

UNITED STATES
ENVIRONMENTAL PROTECTION
AGENCY-REGION 7
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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 7
901 NORTH FIFTH STREET
KANSAS CITY, KANSAS 66101
BEFORE THE ADMINISTRATOR

IN THE MATTER OF)

) CONSENT AGREEMENT
) AND FINAL ORDER
)

ADAMS LAND & CATTLE COMPANY)
Broken Bow, Nebraska)

Respondent.)

) Docket No. CWA 07-2012-0036
)

Proceedings under Section 309(g) of the)
Clean Water Act, 33 U.S.C. Section)
1319(g))
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CONSENT AGREEMENT AND FINAL ORDER

The United States Environmental Protection Agency, Region 7 (EPA) and Adams Land & Cattle Company (Respondent), have agreed to a settlement of the alleged violations set forth in this Consent Agreement and Final Order. This action is simultaneously commenced and concluded pursuant to 40 C.F.R. Part 22, Sections 22.13(b) and 22.18(b)(2) (the Consolidated Rules).

This Consent Agreement and Final Order completely and finally settles all civil and administrative penalty claims and causes of action set forth below. Respondent neither admits nor denies the factual allegations or the violations alleged in this Consent Agreement and Final Order.

ALLEGATIONS

Jurisdictional Allegations

1. This is an administrative action for the assessment of civil penalties, instituted pursuant to Section 309(g)(2)(B) of the Clean Water Act (CWA), 33 U.S.C. § 1319(g)(2)(B), and in accordance with the Consolidated Rules.
2. The EPA has reason to believe that Respondent violated Sections 301 and 402 of the CWA, 33 U.S.C. §§ 1311 and 1342, by discharging pollutants from a concentrated animal feeding operation (CAFO) into navigable waters of the United States in violation of its National Pollutant Discharge Elimination System (NPDES) permit and failing to operate in accordance with Respondent's NPDES permit.

Statutory and Regulatory Framework

3. Section 301(a) of the CWA, 33 U.S.C. §1311(a), prohibits the discharge of pollutants except in compliance with, *inter alia*, a National Pollutant Discharge Elimination System (NPDES) permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.
4. Pursuant to Section 402 of the CWA, 33 U.S.C. § 1342, EPA authorizes states to issue NPDES permits that, among other things, prescribe conditions whereby a discharge may be authorized, and establish design, construction, operation, and maintenance requirements for the permit holder.
5. Section 402 of the CWA, 33 U.S.C. § 1342, provides that pollutants may be discharged only in accordance with the terms of a National Pollutant Discharge Elimination System ("NPDES") permit issued pursuant to that Section.
6. Section 504(12) of the CWA, 33 U.S.C. § 1362(1), defines the term "discharge of pollutant" to include "any addition of any pollutant to navigable waters from any point source."
7. To implement Section 402 of the CWA, the EPA promulgated regulations codified at 40 C.F.R. Part 122. Pursuant to 40 C.F.R. § 122.1, a NPDES permit is required for the discharge of pollutants from any point source into waters of the United States.
8. "Pollutant" is defined by Section 502(6) of the CWA, 33 U.S.C. § 1362 to include, *inter alia*, biological materials and agricultural waste discharged to water.
9. "Point source" is defined by Section 502(14) of the CWA, 33 U.S.C. § 1362 to include "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation . . . from which pollutants are or may be discharged."
10. "Animal feeding operation" or "AFO" is defined by 40 C.F.R. § 122.23(b)(1) as a lot or facility where animals have been, are, or will be stabled or confined and fed or maintained

for a total of 45 days or more in any twelve month period, and where crops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility.

11. “Concentrated animal feeding operation” or “CAFO” is defined by 40 C.F.R. § 122.23(b)(2) as an animal feeding operation that is defined as a Large CAFO in accordance with 40 C.F.R. § 122.23(b)(3).

12. “Large CAFO” is defined according to 40 C.F.R. § 122.23(b)(4)(iii) as an animal feeding operation that stables or confines more than “1,000 cattle other than mature dairy cows or veal calves.”

13. “Waters of the United States” are defined in 40 C.F.R. § 122.2 to include intrastate rivers and streams, and tributaries thereto.

14. The Nebraska Department of Environmental Quality (“NDEQ”) is the agency within the state of Nebraska with the authority to administer the federal NPDES Program. The EPA maintains concurrent enforcement authority with authorized state NPDES programs for violations of the CWA.

15. Section 309(g) of the CWA, 33 U.S.C. § 1319(g), authorizes the EPA to commence an action for administrative penalties against any person who violates Section 301 or 402 of the CWA, 33 U.S.C. §§ 1311 and 1342.

16. NDEQ issued a general permit for CAFOs confining cattle in open lots (NEG011000). This general permit became effective on April 1, 2008 and expires on March 31, 2013 (referenced herein as the General Permit or Respondent’s NPDES Permit).

Factual Allegations

17. Respondent owns and operates an animal feeding operation that is located at 79574 Road 438, Broken Bow, Nebraska (referenced herein as the Facility).

