

IN THE COURT OF COMMON PLEAS
MERCER COUNTY, OHIO

STATE OF OHIO ex rel. JIM PETRO,
ATTORNEY GENERAL OF OHIO
30 East Broad St., 25th Floor
Columbus, Ohio 43215,

Plaintiff,

v.

MICHAEL and TERESA
FULLENKAMP, dba
FULLENKAMP DAIRY
707 St. Joe Road
Ft. Recovery, Ohio 45846,

Defendants.

CASE NO. 06-CIV-019

JUDGE

FILED

MAR 20 2006

James J. Highley
MERCER CO. CLERK OF COURTS
GELINA, OHIO

Consent Order

Plaintiff, State of Ohio ("Plaintiff"), by its Attorney General Jim Petro, has filed a Complaint seeking injunctive relief and civil penalties for alleged violations of Ohio Revised Code ("R.C.") Chapter 6111 and the rules promulgated thereunder.

Defendants Michael and Teresa Fullenkamp ("Defendants") hereby consent to the entry of this Consent Order without admitting liability for the violations alleged in the Complaint.

NOW, THEREFORE, without trial of any issue of fact or law, and upon the consent of the parties hereto, it is hereby ORDERED, ADJUDGED, and DECREED as follows:

I.

JURISDICTION AND VENUE

1. The Court has jurisdiction over the parties and the subject matter of this case pursuant to R.C. Chapter 6111. The Complaint states a claim upon which relief can be granted against the Defendants pursuant to R.C. Chapter 6111. Venue is proper in this Court.

II. PERSONS BOUND

2. The provisions of this Consent Order shall apply to and be binding upon the Defendants to this action, all subsequent owners and/or operators, and all successors in interest to the heifer farm which is currently owned and operated by Defendants, and which is located at 707 St. Joe Rd., Ft. Recovery, Recovery Township, Mercer County, Ohio, ("Fullenkamp Dairy") and to their officers, agents, servants, employees, successors, and assigns, and those persons in active concert or participation with them. Fullenkamp Dairy includes but is not limited to the land upon which the Defendants' former dairy operations were located, and currently where Defendants' heifer operations are located, the former free stall barn, heifer barn, former milking facility, calf hutch area, manure storage lagoon, and manure transfer (pump) station.

3. Defendants and/or all subsequent owners and/or operators of Fullenkamp Dairy shall provide a copy of this Consent Order to each general contractor and/or consultant that is employed to perform the work itemized herein. Defendants and/or all subsequent owners and/or operators of Fullenkamp Dairy shall require each general contractor and consultant to provide a copy of this Consent Order to each of its subcontractors for such work.

4. Defendants and/or all subsequent owners and/or operators of Fullenkamp Dairy shall give thirty (30) days notice to Ohio EPA before sale or transfer of ownership of Fullenkamp Dairy.

5. Defendants and/or all subsequent owners and/or operators of Fullenkamp Dairy shall provide a copy of this Consent Order to any subsequent owner(s) or successor(s) prior to the sale or transfer of ownership in Fullenkamp Dairy

III. SATISFACTION OF LAWSUIT AND RESERVATION OF RIGHTS

6. Plaintiff's Complaint alleges that Defendants have violated R.C. 6111 in the operation of various aspects of the Fullenkamp Dairy. Defendants deny these allegations. Compliance with the terms of this Consent Order shall constitute full satisfaction of any civil liability by Defendants for: (i) all claims or violations alleged in the Complaint against Defendants; (ii) for all civil and administrative claims that could have been raised by Ohio EPA on the facts alleged in the Complaint; and (iii) for all civil and administrative claims that could have been raised by Ohio EPA pursuant to R.C. 6111 arising out of releases of manure or wastewater from Fullenkamp Dairy known to Ohio EPA as of November 30, 2005, including but not limited to claims for injunctive relief and civil penalties.

7. This Consent Order shall not be construed to limit the authority of Plaintiff to seek relief for violations for which liability is not satisfied under Paragraph 6, nor shall this Consent Order bar the State of Ohio from bringing any action against Defendants for any violations that occur after the lodging of this Consent Order. Nothing in this Consent Order shall be construed to relieve Defendants of their obligations to comply with applicable federal, state, or local statutes, rules, regulations, or ordinances.

IV. COMPLIANCE NOT DEPENDENT ON GRANTS OR LOANS

8. Performance of the terms of this Consent Order is not conditioned on the receipt of any federal, state or any other grant, loan, or funds. In addition, unless otherwise stated herein,

performance of the terms of this Consent Order is not excused by the failure to obtain, or shortfall of, any such grant, loan, or funds, or by the processing of any applications for the same.

