, 2276-27; Resp Exh 18)
  - On February 7, 2005, DWQ issued an NOV and Notice of Intent to enforce against Petitioner on the grounds that: (1) Petitioner had discharged animal waste to surface waters and/or wetlands in violation of the General Permit, and (2) Petitioner had failed to provide a written description of the discharge and the cause of the discharge within five days following the discharge, in violation of the General Permit. DWQ informed Petitioner that, if he believed that further enforcement action by DWQ was not warranted, he needed to submit a response on or before February 24, 2005. (T vol I, pp 219-20; Resp Exh 12)
  - The February 7, 2005 notice was mailed by certified mail to Petitioner at the address provided by Petitioner for Freedman Farms. The notice was returned after having been marked "unclaimed." On March 21, 2005, the Bladen County Sheriff's Department personally served Petitioner with a copy of the notice. (T vol I, pp 99-100, 161-62, 219-21; Resp Exh 12)

- 46. In early March 2005, Brantley and Baxley met with Petitioner at the Fayetteville office to review record-keeping requirements with Petitioner. (T vol I, pp 201-02)
- 47. On March 22, 2005, Brantley and Baxley conducted a follow-up inspection at the RDF. Petitioner was present during the inspection. Petitioner did not have a copy of the Permit or his COC on site. He did not have other records which are required under the NPDES General Permit. At the time of the hearing, Petitioner did not know whether all of the requested information had been provided. (T vol I, pp 187-88, 202, 211; Resp Exh 13 and 14)
- 48. After the discharge, Petitioner signed a letter, dated January 31, 2005, concerning his response to the discharge. Petitioner submitted this letter and records for the November 2, 2004 spray event to DWQ in late March 2005. At no time did Petitioner provide all of the requested information. Petitioner did not know recall when the letter was provided to DWQ. In his January 31, 2005 letter, Petitioner did not state that the discharge was the result of tampering or malfunctioning of equipment. He did state that he had made a report to the Bladen County Sheriff's Department. However, at the time of the hearing, he did not know whether the investigation had been completed, or, if so, the results of the investigation. He never contacted by the Sheriff's Department about his report. (T vol I, pp 140-41, 165, 187-88, 202, 211, 219, 221, 137; T vol II, p 326; Resp Exh 13)
- On May 5, 2005, DWQ assessed a \$6,000.00 civil penalty, as well as enforcement costs in the amount of \$989.50, against Petitioner on the grounds that Petitioner had caused an unpermitted discharge of waste into waters of the State in violation of N.C. Gen. Stat. 143-215.1, that Petitioner had violated NPDES General Permit Condition III.19 by applying waste to land that was frozen, and that Petitioner had failed to provide copies of all requested information and reports relating to the operation of his animal waste management system. In assessing the civil penalty, DWQ considered Petitioner's allegation of sabotage. However, DWQ found no evidence to support the allegation. DWQ concluded that the discharge was the result of an intentional irrigation event which had gone wrong. There was no evidence, other than Petitioner's own speculation, that the discharge was caused by a third party. (T vol I, pp 113, 223-25, 230-31, 239-40; T vol II, pp 305-06; Resp Exh 15)
- 50. In Petitioner's Prehearing Statement, Petitioner asserted that the discharge of waste was the result of "unauthorized tampering with or malfunction of irrigation equipment." (emphasis added) During the hearing, Petitioner speculated that it was an act of vandalism. (T vol I, pp 68-72, 116-19, 165)
- During the period 2004 to the date of the hearing, DWQ's Fayetteville Office did not receive any other allegations of any type of vandalism or sabotage at a hog farm except the allegation made by Petitioner in this case. (T vol I, pp 222, 229)

