

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION VII
901 N. 5th STREET
KANSAS CITY, KANSAS 66101

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ENVIRONMENTAL PROTECTION
AGENCY-REGION VII
REGIONAL HEARING CLERK

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:)

J & S FEEDLOTS, INC.)
COLFAX COUNTY, Nebraska)

Respondent.)

Proceedings under Section 309(g) of the)
Clean Water Act, 33 U.S.C. § 1319(g))

) Docket No. CWA-07-2005-0241

) CONSENT AGREEMENT AND
) FINAL ORDER

CONSENT AGREEMENT AND FINAL ORDER

The United States Environmental Protection Agency, Region VII (EPA) and J&S Feedlots, Inc. (Respondent) have agreed to settle this action before EPA files a complaint. 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, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits, 40 C.F.R. Part 22 (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 for Respondent's alleged discharges of pollutants into a tributary of Pebble Creek, a navigable water of the United States in Colfax County, Nebraska.

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. This Consent Agreement and Final Order serves as notice that EPA has reason to believe that Respondent has violated Section 301 of the CWA, 33 U.S.C. § 1311, by discharging pollutants from a concentrated animal feeding operation into the navigable waters of the United States without obtaining the necessary permit(s) required by Section 402 of the CWA, 33 U.S.C. § 1342.

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*, Section 402 of the CWA, 33 U.S.C. § 1342. Section 402 of the CWA provides that pollutants may be discharged only in accordance with the terms of a National Pollutant Discharge Elimination System (NPDES) permit.

4. The CWA prohibits the unpermitted discharge of “pollutants” by any “person” from a “point source” into a “navigable water” of the United States, as these terms are defined by Section 502 of the CWA, 33 U.S.C. § 1362.

5. “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.

6. “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.”

7. An “animal feeding operation” 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.

8. According to 40 C.F.R. § 122.23(b)(2) a “concentrated animal feeding operation” is an animal feeding operation that meets the definition of either a Large CAFO or Medium CAFO under 40 C.F.R. § 122.23(b)(4) or 40 C.F.R. § 122.23(b)(6).

9. “Large CAFO” is defined by 40 C.F.R. § 122.23(b)(4)(iii) as an animal feeding operation where at least “1,000 cattle other than mature dairy cows or veal calves” are stabled or confined.

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

11. The Nebraska Department of Environmental Quality (“NDEQ”) is the agency within the state of Nebraska with the delegated authority to administer the federal NPDES program pursuant to Section 402 of the CWA. NDEQ’s authority is found in the Nebraska Environmental Protection Act (Secs. 81-1504 (11), Reissue 1987) and the State of Nebraska Department of Environmental Quality, Title 119, Rules and Regulations Pertaining to the Issuance of Permits Under the National Pollutant Discharge Elimination System. EPA maintains concurrent enforcement authority with delegated state NPDES programs for violations of the CWA.

12. 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, 33 U.S.C. § 1311.

Factual Allegations

13. Respondent owns and operates an animal feeding operation located in Section 14, Township 20N, Range 4E in Colfax County, Nebraska. The Facility has been in operation since 1981 and surpassed more than 1,000 head of cattle in 1987, making them a Large CAFO, subject to an NPDES permit under Section 402 of the CWA. The facility is situated on 240 acres of land, of which 50 acres is devoted to production.

14. The facility has operated in its present form and capacity since 1993. In 1993, the NDEQ issued an operating permit allowing operation of the facility with only partial waste controls under the condition that J&S may be required to construct a system that provides complete control of feedlot runoff. On August 23, 2002, NDEQ informed J&S that complete controls were necessary and required the submission of a construction application to modify the facility. Respondent requested several deadline extensions (some out of time) that were granted by NDEQ. The fourth extension of time to submit a completed construction permit expired on May 1, 2004.

