

RECEIVED IN THE COURT OF COMMON PLEAS
LICKING COUNTY, OHIO

CLERK OF COMMON PLEAS OF
LICKING COUNTY, OHIO
LAW OFFICE OF JUDICIAL BRANCH

STATE OF OHIO, et al.
BETTY D. MONTGOMERY,
ATTORNEY GENERAL OF OHIO,
ENVIRONMENTAL ENFORCEMENT

Plaintiff,

v.

BUCKEYE EGG FARM, L.P., et al.

Defendants.

CASE NO. 99 CV 756 P 1:25

JUDGE FROST

FILED

**CONSENT ORDER FOR PRELIMINARY INJUNCTION
FOR STORMWATER CONTROL**

WHEREAS, the Plaintiff State of Ohio by its Attorney General Betty D. Montgomery (hereinafter "Plaintiff" or "State of Ohio") has filed its Complaint in the above-captioned case against Defendants pursuant to Ohio Revised Code (hereinafter "RC") Chapters 3704, 3734, 6109, 6111 and 3767, the regulations promulgated thereunder and other laws;

WHEREAS, the State of Ohio's Complaint seeks, among other things, injunctive relief, civil penalties, and remedies to investigate and abate alleged water pollution violations at the Buckeye Egg facility, owned and/or operated by the Defendants, in Licking County, Ohio (hereinafter "Croton facilities");

WHEREAS, the Defendants entered Consent Order for Preliminary Injunction (hereinafter "COPI") with the State of Ohio on June 7, 1999 and December 21, 1999;

WHEREAS, the State of Ohio has on March 1, and March 31, 2000 filed charges in Contempt against Defendants for violations of the December COPI associated, *inter*

alia, with the alleged failure to properly manage stormwater at the Croton facilities consistent with the requirements of the December COPI.

WHEREAS, Buckeye Egg Farm, L.P., Croton Farm, L.L.C., and Anton Pohlmann (hereinafter collectively referred to as the “Defendants”) have agreed to enter into this Consent Order for Preliminary Injunction (hereinafter “COPI”) with the State of Ohio to resolve the March 1 and March 31, 2000 Charges in Contempt.

NOW, THEREFORE, upon consent of the Parties hereto, it is hereby ORDERED as follows:

I. JURISDICTION AND VENUE

1. The Court has jurisdiction over the Defendants and the subject matter of this case. Venue is proper in this Court.

II. PARTIES

2. The provisions of this COPI shall apply to and be binding upon the Defendants, their agents, officers, employees, assigns, successors in interest, and any person acting in concert or privity with any of them and those receiving actual notice of the COPI whether by personal service or otherwise.

3. Defendants shall provide a copy of this COPI to each general contractor, subcontractor, consultant, agent, employee and person hired by or who will provide work or services on behalf of the Defendants related to this COPI.

III. PRELIMINARY INJUNCTION

4. The Defendants are hereby enjoined and ordered to immediately comply with the requirements of R.C. Chapter 6111 and the rules adopted under that Chapter at the Croton facilities, as the term “Croton facilities” is defined in the Complaint filed in

⊖ this matter on December 1, 1999. The Defendants are not authorized to discharge pollution to waters of the State from any location within the State of Ohio except in accordance with permits issued by the Director of the Ohio Environmental Protection Agency (hereinafter "Director" or "Ohio EPA").

5. The Defendants are enjoined and ordered to install and maintain at each of the layer and pullet sites at the Croton facilities such permanent improvements, structures and land, including stormwater ponds/impoundments, center pivot land application equipment and application fields, as are necessary to capture, control, and store, all stormwater run off from the layer and /or pullet site(s) that will occur under wet weather conditions in order to prevent the release from the layer and/or pullet sites of manure, manure contaminated water and/or stormwater, and/or sewage, industrial wastes or other wastes, containing ammonia and any other pollutants to waters of the state under any circumstance including as a result of land application of the contents of the stormwater ponds/impoundments and egg wash wastewater lagoons.