V. REPORTING REQUIREMENT

9. Any report or notification required under this Consent Order shall be sent to Ohio EPA at the following address:

Cathy Alexander (or Successor)
Ohio EPA
Division of Surface Water
PTI/Agricultural Unit
122 South Front Street
P.O. Box 1049
Columbus, Ohio 43216-1049

VI. INJUNCTIVE RELIEF

10. Defendants are hereby immediately ordered and permanently enjoined to comply with R.C. Section 6111.04. Defendants are further ordered and permanently enjoined to comply with the terms of any approvals issued by Ohio EPA of submissions made pursuant to Section VII of this Consent Order. Defendants are ordered and permanently enjoined to maintain one-hundred and eighty (180) days storage for production area runoff and liquid manure. Defendants are ordered and permanently enjoined to comply with the applicable requirements of OAC 3745-33 and the terms and conditions of any NPDES permit issued that is related to the facility and any subsequent renewals or modifications thereof.

11. Defendants are hereby immediately ordered and permanently enjoined to cease all illegal discharges from Fullenkamp Dairy.

VII. COMPLIANCE PROGRAM

12. **Manure Management Plan:** Defendants are hereby enjoined and ordered to develop a Manure Management Plan ("MMP") that will be incorporated into the current version of the

Fullenkamp Dairy Comprehensive Nutrient Management Plan (“CNMP”), that was originally dated November 19, 2004. Defendants are permanently enjoined and ordered to implement all terms and conditions of the MMP in accordance with the schedule and specifications listed below.

- a. **NRCS Standard 633:** The MMP shall comply with Natural Resources Conservation Service (“NRCS”) Conservation Practice Standard, Waste Utilization, Code 633 (“NRCS Standard 633”).
- b. **Manure Removal and Utilization Plan:** By no later than February 1, 2006, Defendants shall submit to Ohio EPA for approval, a Manure Removal and Utilization Plan with details adequate to describe how manure utilization will be handled at Fullenkamp Dairy. The Manure Removal and Utilization Plan shall set forth the method or methods of manure disposal that Defendants have chosen to employ at Fullenkamp Dairy. The Plan shall compare at least the following manure utilization options: (i) the purchase and/or lease and utilization of manure removal and spreading equipment by Fullenkamp Dairy, and (ii) obtaining an outside service or services to remove and utilize the manure. The Plan shall describe the approximate frequency of manure removal, the cost-effectiveness of each method, reasons for selecting the particular method(s) of manure removal and utilization, and the environmental consequences of each method and all financial considerations. Defendants shall implement the approved Manure Removal and Utilization Plan for any manure removal or utilization occurring after Ohio EPA approval of the plan. Defendants are permanently enjoined to comply with all terms and provisions of the approved Manure Removal and Utilization Plan.

c. **Spill Response Plan:** By no later than February 1, 2006, Defendants shall submit to Ohio EPA for approval, a detailed Spill Response Plan. The Spill Response Plan shall include: (i) a detailed protocol for weekly inspections of the entire facility designed to discover and prevent spills and ensure proper functioning of the facility, (ii) a list of persons and/or agencies to be contacted in the event of a discharge, (iii) proactive actions to be taken to contain and remediate contamination in the event of a spill, (iv) a list of equipment available at the facility that will be used in the event of a spill, (v) sources that can be contacted for equipment rental in the event of a spill and what equipment they have available, and (vi) a detailed record keeping log of all actions taken during spill events. Defendants shall implement the Spill Response Plan starting on the later of June 1, 2006 or Ohio EPA approval of the plan. Defendants are further ordered and permanently enjoined to comply with all terms and provisions of the approved Spill Response Plan.

d. **Amendments:** Defendants may amend the Manure Management Plan, Manure Removal and Utilization Plan, or Spill Response Plan by submitting a description of proposed changes to Ohio EPA for review and approval. Such changes shall be effective upon express notice of approval by Ohio EPA. Changes necessary to address emergencies shall be submitted in the format requested by Ohio EPA when Ohio EPA personnel from the Division of Surface Water's PTI, Compliance Assistance and CAFO Unit respond to Defendants' attempt(s) to provide Ohio EPA with notice of the emergency and the proposed change proposed to address the emergency. Changes to address emergencies shall be effective only upon Ohio EPA's express approval for the specific emergency identified.

e. In the event that Ohio EPA establishes in the future a specific process under the NPDES program governing procedures for amendments to any of the plans described in Paragraph 12. d., this process shall supersede the submission, review, and approval requirements of Paragraph 12. d. for plans subject to that process and Defendants shall use that process to pursue amendments to these plans.

13. Manure Transfer Station: By no later than February 1, 2006, Defendants shall submit engineering specifications for Ohio EPA approval to minimize storm water inflow into the manure transfer station and to prevent overflows of water out of the manure transfer station. By the later of June 30, 2006 or 60 days after Ohio EPA approval of the specifications, Defendants shall complete construction of the upgraded manure transfer station in accordance with the specifications approved by Ohio EPA.