15. On May 6, 2004, EPA personnel conducted an inspection of the Facility.

16. Respondent’s consultant submitted a permit application on May 25, 2004. On June 2, 2004, Respondent and his consultant were notified by NDEQ that the May 25, 2004, application was incomplete. The June 2, 2004, correspondence from NDEQ also extended the deadline to submit a complete construction application until July 15, 2004. A new or corrected permit application was not submitted until January 10, 2005; approximately two weeks after EPA issued an Administrative Compliance Order to Respondent, six months after NDEQ’s final deadline expired, and over two and one-half years after Respondent was informed of the need to construct addition controls. The failure to submit a complete construction application to NDEQ in a timely manner was one of the factors that precipitated this action.

17. At the time of EPA’s May 6, 2004, inspection, there were approximately 2,500 head of cattle confined and fed at the Facility.

18. The Facility confines and feeds or maintains at least 1,000 cattle for a total of 45 days or more in any twelve-month period.

19. No crops, vegetation, forage growth, or post-harvest residues were sustained over any portion of the Facility at the time of inspection, and no such growth is sustained at the Facility in the normal growing season.

20. The Facility does not have adequate livestock waste controls. The Facility's waste controls consist of a settling basin and an upgradient fresh-water pond to limit the amount of water that flows onto the production area. The purpose of the sedimentation basin is to settle solids out of wastewater runoff before the wastewater is discharged. The settling basin is on-site and is channeled to an unnamed tributary of Pebble Creek via a series of perforated standpipes. Runoff from the facility flows east to the unnamed tributary of Pebble Creek. The tributary flows across Respondent's facility and meets up with Pebble Creek approximately two miles east of the feedlot.

21. Respondent is currently operating under an interim measures plan approved by EPA in conjunction with the Compliance Order dated December 27, 2004.

22. Based on the size of the Facility, the distance of the Facility from waters of the United States, and the slope and condition of the land across that distance, EPA has concluded that wastewater containing pollutants from open lots at the Facility has flowed and without proper waste controls will continue to flow into Pebble Creek and its unnamed tributary during and after significant precipitation events.

23. Respondent is currently and actively seeking an NPDES permit for the Facility. Respondent, however, does not currently have an NPDES permit.

Alleged Violations

24. The allegations set forth in paragraphs 1 through 23 are incorporated herein.

25. Respondent is a corporation and therefore a person as defined by Section 502(5) of the CWA, 33 U.S.C. § 1362.

26. The Facility is a "concentrated animal feeding operation" as defined by 40 C.F.R. § 122.23(b)(4)(iii), and as that phrase is used in Section 502(14) of the CWA, 33 U.S.C. § 1362(14). As a result, the Facility is a "point source" within the meaning of Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

27. The number of cattle confined and fed at the Facility is above the threshold defined in 40 C.F.R. § 122.23(b)(4)(iii) for Large CAFOs.

28. Pebble Creek and its unnamed tributary that flows from the Facility are waters of the United States, as defined under 40 C.F.R. Part 122.2.

29. Wastewater runoff, which is discharged from the Facility into the tributary of Pebble Creek during and after precipitation events, contains "pollutants" within the meaning of Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

30. Respondent's Facility has discharged wastewater into Pebble Creek and its unnamed tributary. Respondent's discharges constitute unauthorized discharges of pollutants from a point source to waters of the United States. This, coupled with Respondent not having an NPDES permit has resulted in violations of Sections 301 and 402 of the CWA, 33 U.S.C. §1311 and 1342, and implementing regulations.

CONSENT AGREEMENT

31. 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 the Consent Agreement and Final Order.

32. Respondent neither admits nor denies the factual allegations contained in this Consent Agreement and Final Order.

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

34. Respondent and Complainant each agree to bear their own costs and attorney's fees.

35. Nothing contained in the 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.

36. Respondent consents to the issuance of the Final Order and consents to the payment of a civil penalty of forty-seven thousand dollars (\$47,000). Due to the fact that Respondent will incur significant expense in the construction of a livestock waste management facility, EPA permits Respondent to pay the penalty on a two-year schedule. The payments shall be as follows:

A. Respondent shall pay the penalty in quarterly installments of Five Thousand Nine Hundred Thirty-one Dollars and Forty-four Cents (\$5,931.44) that includes principal and accrued interest for a period of two (2) years beginning thirty (30) days after the effective date of this Consent Agreement and Final Order.