⊖ 6. This order does not replace or supercede the December 21, 1999 COPI. Until such time as Defendants have completed the installation of stormwater controls required by this order and the approved Permits to Install ("PTI") at any specific Croton layer and/or pullet site, Defendants are hereby ordered and enjoined to fully implement and operate the temporary improvements and measures related to stormwater control established in Section IV of the December 21, 1999 COPI with regard to the control and storage of all stormwater associated with that specific layer or pullet site(s) at the Croton facility. Further, until such time as Defendants have completed the installation of the permanent stormwater controls consistent with this Order, the Defendants are enjoined

and ordered to install and maintain at each of the layer and pullet sites at the Croton facilities such temporary improvements as are necessary to prevent the release of manure and/or manure contaminated water and/or sewage, industrial wastes or other wastes, containing ammonia in excess of 2 parts per million (hereinafter "ppm") between October 1 and May 31 or 1.5 ppm between June 1 and September 30 of each year from the site. For the purpose of this paragraph, a "release" from a "site" shall mean the flow of contaminated water and/or sewage, industrial waste or other wastes beyond containment berms, slide gates, or dams in drainage ditches that are present at the layer and pullet site on the date of entry of this Order, including the dams downstream from the slide gates and berms at Pullet Sites 1 and 4 and Layer Site 4. Once the permanent stormwater controls are installed and capable of full operation at a specific Croton layer or pullet site, the Defendants are ordered and enjoined to cease using the "slide gates" to impound stormwater from that specific site. Once the permanent stormwater controls are installed and fully operational at a specific Croton layer or pullet site there shall be no releases of stormwater, manure or manure contaminated water, or other wastewater or industrial waste from that specific site to waters of the state, regardless of the level of ammonia. All stormwater shall be land applied at agronomic rates utilizing approved center pivot irrigation systems on approved application fields.

IV. INJUNCTION – STORMWATER CONTROLS

7. The Defendants are ordered and enjoined to construct, operate and maintain stormwater ponds adequate to contain, manage and store all water, sewage, industrial wastes or other wastes associated with stormwater originating at any of the layer or pullet sites at the Croton facilities. The Defendants are ordered and enjoined to

construct and maintain adequate center pivot irrigation systems and application fields for the land application of this wastewater/stormwater at agronomic rates and to prevent the release of wastewater/stormwater to waters of the state as a result the land application.

The Defendants shall submit approvable Permit to Install applications, including detailed plans, consistent with the criteria set forth in this paragraph, for the permanent stormwater controls and construct and operate the stormwater control system in accordance with the terms and conditions of any Permit to Install, and this order. Specifically, the Defendants shall meet the following criteria for the design and construction of the permanent storm water controls:

a. The storage requirements for each of the stormwater ponds shall be based upon the expected inflows and outflow to/from the storage ponds. The expected inflows include the monthly rainfall with a five (5) year return period multiplied by a runoff coefficient determined for each site using standard engineering practices; the estimated egg wash wastewater volume (where appropriate); the estimated water treatment backflush wastewater volume; the volume of an accidental manure release event; and the 25 year 24 hour storm event.

b. Land application of the contents of the stormwater ponds/impoundments from the Croton layer and pullet sites shall be accomplished utilizing the existing center pivot irrigation systems at the layer sites and the construction of new center pivot irrigation systems at the pullet sites. Based upon the storage capacities specified for the layer and pullet sites, land application is limited to use of the existing center pivot systems and/or comparable center pivot irrigation systems. The annual total hydraulic load of wastewater from all sources including the egg wash

wastewater lagoons and stormwater ponds that can be applied is 38.7 inches per year. Based on information currently available to Defendants, it is expected that the weighted average soil permeability of the application sites for the existing and proposed center pivot irrigation application fields is 0.2 inches per hour. If the actual weighted average soil permeability of any of the sites is less than 0.2 inches per hour, proportional increases in additional application field area will be required in order to address the decreased ability of the field to accept hydraulic load. The systems shall be designed to operate in accordance with this limitation.

c. The detailed plans for the storage ponds shall include soil testing provisions and a maximum permeability of 1×10^{-7} cm/sec on the bottom and sides of the stormwater storage ponds. In the event that the application specifically demonstrates, to the satisfaction of the Director of Environmental Protection ("Director"), subject to review by the Environmental Review Appeals Commission pursuant to R.C. 3745, that the in-situ materials can achieve the 1×10^{-7} maximum permeability, a recompacted clay liner will not be required. However, if this demonstration is not successfully made, a recompacted clay liner that meets the 1×10^{-7} maximum permeability criterion will be required.