18. On June 10, 2008, Respondent was issued NPDES permit coverage under the General Permit described in paragraph 16 and was assigned Request for Coverage Number NEG011191. At all times relevant to this action, Respondent operated under the General Permit.

19. On or around December 07, 2010, EPA personnel conducted a compliance inspection of the Facility that consisted of a review of facility operations, required records, waste generation and management practices, and a visual inspection of the Facility.

20. At the time of the December 2010 EPA inspection, the Facility confined approximately 83,000 head of cattle and the Facility is permitted to confine 85,000 head.

21. EPA personnel conducted a follow up investigation on December 20-21, 2011 that included an assessment of an unnamed tributary of Mud Creek.

22. The Facility confines and feeds or maintains cattle for a total of forty-five (45) days or more in any twelve month period.

23. Neither crops, vegetation, forage growth, nor post harvest residues are sustained over any portion of the Facility's feeding areas.

24. The Facility is an AFO as defined by 40 C.F.R. § 122.23(b)(1).

25. Based on inspector observations and Respondent's records, the number of cattle confined and fed at the Facility at all times relevant to this action were greater than 1,000, therefore the Facility was a large CAFO as that term is defined in 40 C.F.R. § 122.23(b)(4) and as that phrase is used in Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

26. The unnamed tributary of Mud Creek and Mud Creek are waters of the United States, as defined under 40 C.F.R. Part 122.2.

Alleged Violations

27. Paragraphs 1-26 above are hereby incorporated by reference.

Unauthorized Discharges

28. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants, except in compliance with, *inter alia*, Section 402 of the CWA, 33 U.S.C. § 1342.

29. The Facility's General Permit requires that open feedlot CAFOs are not allowed to discharge manure, litter, or process wastewater pollutants into waters of the state from the production area, except when precipitation causes an overflow of manure, litter, or process wastewater. The overflow may be discharged into waters of the state, provided that the LWCF is designed, constructed, operated and maintained to contain all manure, litter, and process wastewater including the runoff and the direct precipitation from a 25-year, 24-hour rainfall event.

30. According to records provided by Respondent to NDEQ, Respondent's CAFO discharged process waste water to an unnamed tributary of Mud Creek on 12 occasions between April 25, 2007 and October 14, 2010.

31. These process wastewater discharges were a result of the failure of piping associated with dewatering LWCFs (holding ponds), inadequate storage capacity resulting from Respondent's failure to adequately remove accumulated solids from holding basins, and/or alleged lack of controls at the Facility necessary to prevent the unnamed tributary of Mud Creek from flooding LWCFs (holding ponds).

32. As a result of design, construction, operation, and/or maintenance issues at the Facility, the EPA alleges that none of the discharges referenced in Paragraph 30 were authorized by Respondent's NPDES permit.

33. Respondent's unauthorized discharges of pollutants (i.e., process wastewater) to an unnamed tributary of Mud Creek were violations of Respondent's NPDES permit and Section 301 and 402 of the CWA, 33 U.S.C. §§ 1311 and 1342, and implementing regulations.

Operation and Maintenance: Sludge Accumulation and LWCF Capacity

34. Respondent's General Permit requires that sludge accumulation levels not exceed the maximum sludge depth identified in the facility design for open lot animal feeding operations. The permit also requires the minimum storage period capacity to be no less than the calculated average runoff for the month of June, runoff from a 25-year, 24-hour rainfall event, and any manure, litter, and process wastewater produced for the month of June.

35. Observations made during EPA's 2010 inspection of Respondent's LWCF document that sludge accumulations in the holding ponds at the Facility exceeded the designed maximum sludge depth and resulted in alleged violations of minimum storage requirements established by the NPDES permit. Respondent's engineering records demonstrate that, at times relevant to this action, accumulated sludge and process wastewater compromised the Facility's holding pond storage capacity resulting in failure to maintain the minimum storage capacities required by the NPDES permit.

36. Respondent's failure to maintain adequate storage capacity in the LWCF holding ponds is a violation of Respondent's NPDES permit and Section 402 of the CWA, 33 U.S.C. §§ 1342, and implementing regulations.

CONSENT AGREEMENT

37. Solely for the purpose of this proceeding, and to fully resolve the EPA's allegations without the need for a trial, Respondent admits the jurisdictional allegations in this Consent Agreement and Final Order and agrees not to contest EPA's jurisdiction in this proceeding or any subsequent proceeding to enforce the terms of this Consent Agreement and Final Order.

38. Respondent neither admits nor denies the factual allegations or the violations alleged in this Consent Agreement and Final Order.

39. Respondent waives any right to contest the allegations of this Consent Agreement as well as its right to appeal the proposed Final Order accompanying this Consent Agreement.

40. Respondent and EPA shall each agree to bear their own costs and, if applicable, any attorney's fees.

41. Nothing contained in this Consent Agreement and Final Order shall alter or otherwise affect Respondent's obligation to comply with all applicable federal, state, and local environmental statutes and regulations and applicable permits.

