

U. S. ENVIRONMENTAL PROTECTION AGENCY
REGION 7
11201 RENNER BOULEVARD
LENEXA, KANSAS 66219
BEFORE THE ADMINISTRATOR

UNITED STATES
ENVIRONMENTAL PROTECTION
AGENCY-REGION 7

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In the Matter of

Jim Dalinghaus,

Respondent.

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Docket No. CWA-07-2017-0355

CONSENT AGREEMENT AND FINAL ORDER

Preliminary Statement

The U.S. Environmental Protection Agency, Region 7 (EPA or Complainant), and Jim Dalinghaus (Respondent), doing business as Jim Dalinghaus Feedlot, have agreed to a settlement of this action before the filing of a complaint, and thus this action is simultaneously commenced and concluded pursuant to Rules 22.13(b) and 22.18(b)(2) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. §§ 22.13(b) and 22.18(b)(2).

Jurisdiction

1. This proceeding is an administrative action for the assessment of civil penalties instituted pursuant to Section 309(g) of the Clean Water Act (CWA), 33 U.S.C. § 1319(g).
2. This Consent Agreement and Final Order serves as notice that the EPA has reason to believe that Respondent has violated Section 301 of the CWA, 33 U.S.C. § 1311.

Parties

3. Complainant, by delegation from the Administrator of the EPA and the Regional Administrator, EPA, Region 7, is the Director of the Water, Wetlands and Pesticides Division, EPA, Region 7.
4. Respondent is an individual doing business in the state of Kansas.
5. Complainant and Respondent are hereinafter collectively referred to as "the Parties."

Statutory and Regulatory Background

6. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of any pollutant by any person except in compliance with, *inter alia*, a permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

7. Section 502(12) of the CWA, 33 U.S.C. § 1362(12), defines the terms “discharge of a pollutant” and “discharge of pollutants” as, *inter alia*, any addition of any pollutant to navigable waters from any point source.

8. Section 502(6) of the CWA, 33 U.S.C. § 1362(6), defines the term “pollutant” as, *inter alia*, biological materials and agriculture waste discharged to water.

9. Section 502(7) of the CWA, 33 U.S.C. § 1362(7), defines the term “navigable waters” as, *inter alia*, the “waters of the United States,” as defined at 40 C.F.R. § 122.2.

10. Section 502(14) of the CWA, 33 U.S.C. § 1362(14), defines the term “point source” 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, [or] concentrated animal feeding operation . . . from which pollutants are or may be discharged.”

11. Section 502(5) of the CWA, 33 U.S.C. § 1362(5), defines the term “person” as, *inter alia*, an individual, corporation, partnership, or association.

12. 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.

13. 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.

14. To implement Section 402 of the CWA, EPA promulgated regulations codified at 40 C.F.R. Part 122.

15. 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,” as those terms are defined at 40 C.F.R. § 122.2.

16. Pursuant to 40 C.F.R. § 122.23(a), “concentrated animal feeding operations,” or “CAFOs,” are point sources subject to NPDES permitting requirements.

