

FILED

**BEFORE THE ENVIRONMENTAL QUALITY COUNCIL FEB 04 2004
STATE OF WYOMING**

Terri A. Lorenzon, Director
Environmental Quality Council

IN THE MATTER OF THE NOTICE OF)
VIOLATION ISSUED TO NEW FASHION PORK)
MR. TODD GOENS, FACILITY MANAGER,) DOCKET NO. 3531-04
5230 COUNTY ROAD 228, ALBIN WY 82050)

NOTICE OF APPEAL AND PETITION FOR HEARING

NFP Farms, L.L.P and NFP West, R.L.L.P. ("NFP" or "Petitioner"), hereby appeal the Notice of Violation and Order issued by the Department of Environmental Quality under Docket No. 3531-04 and request a hearing pursuant to the Environmental Quality Act, the Administrative Procedures Act and the Environmental Quality Council's ("EQC") Rules of Practice and Procedure. In support of this appeal, NFP advises the EQC as follows:

INFORMATION ABOUT THE PETITIONER:

1. The Petitioners filing this appeal are NFP Farms, L.L.P and NFP West, R.L.L.P., each of which are successors to New Fashion Pork, Inc., and each of which own assets at the NFP facilities which are the subject of this appeal. NFP Farms, L.L.P. and NFP West R.L.L.P. are in the process of a merger, in which NFP West R.L.L.P. will be the surviving entity. NFP West R.L.L.P. will be the relevant entity for future proceedings in this appeal. NFP's address is 5230 County Road 228, Albin, Wyoming. The Environmental Manager for NFP is Mr. Jay Moore. NFP is represented by Keith Burron of Associated Legal Group, LLC. Correspondence and information related to this appeal should be served on counsel at the address provided below.

BACKGROUND:

2. NFP owns and operates a sow farm operation in Albin, Wyoming. NFP began operating the facilities in January, 1999, and acquired the facilities by purchase in December, 2001. NFP's operations consists of two sow sites (consisting of six gestation and one farrowing barn at each site), a solid separator, an effluent lagoon and corresponding land application areas permitted through the DEQ for application of lagoon effluent.
3. NFPs barns and lagoon are located off of County Road 228 on a parcel of land comprising approximately 80 acres. Flush water from the two sites is piped to the effluent lagoon where it runs through the solids separator. Lagoon effluent is then pumped to center pivot sprinklers for land application. Land application areas are

located adjacent to the NFP property and are operated pursuant to leases with neighboring landowners.

4. In the instance relevant to this appeal, the county road from which the alleged odor exceedance was recorded, is only 10-30 yards (+/-) from Site 1, which DEQ contends is the source of the alleged odor violation.

BASIS FOR APPEAL:

5. The regulation at issue in this appeal is Chapter 2 Section 11 of the Air Quality Rules and Regulations, which provides in relevant part:
 - (a) The ambient air standard for odors from any source shall be limited to:
 - (i) An odor emission at the property line which is undetectable at seven dilutions with odor free air as determined by a scentometer as manufactured by the Barneby-Cheney Company or any other instrument, device, or technique designated by the Division as producing equivalent results. The occurrence of odors shall be measured so that at least two measurements can be made within a period of one hour, these determinations being separated by at least 15 minutes.
6. The NOV indicates that the DEQ measured the alleged violation at a point along County Road 228, adjacent to the facility. From the description provided in the NOV, the measurement locations were as close to NFP's facilities as the inspector could get from the county road, without entering onto NFP's property.
7. County Road 228 is a rural county gravel road that sees very little traffic. There is no receptor (house, business, school, etc.) within one mile of the location on County Road 228 where odor measurements were taken. NFP contends that enforcement of the odor standard at the selected location, when there is no receptor anywhere nearby, is arbitrary and capricious, and constitutes an unreasonable and selective interpretation and implementation of Chapter 2, Section 11 of the AQRR, because it fails to take into consideration the factors mandated by the legislature in W.S. § 35-11-202.
8. At the EQC's public meeting of January 16, 2003, the DEQ proposed to step-up its enforcement of odor standards at hog farms by measuring odor twice per

month. At that same meeting, the DEQ also committed to reviewing the regulations for all odor sources and instituting rulemaking to arrive at fair, appropriate and defensible criteria for the regulation of odor. To date, the DEQ has not commenced that rulemaking process, but has instead focused on its interim enforcement policy that operates to the prejudice of the hog industry in Wyoming.