8. Defendants shall design the stormwater controls and construct the stormwater ponds in accordance with the following schedules:

a. Submit approvable permit to install applications with detailed plans for layer site 1 & pullet site 4

June 30, 2000

b. Submit approvable permit to install applications with detailed plans for layer site 4

- and pullet site 1 July 15, 2000
- c. Commence construction of stormwater ponds for pullet site 4 and layer site 1 August 15, 2000
- d. Commence construction of stormwater ponds for pullet site 1 and layer site 4 August 31, 2000
- e. Complete construction and seed & mulch (straw mulch including crimping)¹ all affected areas & have in operation each storm water ponds for pullet sites 1 & 4 and layer sites 1 & 4 November 15, 2000
- f. Submit approvable permit to install applications with detailed plans for layer sites 2 & 3 and pullet sites 2 & 3 December 1, 2000
- g. Commence construction of storm water ponds for pullet sites 2 & 3 and layer sites 2 & 3 May 1, 2001
- h. Complete construction and seed & mulch (straw mulch including crimping)¹ all affected areas & have in operation each storm water pond for pullet sites 2 & 3 and layer sites 2 & 3 September 3, 2001

9. If any event occurs which causes or may cause a delay of any requirements of Paragraph 8 above, Defendants shall notify the Ohio EPA in writing within ten (10) calendar days of the event, describing in detail the anticipated length of

the delay, the precise cause or causes of the delay, the measures taken and to be taken by Defendant to prevent or minimize the delay and the timetable by which measures will be implemented. Defendant will adopt all reasonable measures to avoid or minimize any such delay.

10. In any action by the Plaintiff to enforce any of the provisions of Paragraph 8 above, Defendant may raise that it is entitled to a defense that its conduct was caused by reasons entirely beyond its control such as, by way of example and not limitation, acts of God, strikes, acts of war, civil disturbances, or vandalism. While the Plaintiff does not agree that such a defense exists, it is, however, hereby agreed upon by Defendant and the Plaintiff that it is premature at this time to raise and adjudicate the existence of such a defense and that the appropriate point at which to adjudicate the existence of such a defense is at the time that a proceeding to enforce this Order, if any, is commenced by the Plaintiff. At that time, Defendant will bear the burden of proving that any delay was or will be caused by circumstances entirely beyond the control of Defendant. Unanticipated or increased costs associated with the implementation of any action required by this Consent Order, or changed financial circumstances, shall not constitute circumstances entirely beyond the control of Defendant or serve as a basis for an extension of time under this Order. Failure by Defendant to comply with the notice requirements of Paragraph 9 above shall render this Paragraph void and of no force and effect as to the particular incident involved and shall constitute a waiver of Defendant's right to request an extension of its obligations under this Order based on such incident. An extension of one date based on a particular incident does not mean that Defendant qualifies for an

¹ Seed and mulch in order to establish a vegetative cover sufficient to control erosion for all affected areas associated with the construction of storm water containment ponds.

extension of a subsequent date or dates. Defendant must make an individual showing of proof regarding each incremental step or other requirement for which an extension is sought. Acceptance of this Order without a Force Majeure Clause does not constitute a waiver by Defendant of any rights or defenses they may have under applicable law.

11. Prior to increasing the amount of process wastewater, including but not limited to egg wash wastewater, backflush wastewater, treated sanitary wastewater and/or stormwater, generated above the amount included in the Defendants' applications for a permit to install and/or increasing the volume of process wastewater to be disposed of by land application, the Defendants shall submit to Ohio EPA, for review and acceptance, a complete explanation for the proposed change and the impact that it will have on the adequacy of the existing storage capacity or acreage available for land application. This submission shall include any documentation that serves as the basis of any claim that existing storage capacity/ application acreage will be adequate for the proposed increase. Defendants shall not implement the proposed increase without receiving Ohio EPA's prior written concurrence that additional storage and/or acreage are not required.

12. Defendants shall conduct soil analysis on an annual basis within the stormwater application area of all center pivot systems to ensure that nutrient levels do not exceed agronomic rates. In the event that soil analysis documents that the level for any nutrient exceeds agronomic rates, Defendants shall cease land application on the field(s) in question and shall, within thirty (30) days of Defendants' receipt of the soil analysis, submit all required permit applications and initiate within thirty (30) days of the issuance of a permit, all necessary work to provide additional acreage for the center pivot irrigation system in question.

13. Defendants shall maintain, or cause Buckeye Egg Farm L.P. to maintain, a daily log for each of the Croton facility center pivots systems identifying the amount of water applied, the time over which the water was applied, the person or persons operating the system, the inspection of all equipment to ensure safe and effective applications, the level of the containment pond, and a daily precipitation amount.