## CONCLUSIONS OF LAW

- 1. N.C. Gen. Stat. § 143-215.1(a)(12) provides that no person shall construct or operate an animal waste management system, as defined in N.C. Gen. Stat. § 143-215.10B, without first obtaining a permit.
- Petitioner was permitted to operate the Ronald Davis Farm in Bladen County under North Carolina's Swine Waste Management System General NPDES Permit NCA200000 pursuant to a Certificate of Coverage dated April 9, 2003.
- 3. The General Permit prohibits any discharge of waste which reaches surface waters or wetlands. The Permit further requires that the waste collection, treatment, storage, and application system be maintained and operated as a non-discharge system to prevent the discharge of pollutants to surface waters or wetlands. The Permit also prohibits the application of waste on ground that is flooded, saturated or frozen in order to prevent run-off of waste.
- 4. On January 28, 2005, during a planned land application of waste, approximately 151,200 gallons to 207,930 gallons of swine waste were discharged from the Ronald Davis Farm as a result of spraying waste on frozen ground. The temperature dropped to the mid-twenties during the night. Petitioner was not present to monitor the spray irrigation, as required by the General Permit and Petitioner's own Nutrient Management Plan. During the night, the equipment malfunctioned in that the motorized reel cut off and stopped pulling in the spray gun which continued spraying waste throughout the night which caused the field to become saturated with waste and caused a substantial discharge of waste into surface waters and wetlands which are waters of the State pursuant to N.C. Gen. Stat. § 143-212(6).
- 5. As permittee under the General Permit and as the operator-in-charge, Petitioner was solely responsible for all pumping and land application of waste on the Ronald Davis Farm.
- 6. The discharge of waste from the Ronald Davis Farm on January 28, 2005, constitutes "making an outlet to waters of the State," pursuant to N.C. Gen. Stat. § 143-215.1(a)(1), for which a permit is required under N.C. Gen. Stat. § 143-215.1. Petitioner did not have a permit to discharge waste from the Ronald Davis Farm into waters of the State and he is, therefore, in violation of N.C. Gen. Stat. § 143-215.1(a)(1).
- 7. The discharge of waste onto land that was frozen constitutes a violation of Condition II.2 of NPDES General Permit NCA200000 by Petitioner.
- 8. Petitioner violated Condition III.19 of NPDES General Permit NCA200000 by failing to provide copies of all information and reports relating to the

- operation of the animal waste management system after copies of the records were requested by DWQ.
- 9. Pursuant to N.C. Gen. Stat. § 143-215.6A(a)(2), DWQ has authority to assess civil penalties against Petitioner in an amount not to exceed \$25,000.00 per violation for making an outlet to waters of the State without a permit, in violation of N.C. Gen. Stat. § 143-215.1(a)(1).
- 10. Pursuant to N.C. Gen. Stat. § 143-215.6A(a)(2), DWQ has authority to assess civil penalties against Petitioner in an amount not to exceed \$25,000.00 per violation for failure to comply with the terms, conditions or requirements of a permit required by N.C. Gen. Stat. § 143-215.1.
- 11. Pursuant to N.C. Gen. Stat. § 143-215.3(a)(9) and N.C. Gen. Stat. § 143B-282.1(b)(8), Respondent is authorized to assess the State's enforcement costs against Petitioner.
- 12. Respondent did not err in assessing a civil penalty in the amount of \$6,989.50, including enforcement costs, against Petitioner for: (1) violating N.C. Gen. Stat. § 143-215.1 by making an outlet to waters of the State without a permit and (2) violating Condition No. II. 20 of National Pollutant Discharge Elimination System ("NPDES") Permit No. NCA200000 by applying animal waste to land that was frozen; and violating of Condition No. III. 19 of the NPDES General Permit No. NCA200000 by failing to provide copies of all requested information and reports related to the operation of the animal waste management system at the Ronald Davis Farm in Bladen County.
- 13. The civil penalty assessed by Respondent against Petitioner on May 5, 2005 is valid and enforceable.

## DECISION

NOW, THEREFORE, based upon the foregoing, the Undersigned hereby AFFIRMS Respondent's decision to assess a civil penalty in the amount of \$6,989.50 against Petitioner.

#### ORDER

It is hereby ordered that the agency serve a copy of the final decision on the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, NC 27699, in accordance with N.C. Gen. Stat. § 150B-36(b).

### **NOTICE**

Pursuant to N.C. Gen. Stat. § 150B-36, the agency making the final decision in this contested case is required to give each party an opportunity to file exceptions to this

decision and to present written arguments to those in the agency who will make the final decision.

The agency is required by N.C. Gen. Stat. § 150B-36(b) to serve a copy of the final decision on all parties and to furnish a copy to the parties attorneys of record and to the Office of Administrative Hearings.

This the	day of		2008
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Donald W. Overby Administrative Law Judge

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# CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing Respondent's Proposed Decision on petitioner's Counsel by placing a copy in an envelope, first class postage prepaid and addressed as follows:

Gary A. Grady Hester, Grady & Hester, PLLC Post Office Drawer 130 Elizabethtown, North Carolina 28337

This the 29 day of September, 2008.

Jane L. Oliver

Assistant Attorney General

Same L Drive