17. “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 or Medium CAFO in accordance with 40 C.F.R. § 122.23(b).
18. “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, vegetative, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility.
19. “Large CAFO” is defined, according to 40 C.F.R. § 122.23(b)(4), as an animal feeding operation that stables or confines, “1,000 cattle other than mature dairy cows or veal calves.”
20. “Waters of the United States” are defined in 40 C.F.R. § 122.2 to include intrastate rivers and streams, and tributaries thereto.
21. “Process wastewater” is defined by 40 C.F.R. § 122.23(b)(7) as water “directly or indirectly used in the operation of the AFO for any or all of the following: spillage or overflow from animal or poultry watering systems; washing, cleaning, or flushing pens, barns, manure pits, or other AFO facilities; direct contact swimming, washing, or spray cooling of animals; or dust control. Process wastewater also includes any water which comes into contact with any raw materials, products, or byproducts including manure, litter, feed, milk, eggs or bedding.”
22. “Production area” is defined by 40 C.F.R. § 122.23 as that part of an AFO that includes the animal confinement area, the manure storage area, the raw materials storage areas, and the waste containment areas. The animal confinement area includes, but is not limited to, open lots, housed lots, feedlots, confinement houses, stall barns, free stall barns, milkrooms, milking centers, cowyards, barnyards, medication pens, walkers, animal walkways, and stables. The manure storage area includes, but is not limited to, lagoons, runoff ponds, storage sheds, stockpiles, under house or pit storages, liquid impoundments, static piles, and composting piles. The raw materials storage area includes, but is not limited to, feed silos, silage bunkers, and bedding materials. The waste containment area includes, but is not limited to, settling basins, and areas within berms and diversions which separate uncontaminated storm water. Also included in the definition of production area is any egg washing or egg processing facility, and any area used in the storage, handling, treatment, or disposal of mortalities.
23. The Kansas Department of Health and Environment (KDHE) is the state agency authorized to administer the federal NPDES program in the state of Kansas pursuant to Section 402 of the CWA, 33 U.S.C. § 1342. EPA maintains concurrent enforcement authority with authorized states for violations of the CWA.

24. Section 309(g)(2)(B) of CWA, 33 U.S.C. § 1319(g)(2)(B), authorizes the EPA Administrator to assess a civil penalty of \$10,000 for each violation of Section 301 of the CWA, 33 U.S.C. § 1311, and a total maximum penalty of \$125,000. The Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, 28 U.S.C. § 2461, and implementing regulations found at 40 C.F.R. Part 19, increased these statutory maximum penalties to \$20,965 for each violation and a total maximum penalty of \$262,066.

General Factual Allegations

25. Respondent, owns or operates an animal feeding operation that is located at: North West Quarter of Section 03 of Township 03 South, Range 11 East, in Nemaha County, Kansas, more commonly known as: 424 144th Road, Baileyville, Kansas 66404 (the Facility).

26. Respondent is and, at all times referred to herein, was a “person” as defined by Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

27. On or about January 27, 2017 and March 29, 2017, a representative of the EPA conducted compliance evaluation inspections at the Facility (the inspections). The inspections were conducted under the authority of Section 308 of the CWA, 33 U.S.C. § 1318, to evaluate Respondent’s compliance with the requirements of the CWA and the federal regulations promulgated thereunder. Copies of the inspection reports were mailed to Respondent on April 24, 2017.

28. At the time of the inspections, Respondent did not have a NPDES permit authorizing the discharge of pollutants from the Facility.

29. Observations made during the inspections revealed that the Facility lacked adequate livestock waste control facilities to prevent the discharge of manure and process wastewater from Facility production areas.

30. Manure and process wastewater discharged from the Facility are “pollutants” as defined by Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

31. Observations made during the inspections revealed that, as a result of significant precipitation events, pollutants from production areas of the Facility discharge into an unnamed tributaries of the North Fork of the Black Vermillion River (the River).

32. Analysis of samples collected during the March 29, 2017 inspection revealed the presence of Escherichia coli (E. coli), a disease-causing type of fecal coliform bacteria passed through the fecal excrement of livestock and associated with discharges from CAFOs, in the discharge from the Facility.

33. The observations made during the inspections and collected samples document the discharge of pollutants from the Facility into the River and its tributaries.

34. The unnamed tributaries and the River are “waters of the United States” within the meaning of 40 C.F.R. § 122.2 and, therefore, “navigable waters” pursuant to Section 502(7) of the CWA, 33 U.S.C. § 1362(7).

35. At all times relevant to the allegations herein, the Facility stabled or confined and fed or maintained animals for a total forty-five (45) days or more in any twelve (12) month period.

36. At all times relevant to the allegations herein, neither crops, vegetation, forage growth, nor post-harvest residues were sustained over any portion of the Facility’s confinement areas.

37. At all times relevant to the allegations herein, the Facility was an “animal feeding operation” or “AFO” as defined by 40 C.F.R. § 122.23(b)(1).