14. In the event of a discharge to waters of the state from the stormwater containment ponds as the result of insufficient storage capacity, Defendants shall within 30 days of the discharge submit all required permit applications and shall initiate all necessary work, within 30 days of the issuance of permit approval, to provide additional storage to ensure that the direct discharge is eliminated and will not reoccur. Any application and detailed plans submitted pursuant to the preceding sentence shall at a minimum provide for one additional month of storage capacity. However, if the Defendants can establish, through documentation submitted to the Director, that the discharge resulted from a severe storm that substantially exceed the capacity design assumptions for the stormwater ponds as approved and that the severe storm is unlikely to reoccur, the Defendants will not be required to apply for approval and to construct additional capacity because of that discharge.

15. The Defendants are ordered and enjoined to retain the records required by paragraph 13 of this COPI for five years, and to provide them to the Ohio EPA immediately upon request by any Ohio EPA personnel.

VI. REPORTING AND DOCUMENT SUBMITTAL

16. Within seven (7) days from the completion date of each task listed in Section IV, Paragraph 8, the Defendants are ordered to submit a written report stating

whether it has performed the actions set forth therein. Unless otherwise provided in this COPI, all documents or notices required to be submitted pursuant to this COPI shall be sent to the following address:

Ohio Environmental Protection Agency
Division of Surface Water
Lazarus Government Center
122 South Front Street
Columbus, Ohio 43216-1049

ATTN: John Kessler and Paul Painter
Agriculture/PTI Unit

VI. MISCELLANEOUS

17. Nothing in this order shall be construed to authorize the construction or modification of any treatment works or disposal system or other facility. Any construction or modification of any treatment works or disposal system shall be in accordance with all applicable requirements of Ohio law, including, if necessary, obtaining a Permit to Install that authorizes the installation and/or modification and/or a NPDES permit for stormwater for construction activities.

VII. CIVIL PENALTY

18. Within fourteen (14) days of the entry of this Order, Defendants are hereby enjoined and ordered to pay to the State of Ohio a civil penalty in the amount of *thirty-two thousand dollars (\$32,000)*. The civil penalty payment shall be paid by delivering a check in the same amount, made payable to "Treasurer, State of Ohio", to Jena Suhadolnik, or her successor, at the Ohio Attorney General's Office, Environmental Enforcement Section, 30 East Broad Street, 25th Floor, Columbus, Ohio 43215-3428.

VIII. STIPULATED PENALTIES

19. In the event that the Defendants have any release of stormwater, manure and/or manure contaminated water and/or sewage, industrial wastes or other wastes, containing ammonia in excess of 2 parts per million (hereinafter "ppm") between October 1 and May 31 or 1.5 ppm between June 1 and September 30 of the year from any of the Croton Layer or Pullet Sites, that occurs prior to the completion of the construction of permanent storm water controls, the Defendants shall pay a stipulated penalty of \$1,500.00 for each such release from each individual layer or pullet sites for each calendar day on which a release from the site occurs. For the purpose of this paragraph, a "release" from a "site" shall mean the flow of contaminated water and/or sewage, industrial waste or other wastes beyond containment berms, slide gates, or dams in drainage ditches that are present at the layer and pullet site on the date of entry of this Order, including the dams downstream from the slide gates and berms at Pullet Sites 1 and 4 and Layer Site 4.

20. Any stipulated penalties required under this section shall be paid by delivering a check(s) for the appropriate amount(s), made payable to "Treasurer, State of Ohio", to Jena Suhadolnik, or her successor, at the Ohio Attorney General's Office, Environmental Enforcement Section, 30 east Broad Street, 25th Floor, Columbus, Ohio 43215-3428, within forty-five (45) days from the date of the failure to meet the compliance deadline or the occurrence of the release. The payment of stipulated penalties by Defendants and the acceptance of such stipulated penalties by Plaintiff State of Ohio pursuant to this Section shall not be construed to limit Plaintiff State of Ohio's authority to seek additional relief or otherwise to seek judicial enforcement of this Order.

IX. RESERVATION OF RIGHTS

21. The State of Ohio reserves the right to seek further relief from this or any other Court, including, but not limited to, further preliminary and/or permanent injunctive relief and civil penalties. This COPI in no way waives any defenses which Defendants may have as to such further relief.