14. Calf Hutch Area: By no later than February 1, 2006, Defendants shall submit a plan for Ohio EPA approval to eliminate all contaminated storm water discharges from the former calf hutch area. By the later of June 30, 2006 or 60 days after Ohio EPA approval of the plan, Defendants shall complete implementation of the Ohio EPA approved plan to eliminate contaminated discharges from the former calf hutch area.

15. Storm Water Diversion Plan: By no later than February 1, 2006, Defendants are hereby enjoined and ordered to submit, to Ohio EPA for approval, a Storm Water Diversion Plan which shall describe in detail Defendants' plan to, where appropriate, divert clean storm water from the Fullenkamp Dairy former processing areas, production areas, manure storage lagoon, barns, reception pit, collection system, and any other areas that may contribute storm water to the manure handling system. The Storm Water Diversion Plan shall include engineering specifications to minimize the flow of clean storm water from the ground, buildings, production

areas, barns, silage, and collection system into the manure storage pond and reception pit. By the later of June 30, 2006 or 120 days after Ohio EPA approval of the plan, Defendants shall complete construction and implementation of the Storm Water Diversion Plan. Defendants are further ordered and permanently enjoined to comply with all terms and provisions of the Storm Water Diversion Plan.

16. Rain gauge: Defendants shall maintain a rain gauge at Fullenkamp Dairy in an outdoor area, conduct daily monitoring of rainfall and maintain daily records of rainfall.

17. Static Level Indicator: A Static Level Indicator shall be installed in the Manure Storage Lagoon by no later than February 1, 2006. Readings shall, at a minimum, be taken once per week and after rain events in conjunction with rain gauge readings. In the event that additional requirements are imposed by an NPDES permit, Defendants shall also comply with such requirements. Defendants shall maintain records of the static level readings.

18. Manure Storage Lagoon: By no later than February 1, 2006, Defendants shall submit to Ohio EPA for approval, a demonstration that the current Manure Storage Lagoon has sufficient capacity for at least 180 days of storage. The demonstration shall describe in detail the amount of manure, wash water, runoff, inflow and infiltration, effect of storm water, and all other sources of inflow into the Manure Storage Lagoon. If Defendants are unable to demonstrate sufficient capacity for 180 days of storage, then Defendants shall submit detailed engineering plans or specifications to Ohio EPA for approval, for the construction of a new or upgraded Manure Storage Lagoon, by no later than March 1, 2006. Construction of the new or upgraded manure storage lagoon shall be completed in accordance with the specifications as approved by Ohio EPA, no later than July 31, 2006 or 120 days after such approval.

19. **Certified Livestock Management Training Course:** Defendants are ordered to attend and complete an Ohio Department of Agriculture Certified Livestock Management Training Course by November 1, 2006 or, if the course is not offered by the Ohio Department of Agriculture by that time, shall attend and complete the first such training course offered.

20. **National Pollutant Discharge Elimination System ("NPDES") Permit:** Defendants are hereby enjoined and ordered to submit an updated, complete and approvable NPDES Permit application by no later than February 1, 2006. Defendants are ordered and enjoined to comply with all terms and conditions of any NPDES Permit and any renewals and modifications thereof immediately upon issuance by Ohio EPA.

21. Defendants are hereby enjoined and immediately ordered to conduct all record keeping activities required by any provision of the Consent Order, the NPDES permit, and the Amended CNMP applicable to Fullenkamp Dairy. Defendants are further enjoined and ordered to retain all such records for at least five years from the time they are made. Such records shall be made available to Ohio EPA upon request.

22. In the event that any plan or report required to be submitted to Ohio EPA for approval pursuant to this Consent Order is deemed unapprovable or deficient, Defendants shall resubmit the plan or report to Ohio EPA within thirty (30) days of receipt of comments from Ohio EPA indicating deficiencies or unapprovability. The resubmittal shall fully address all comments and noted deficiencies.

VIII. CIVIL PENALTY

23. It is hereby ordered that Defendants shall pay to the State of Ohio the agreed upon civil penalty in the amount of ten thousand dollars (\$10,000), which shall be satisfied pursuant to Ohio EPA's general unsecured claim asserted in Defendant's Chapter 12 bankruptcy proceeding,

In Re: Michael B. Fullenkamp and Teresa N. Fullenkamp, Case No. 04-30542s, in the United States Bankruptcy Court for the Northern District Of Ohio. The civil penalty payment shall be given the same treatment as all other general unsecured claims in the Chapter 12 case and shall not be subordinate to any general unsecured claim in that case. The civil penalty payment shall be made by certified check, cashier's check, or other suitable method as ordered by the Bankruptcy Court, payable to "Treasurer, State of Ohio", and shall be delivered by mail, or otherwise, to Mark Lemmon, Paralegal, or his successor, Ohio Attorney General's Office, Environmental Enforcement Section, Public Protection Division, 30 East Broad Street, 25th Floor, Columbus, Ohio 43215-3400.