9. As part of its stepped-up enforcement program for hog farms, the DEQ measured odor twice per month around the boundaries of NFP's operations in the months of July through October, 2003. No fewer than ten separate measurements were taken at various locations and at various times around the perimeter of NFP's facilities. With the exception of the single alleged violation on October 23rd, the DEQ did not record any other alleged violations of the standard.
10. Conducting compliance measuring for a violation from locations on a rural county road virtually out the "back door" of NFP's facilities, where no receptors are in close proximity to the location of measurement, is inconsistent with the letter and intent of Chapter 2 Section 11 and cannot reasonably form the basis for a violation of the standard. These factors were acknowledged by the DEQ's inspector's report of December 12, 2003. That report states: "There are two items that should be taken into consideration with this potential violation. First, the barn odors from the Farrowing Farm 1 were evaluated along County Road (Rd.) 228, which runs along the south side of the facility at a distance of approximately 10-30 yards. This is a very short distance which will not provide for much dispersion. Second, no complaints have been filed against this facility according to Division records." (See Attachment A, DEQ Inspection Report.)
11. To interpret the odor standard as being applicable from a county road in such close proximity to NFP's facilities would also render compliance under all circumstances impossible, because compliance within such a short distance of the facilities is technologically impracticable and economically infeasible to achieve under all circumstances. NFP contends that to record an alleged violation in such close proximity to the facility on only one occasion out of 10 attempts, demonstrates that NFP's facilities are being properly managed and operated in compliance with the letter and spirit of the regulation.
12. Enforcing the standard by measuring compliance at such a rural location immediately outside the facility also disregards all of the considerations prescribed by W.S. § 35-11-202, which provides:

35-11-202. Establishment of standards.

(b) In recommending such standards or requirements the administrator shall:

(i) Consider all the facts and circumstances bearing upon the reasonableness of the emissions involved, including:

(A) The character and degree of injury to, or interference with the health and physical well being of the people, animals, wildlife and plant life;

(B) The social and economic value of the source of pollution;

(C) The priority of location in the area involved;

(D) The technical practicability and economic reasonableness of reducing or eliminating the pollution; and

(E) The social welfare and aesthetic value.

A consideration of these factors militates heavily against construing the odor standard to allow measurement for compliance at the location described in the NOV, and demonstrates that the enforcement policy being utilized by the DEQ is inconsistent with the statutory considerations the legislature mandated the DEQ to consider in promulgating and implementing standards.

13. NFP's facilities are properly designed and permitted in full compliance with all DEQ regulations. The facilities are working property and are being operated optimally to ensure proper functioning of the barns, lagoon and land application systems.
14. NFP further objects to, and appeals on the basis of, the subjectivity and inaccuracy inherent in the use of the scentometer method in determining compliance with air quality regulations, and contends that the use of such a method is prejudicial to NFP and cannot form the basis for an enforceable standard. NFP further reserves the right to challenge the methodology, sample collection method, inspector training and qualification and protocol used, and technical defensibility of the scentometer as may be warranted after completion of discovery.
15. NFP further challenges the NOV on grounds that the inspectors were unable to differentiate odor from NFP's facilities from other sources, including cattle operations and ambient air odors in the vicinity of NFP's operations.

16. NFP further contests the Order issued with the NOV on the grounds that the mitigation suggested or requested by the DEQ is not technically practicable, economically feasible, or warranted in light of the circumstances and the considerations of W.S. § 35-11-202.


17. As NFP has been provided with nothing more than the bare NOV and Order, it is unaware of all of the relevant facts and circumstances surrounding the DEQ's investigation of the alleged violation. Accordingly, NFP reserves the right to raise additional grounds in support of this Appeal and Petition as may be appropriate after further inquiry.

WHEREFORE, NFP requests that the EQC grant the following relief:


1. Grant NFP a contested case hearing on its appeal pursuant to the Environmental Quality Act, W.S. § 35-11-112, the Administrative Procedures Act and the EQC's Rules of Practice and Procedure.
2. Disapprove, revoke and repeal the DEQ's Notice of Violation and Order in this matter.
3. Provide such other and further relief as the EQC determines just and equitable in the premises.

RESPECTFULLY SUBMITTED this 4th day of February, 2004.



For NFP:



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MEMORANDUM

TO: Dan Olson, Air Quality Division Administrator 

FILING: Albin - Hog Farms Compliance File
AQD Administrator Files (copy)

THROUGH: Bob Gill, SCC Program Manager 
Nancy Vehr, Assistant Attorney General
Kristi Tarantola, Air Quality Engineer 

FROM: Glenn Spangler, District Engineer 

SUBJECT: Swine CAFO Odor Monitoring for New Fashion Pork Hog Farms -
October 2003

DATE: December 12, 2003

On June 30, 2003 the Environmental Quality Council (EQC) directed the Air Quality Division (Division) to begin monthly monitoring of the odors associated with confined hog feeding operations. The monthly odor monitoring is to take place in the towns of Wheatland and Albin, Wyoming from March through October each year for as long as appropriate. The monitoring is to include two site visits each month per facility and at least one overnight stay to obtain a comprehensive survey during night time hours.

Odor monitoring activities during October 2003 for the New Fashion Pork (NFP) hog facilities in Albin, Wyoming were conducted on the following dates: Thursday, October 23rd through Friday, October 24th and Tuesday, October 28th. During these monitoring events Division inspectors visited both of the NFP confined hog feeding operations in Albin and evaluated odors from the facility odor sources when possible. The sites visited include the following: the NFP Farrowing Farm 1 and the NFP Farrowing Farm 2 facilities. The "District 1: Monthly Odor Monitoring - New Fashion Pork" table included in Appendix A provides the information obtained for each odor evaluation conducted.