B. Respondent agrees that interest shall accrue on the outstanding balance at the rate determined by the Secretary of the Treasury (currently one percent per annum for the period January 1, 2005, through December 31, 2005).

C. Respondent agrees that a failure to submit any of the required payments by the respective due date will result in the entire remaining balance becoming immediately due and payable, along with any costs, handling charges, penalties, and accumulated interest.

D. The parties agree that Respondent shall not be subject to a penalty for early payment of the penalty.

37. Payment of the penalty shall be 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. EPA Region VII
P.O. Box 371099M
Pittsburgh, PA 15251

Copies of the transmittal letter and the check shall simultaneously be sent to:

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

J. Daniel Breedlove
Assistant Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency - Region VII
901 N. 5th Street
Kansas City, Kansas 66101.

38. Respondent's failure to pay any portion of the civil penalty of forty-seven thousand dollars (\$47,000) 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.

39. This Consent Agreement and Final Order disposes of all civil and administrative penalty claims for all the CWA violations identified herein. The 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.

40. The undersigned representative of Respondent certifies that they are fully authorized to enter the terms and conditions of this Consent Agreement and Final Order and to execute and legally bind Respondent to it.

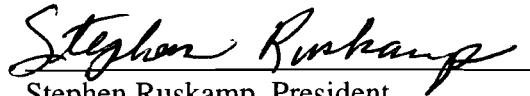
In the Matter of
J & S Feedlots, Inc.

41. 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.

For the Respondent:

6-13-05

Date

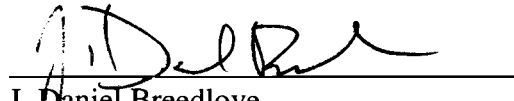


Stephen Ruskamp, President
J & S Feedlots, Inc.

For the United States Environmental Protection Agency - Region VII

8/8/2005

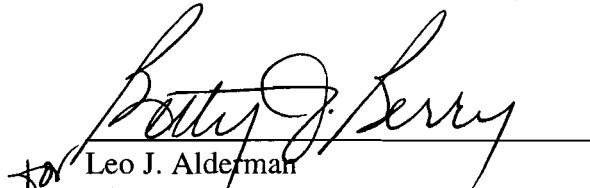
Date



J. Daniel Breedlove
Assistant Regional Counsel
U.S. Environmental Protection Agency- Region VII

08/08/05

Date




Leo J. Alderman
Director
Water, Wetlands and Pesticides Division
U.S. Environmental Protection Agency - Region VII

In the Matter of
J & S Feedlots, Inc.

FINAL ORDER

The foregoing Consent Agreement is hereby approved and incorporated by reference into this Final Order. The Respondent is ordered to comply with the terms of the above Consent Agreement, effective immediately.

IT IS SO ORDERED.



ROBERT L. PATRICK
Regional Judicial Officer
U.S. Environmental Protection Agency
Region VII

Date: Aug. 11, 2005

IN THE MATTER OF J&S Feedlots, Inc., Respondent
Docket No. CWA-07-2005-0241

CERTIFICATE OF SERVICE

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

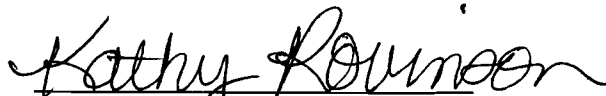
Copy hand delivered to
Attorney for Complainant:

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

Copy by Certified Mail Return Receipt to:

Jaron Bromm, Esq.
1221 N Street, Suite 801
Lincoln, Nebraska 68508-2028

Dated: 8/11/05


Kathy Robinson
Regional Hearing Clerk