42. Respondent consents to the issuance of the Final Order and consents to the payment of a civil penalty of One Hundred Forty-Five Thousand Dollars (\$145,000).

43. Respondent shall pay the penalty within thirty (30) days of the Effective Date of this Consent Agreement and Final Order. Payments shall be made by cashier or certified check made payable to "United States Treasury." The check must include the docket number and the name of the case. The check must be remitted to:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, Missouri 63197-9000.

Copies of the transmittal letters and the checks shall simultaneously be sent to:

Regional Hearing Clerk
U.S. Environmental Protection Agency - Region 7
901 North 5th Street
Kansas City, Kansas 66101;
and

J. Daniel Breedlove
Senior Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency - Region 7
901 North 5th Street
Kansas City, Kansas 66101.

44. Respondent's failure to pay any portion of the civil penalty in accordance with the provisions of this Consent Agreement and Final Order may result in commencement of a civil action in Federal District Court to recover the total penalty, together with interest thereon at the applicable statutory rate.

45. The penalty payment made by Respondent pursuant to this Consent Agreement and Final Order is payment of a civil penalty and shall not be deductible for purposes of federal, state, or local income taxes.

46. Payment of the entire civil penalty shall resolve all civil and administrative claims of the United States and Respondent's liability for civil penalties based on the Alleged Violations (consisting of Paragraphs 27 through 36 of this Consent Agreement) and facts alleged in this Consent Agreement and Final Order.

47. Respondent certifies by the signing of this Consent Agreement and Final Order that the Facility is operating in compliance with the requirements of Sections 301 and 402 of the CWA, 33 U.S.C. §§ 1311 (a) and 1342 (k). The effect of the settlement described in paragraph 46 above is conditioned upon the accuracy of this certification.

48. This Consent Agreement and Final Order shall not relieve Respondent of its obligation to comply with all applicable federal, state, and local laws, nor shall it be construed to be a ruling on, or determination of, any issue related to any federal, state, or local permit.

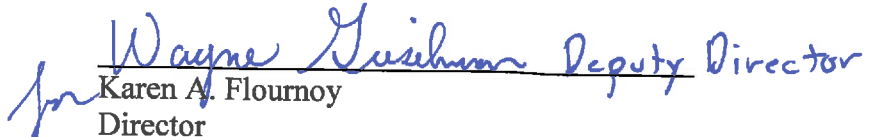
49. EPA reserves the right to take any enforcement action with respect to any other violations of the CWA or any other applicable law and to enforce the terms and conditions of this Consent Agreement and Final Order. Respondent reserves the right to defend against such actions on any basis in law or fact.

50. The undersigned representative of Respondent certifies that he/she is fully authorized to enter the terms and conditions of this Consent Agreement and Final Order and to execute and legally bind Respondent to it.

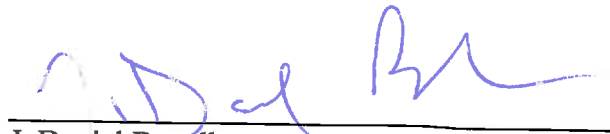
51. This Final Order shall be entered and become effective only after the conclusion of the period of public notice and comment required pursuant to Section 309(g)(4), 33 U.S.C. § 1319(g)(4), and 40 C.F.R. § 22.45. The Effective Date shall be the date it is signed by the Regional Judicial Officer.

COMPLAINANT:
U.S. ENVIRONMENTAL PROTECTION AGENCY

8/23/12
Date



Karen A. Flournoy
Director
Water, Wetlands and Pesticides Division




J. Daniel Breedlove
Senior Counsel

RESPONDENT:
Adams Land & Cattle Company

5-31-12

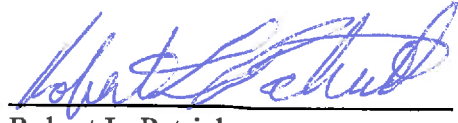
Date



Barry Fox, President

IN THE MATTER of Adams Land & Cattle Company
Docket No. CWA-07-2012-0036
Page 9 of 9

IT IS SO ORDERED. This Order shall become effective immediately.



Robert L. Patrick
Regional Judicial Officer
U.S. Environmental Protection Agency
Region 7

August 29, 2012
Date

IN THE MATTER OF Adams Land & Cattle Company, Respondent
Docket No. CWA-07-2012-0036

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Order was sent this day in the following manner to the addressees:

Copy hand delivered to
Attorney for Complainant:

J. Daniel Breedlove
Assistant Regional Counsel
Region 7
United States Environmental Protection Agency
901 N. 5th Street
Kansas City, Kansas 66101

Copy by First Class Mail to:

Michael Mostek
Attorney
Koley Jessen P.C., L.L.O.
1125 S. 103rd St., Suite 800
Omaha, Nebraska 68124

Dated: 8/30/12



Kathy Robinson
Kathy Robinson
Hearing Clerk, Region 7