IX. STIPULATED PENALTIES

24. In the event that Defendants fail to meet any of the requirements set forth in Section VII of this Consent Order, Defendants shall immediately and automatically be liable for and shall pay a stipulated penalty according to the following payment schedule:

- i. For each day of each failure to meet a requirement, from one (1) day to thirty (30) days – two hundred dollars (\$200.00) per day per requirement not met;
- ii. For each day of each failure to meet a requirement, from thirty-one (31) days to sixty (60) days – three hundred fifty dollars (\$350.00) per day per requirement not met;
- iii. For each day of each failure to meet a requirement, over sixty-one (61) days – five hundred dollars (\$500.00) per day per requirement not met.

25. Any stipulated penalty payment required to be made under the provisions of this Consent Order shall be made within thirty (30) days of the violation, by certified check, payable to "Treasurer, State of Ohio", and shall be delivered by mail, or otherwise, to Mark Lemmon, Paralegal, the Ohio Attorney General's Office, Environmental Enforcement Section, Public

Protection Division, 30 East Broad Street, 25th Floor, Columbus, Ohio 43215-3400. A letter indicating what violations are being covered by the specific check shall accompany each payment.

26. The imposition of payment and collection of stipulated penalties pursuant to Paragraphs 24 and 25 for violations of this Consent Order shall not prevent Plaintiff from pursuing additional remedies, civil, criminal or administrative, for violations of applicable laws.

27. The payment of stipulated penalties by Defendants and the acceptance of such stipulated penalties by Plaintiff pursuant to this section shall not be construed to limit Plaintiff's authority to seek additional relief pursuant to R.C. Chapter 6111, including civil penalties under R.C. 6111.09, or to bring contempt or to otherwise seek judicial enforcement of this Consent Order for the same violation for which a stipulated penalty was paid or for other violations. In the event that Plaintiff seeks civil penalties in addition to stipulated penalties and/or contempt penalties for any violation, the amount of the stipulated penalty and/or contempt penalty paid shall be credited toward any civil penalty imposed by the Court.

X. TERMINATION

28. After Defendants have completed all work required by Paragraphs 12-15, 17-18, 20, and 22 of this Consent Order, demonstrated compliance with the terms of this Consent Order for a further twelve (12) consecutive months, and paid all civil and/or stipulated penalties that are or may be due, Defendants may move this Court, pursuant to Rule 60(B) of the Ohio Rules of Civil Procedure, to terminate this Consent Order. Plaintiff takes no position with regard to such motion at this time, and reserves the right to oppose the motion. Termination of any or all of the provisions of this Consent Order may also be granted upon a joint motion by the parties.

XI. RETENTION OF JURISDICTION

29. Except for matters over which the Bankruptcy Court has exclusive jurisdiction, the Court will retain jurisdiction of this action for purposes of enforcing this Consent Order.

XII. COURT COSTS

30. Defendants are hereby ordered to pay all court costs of this action.

XIII. MISCELLANEOUS

31. Nothing in this Consent Order shall affect Defendants' obligation to comply with all applicable federal, state and local laws, regulations, rules and ordinances. Defendants shall obtain any and all federal, state, or local permits necessary to comply with this Consent Order.

32. Defendants shall inform Ohio EPA of any change of Defendants' business addresses or telephone numbers.

XIV. ENTRY OF CONSENT ORDER AND FINAL JUDGEMENT BY CLERK

33. The parties agree and acknowledge that final approval by the Plaintiff and Defendants, and entry of this Consent Order is subject to the requirement of 40 CFR § 123.27(d)(2)(iii), which provides for notice of the lodging of this Consent Order, opportunity for public comment, and the consideration of any public comment. The State and/or Defendants reserve the right to withdraw this Consent Order based on comments received during the public comment period. Defendants shall pay the cost of publishing the public notice.

34. Pursuant to Rule 58(B) of the Ohio Rules of Civil Procedure, upon the signing of this Consent Order by the Court, the clerk is hereby directed to enter it upon the journal. Within three days of entering the judgment upon the journal, the clerk is hereby directed to serve upon the parties notice of the judgment and its date of entry in the journal in the manner prescribed by Rule 5(B) of the Ohio Rules of Civil Procedure and note the service in the appearance docket.

XV. AUTHORITY TO ENTER INTO THE CONSENT ORDER

35. The signatory for Defendants represents and warrants that he/she has been duly authorized to sign this document and so bind the Defendants to all terms and conditions thereof.

IT IS SO ORDERED

DATE

/s/ Jeffrey R. Ingraham
JUDGE
COURT OF COMMON PLEAS
MERCER COUNTY

APPROVED:

**JIM PETRO
ATTORNEY GENERAL**

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