Odor Monitoring Results Summary

Table 1 on the following page summarizes the results of the October odor monitoring. As shown by the table, Division inspectors visited each site on three occasions. On these occasions, odors were evaluated when possible. For the Farrowing Farm 1 facility, odors were detected from the hog barns during each visit. Odors at the 2:1 D/T level were detected on one occasion. Odors at the 7:1 D/T level were detected on one occasion. For the Farrowing Farm 2 facility, odors from the hog barns were not detected in isolation. However, combined odors from the hog barns and the wastewater lagoon were detected on one occasion at the 7:1 D/T level. Odors from the wastewater lagoon itself, were detected by nose on one occasion. Potential violations of the Chapter 2, Section 11 odor standards were detected at the Farrowing Farm 1 facility on October 23rd.

Notes Concerning Potential Odor Violations

Farrowing Farm 1 - During the late evening of October 23, 2003 from 2045 hours to 2105 hours, I detected odors at the 7:1 D/T odor standard at the Farrowing Farm 1 facility. Two odor evaluations of the facility hog barn odors were made separated by greater than the required 15 minutes. The evaluations were conducted within one hour. Thus, the set of odor evaluations met the criteria for an odor violation.

There are two items that should be taken into consideration with this potential violation. First, the barn odors from the Farrowing Farm 1 were evaluated along County Road (Rd.) 228 which runs along the south side of the facility at a distance of approximately 10 - 30 yards. This is a very short distance which will not provide for much dispersion. Second, no complaints have been filed against this facility according to Division records.

Table 1: New Fashion Pork Monthly Odor Monitoring Summary - October 2003

Company	Facility	No. of Days Visited	No. of Days Evaluated	No. of Days Odors Detected	Highest Detection Level	No. of Potential Odor Violations
NFP	Farrowing Farm 1	3	3	3	7:1	1
NFP	Farrowing Farm 2	3	2	2	7:1	None

District 1: Monthly Odor Monitoring - New Fashion Pork

Date	Time	Evaluator	By Nose	2:1	7:1	15:1	31:1	Wind Direction (Degrees)	Wind Speed	Distance to Source	Eval. Type	Down- wind Eval. ID	Upwind Eval. ID	Site Description
NFP: Farrowing Farm 1														
<i>Hog Barn</i>														
10/23/03	20:45	Spangler	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	280° -'	04-07 mph	~0.1 miles	Downwind	na	102303-2058	Rd. 228, ~0.1 miles east of the NFP Farrowing Farm 1 fenceline.
10/23/03	21:05	Spangler	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	280° -'	04-07 mph	~0.1 miles	Downwind	na	102303-2058	Rd. 228, ~0.1 miles east of NFP Farrowing Farm 1
10/24/03	8:02	Spangler	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	335° -'	04-07 mph	~30 yards	Downwind	na	102403-0753	Rd. 228, ~15 yards east of east fenceline on road.
10/24/03	8:05	Spangler	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	335° -'	04-07 mph	~ 20 yards	Downwind	na	102403-0753	Rd. 228, directly south of southernmost barn, on road.
10/24/03	8:12	Spangler	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	335° -'	04-07 mph	~20 yards	Downwind	na	102403-0753	Rd. 228, directly south of southernmost barn, on road.
10/28/03	9:40	Tarantola	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	300° -'	04-07 mph		Downwind	na	na	
<i>Upwind</i>														
10/23/03	20:58	Spangler	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	280° -'	04-07 mph	Variable	Upwind	102303-2045	na	Drive by on Rd. 152 west of the farms.
10/24/03	7:53	Spangler	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	335° -'	04-07 mph	Variable	Upwind	102403-0739	na	Drive by on roads 152, 154, and Hwy. 216.
NFP: Farrowing Farm 2														
<i>Not Evaluated</i>														
10/28/03	9:41	Tarantola	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	300° -'	04-07 mph					Upwind drive by on Rd. 152.
NFP: Farrowing Farms														
<i>Combined Odors</i>														
10/24/03	7:39	Spangler	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	330° -'	04-07 mph	~40 yards	Downwind	na	102403-0743	Rd. 228, ~ 20 yards from east fenceline, on road.
<i>Wastewater Lagoon</i>														

<i>Date</i>	<i>Time</i>	<i>Evaluator</i>	<i>By</i> <i>Nose</i>	<i>2:1</i>	<i>7:1</i>	<i>15:1</i>	<i>31:1</i>	<i>Wind</i> <i>Direction</i> <i>(Degrees)</i>	<i>Wind</i> <i>Speed</i>	<i>Distance to</i> <i>Source</i>	<i>Eval.</i> <i>Type</i>	<i>Down-</i> <i>wind</i> <i>Eval. ID</i>	<i>Upwind</i> <i>Eval. ID</i>	<i>Site Description</i>
10/23/03	20:35	Spangler	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	280° - '	04-07 mph	~0.75 miles	Downwind	na	102303-2058	Rd. 228, 0.8 miles east of NFP Farrowing Farm 1