38. At all times relevant to the allegations herein, the Facility stabled or confined at least 1,000 head of cattle for a total of forty-five (45) days or more in any twelve (12) month period.

39. At all times relevant to the allegations herein, the Facility was a “Large CAFO” as defined by 40 C.F.R. § 122.23(b)(4).

40. The Facility is a “concentrated animal feeding operation” or “CAFO” as defined by 40 C.F.R. § 122.23(b)(2).

41. The Facility is a “point source” as defined by 40 C.F.R. § 122.23(a) and Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

42. As a result of the EPA inspections and additional information obtained EPA, Complainant has determined that violations of Section 301 of the CWA, 33 U.S.C. § 1311, occurred at the Facility.

Allegations of Violations

43. Complainant hereby states and alleges that Respondent has violated the CWA and federal regulations promulgated thereunder as follows:

44. As described above, the Facility’s lack of adequate livestock waste control facilities resulted in the discharge of pollutants into the River and its tributaries. Respondent did not have an NPDES permit authorizing the discharge of pollutants from the Facility.

45. Each day Respondent discharged pollutants into navigable waters without a NPDES permit is a violation of Section 301 of the CWA, 33 U.S.C. § 1311, and implementing regulations.

CONSENT AGREEMENT

46. For the purpose of this proceeding, as required by 40 C.F.R. § 22.18(b)(2),
Respondent:

- (a) admits the jurisdictional allegations set forth herein;
- (b) neither admits nor denies the specific factual allegations stated herein;
- (c) consents to the assessment of a civil penalty, as stated herein;
- (d) consents to the issuance of any specified compliance or corrective action order;
- (e) consents to any conditions specified herein;
- (f) consents to any stated Permit Action;
- (g) waives any right to contest the allegations set forth herein; and
- (h) waives its rights to appeal the Final Order accompanying this Consent Agreement.

47. Respondent consents to the issuance of this Consent Agreement and Final Order and consents for the purposes of settlement to the payment of the civil penalty specified herein.

48. Respondent and EPA agree to conciliate this matter without the necessity of a formal hearing and to bear their respective costs and attorneys' fees.

Penalty Payment

49. Respondent agrees that, in settlement of the claims alleged herein, Respondent shall pay a civil penalty of Seventy-Seven Thousand Nine Hundred Seventy Dollars (\$77,970.00), as set forth below.

50. Respondent shall pay the penalty within thirty (30) days of the effective date of the Final Order. Such payment shall identify Respondent by name and docket number and shall be by certified or cashier's check made payable to the "United States Treasury" and sent to:

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

or by alternate payment method described at <http://www.epa.gov/financial/makepayment>.

51. A copy of the check or other information confirming payment shall simultaneously be sent to the following:

Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219; and

Clarissa Howley Mills, Attorney
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219.

52. Respondent understands that its failure to timely pay any portion of the civil penalty may result in the commencement of a civil action in Federal District Court to recover the full remaining balance, along with penalties and accumulated interest. In such case, interest shall begin to accrue on a civil or stipulated penalty from the date of delinquency until such civil or stipulated penalty and any accrued interest are paid in full. 31 C.F.R. § 901.9(b)(1). Interest will be assessed at a rate of the United States Treasury Tax and loan rates in accordance with 31 U.S.C. § 3717. Additionally, a charge will be assessed to cover the costs of debt collection including processing and handling costs, and a non-payment penalty charge of six (6) percent per year compounded annually will be assessed on any portion of the debt which remains delinquent more than ninety (90) days after payment is due. 31 U.S.C. § 3717(e)(2).

Effect of Settlement and Reservation of Rights

53. Full payment of the penalty proposed in this Consent Agreement shall only resolve Respondent's liability for federal civil penalties for the violations alleged herein. Complainant reserves the right to take any enforcement action with respect to any other violations of the CWA or any other applicable law.

54. The effect of settlement described in the immediately preceding paragraph is conditioned upon the accuracy of Respondent's representations to the EPA, as memorialized in paragraph directly below.