22. The State of Ohio expressly reserves, and this COPI shall be without prejudice to, any and all claims, demands, rights or causes of action, judicial or administrative, the State of Ohio may have or which may in the future accrue against Defendants with the exception of the States' claim for civil penalty for the violations of law and this Court's December 21, 1999 COPI alleged in the State's March 1 and March 31, 2000 Charges in Contempt. The State of Ohio expressly reserves, and this COPI shall be without prejudice to, any and all claims, demands, rights or causes of action, judicial or administrative, the State of Ohio may have or which may in the future accrue against any entities other than the Defendants, regardless of whether such claim, demand, right or cause of action was asserted in the Complaint. This COPI in no way waives any defenses which Defendants may have as to such claims, demands, rights or causes of action other than as to the State's Charges in Contempt filed March 1, and March 31, 2000.

23. Nothing herein shall limit the authority of the State of Ohio to undertake any action against any entity, including Defendants, to eliminate or control conditions which may present a threat to the public health, safety, welfare or environment, and to seek cost reimbursement for any such action. This COPI in no way waives any defenses which Defendants may have as to such claims, demands, rights or causes of action.

24. Nothing herein shall be construed to relieve Defendants of their obligation to comply with applicable federal, state or local statutes, regulations or ordinances, including, but not limited to, permit requirements. Further, nothing in this order shall be construed to authorize any action by Defendants that requires a permit to install or other such permit from the Ohio EPA.

X. MODIFICATION

25. No modification shall be made to this COPI without the written agreement of the Parties and the Court.

XI. RETENTION OF JURISDICTION

26. The Court shall retain jurisdiction of this action for the purpose of administering and enforcing Defendants' compliance with this COPI, and for the purpose of resolving disputes arising under this COPI between the parties.

XII. TERMINATION


27. This COPI shall terminate upon Order of this Court, upon Joint Motion of the Parties that all of the activities required or contemplated under this COPI have been completed or upon entry of final judgment in this action. Nothing herein shall preclude the State of Ohio from seeking further investigatory work in connection with implementation of this COPI or to address an imminent threat of harm to the public health, or the environment. This Section, as well as the Section of this COPI on Reservation of Rights, shall survive this termination provision.

XI. SIGNATORIES


28. The undersigned representatives of the Defendants, Buckeye Egg Farm L.P., Croton Farm LLC, and Anton Pohlmann understand the terms and conditions of this COPI and certify that they are fully authorized to enter into the terms and conditions of this COPI and to execute and legally bind those Defendants to this document.

IT IS SO ORDERED:

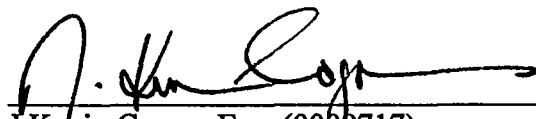
ENTERED THIS ____ DAY OF JUNE, 2000.


JUDGE GREGORY L. FROST
LICKING COUNTY
COURT OF COMMON PLEAS

APPROVED:

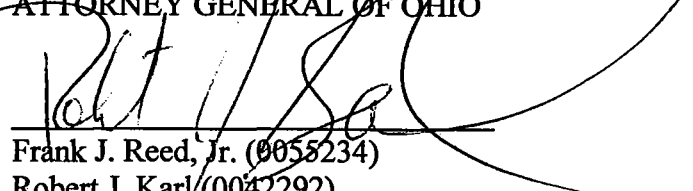

David E. Northrop, Esq. (0001804)
Nancy J. Miller, Esq. (0021761)
Samuels & Northrop Co., LPA
180 East Broad Street
Suite 816
Columbus, Ohio 43215
(614) 464-3232

Counsel for Defendants

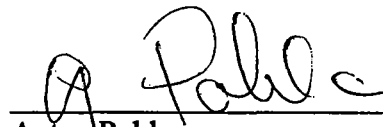

J. Kevin Cogan, Esq. (0009717)
Jones, Day, Reavis & Pogue
1900 Huntington Center
41 South High Street
Columbus, Ohio 43215
(614)-469-3825

Counsel for Defendants

BETTY D. MONTGOMERY
ATTORNEY GENERAL OF OHIO


Frank J. Reed, Jr. (0058234)
Robert J. Karl (0042292)
Margaret A. Malone (0021770)
Robert J. Schmidt (0062261)
Assistant Attorneys General
Environmental Enforcement Section
30 East Broad Street, 25th Floor
Columbus, Ohio 43215-3428
(614) 466-2766

Counsel for Plaintiff, State of Ohio


Anton Pohlmann
12568 Croton Road
Croton, Ohio 43013

*In his personal capacity, and on
behalf of Buckeye Egg Farm, LP and
Croton Farm, LLC*