55. Respondent certifies by the signing of this Consent Agreement that it is presently in compliance with all requirements of the Administrative Order for Compliance on Consent, Docket No. CWA 07-2017-0148, entered into by Respondent and Complainant and effective June 14, 2017. Fulfillment of the terms of the Administrative Order for Compliance on Consent is intended to bring Respondent into compliance with Sections 301 and 402 of the CWA, 33 U.S.C. § 1311 and 1342.

56. Full payment of the penalty proposed in this Consent Agreement shall not in any

case affect the right of the Agency or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law. This Consent Agreement and Final Order does not waive, extinguish or otherwise affect Respondent's obligation to comply with all applicable provisions of the CWA and regulations promulgated thereunder.

57. Complainant reserves the right to enforce the terms and conditions of this Consent Agreement and Final Order.

General Provisions

58. By signing this Consent Agreement, the undersigned representative of Respondent certifies that he or she is fully authorized to execute and enter into the terms and conditions of this Consent Agreement and has the legal capacity to bind the party he or she represents to this Consent Agreement.

59. This Consent Agreement shall not dispose of the proceeding without a final order from the Regional Judicial Officer or Regional Administrator ratifying the terms of this Consent Agreement. This Consent Agreement and Final Order shall be effective upon the filing of the Final Order by the Regional Hearing Clerk for EPA, Region 7. Unless otherwise stated, all time periods stated herein shall be calculated in calendar days from such date.

60. The penalty specified herein shall represent civil penalties assessed by EPA and shall not be deductible for purposes of Federal, State and local taxes.

61. This Consent Agreement and Final Order shall apply to and be binding upon Respondent and Respondent's agents, successors and/or assigns. Respondent shall ensure that all contractors, employees, consultants, firms, or other persons or entities acting for Respondent with respect to matters included herein comply with the terms of this Consent Agreement and Final Order.

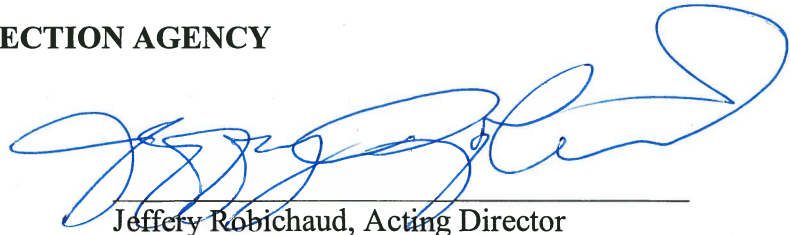
RESPONDENT
JIM DALINGHAUS

Date: 8-31-17

By: Jim Ody lens
Jim Ody lens
Print Name

COMPLAINANT
U. S. ENVIRONMENTAL PROTECTION AGENCY

Date: 10/30/17



Jeffery Robichaud, Acting Director
Water, Wetlands, and Pesticides Division
U.S. Environmental Protection Agency, Region 7



Clarissa Howley Mills
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 7

FINAL ORDER

Pursuant to 309(g) of the CWA, 33 U.S.C. § 1319(g) and the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. Part 22, the foregoing Consent Agreement resolving this matter is hereby ratified and incorporated by reference into this Final Order.

Respondent is ORDERED to comply with all of the terms of the Consent Agreement. In accordance with 40 C.F.R. § 22.31(b), the effective date of the foregoing Consent Agreement and this Final Order is the date on which this Final Order is filed with the Regional Hearing Clerk.

IT IS SO ORDERED.

Karina Borromeo

Karina Borromeo
Regional Judicial Officer

Nov. 6, 2017

Date

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:

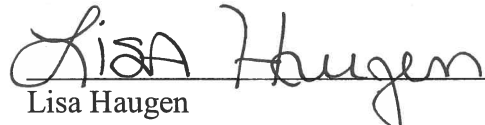
Copy emailed to Attorney for Complainant:

mills.clarissa@epa.gov

Copy by First Class Mail to Respondent:

Jim Dalinghaus
424 144th Road
Baileyville, Kansas 66404

Dated: Nov 7, 2017



Lisa Haugen
Hearing Clerk, Region 7