

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 7
11201 RENNER BOULEVARD
LENEXA, KANSAS 66219

BEFORE THE ADMINISTRATOR

2015 MAR -3 PM 1:00
UNITED STATES
ENVIRONMENTAL PROTECTION
AGENCY-REGION 7

Kellen Farms, Inc., and/or)	
Rick Kellen, and/or)	
Tony Kellen)	Docket No. CWA-07-2015-0040
)	
Alton, Iowa)	
)	
Respondents)	FINDING OF VIOLATION
)	ORDER FOR COMPLIANCE
Proceedings under Sections 308 and)	
309(a)(3) of the Clean Water Act,)	
33 U.S.C. §§1318 and 1319(a)(3))	

Respondents Preliminary Statement

1. The following Findings of Violation are made and Order for Compliance (“Order”) issued pursuant to the authority of Section 309(a)(3) of the Clean Water Act (“CWA” or “Act”), 33 U.S.C. § 1319(a)(3). This authority has been delegated by the Administrator of the United States Environmental Protection Agency (“EPA”) to the Regional Administrator, EPA, Region 7, and redelegated to the Director of Region 7’s Water, Wetlands and Pesticides Division.
2. Kellen Farms, Inc., and/or Rick Kellen, and/or Tony Kellen (“Respondents”) operate an animal feeding operation (“Facility”) that is located in Section 24 of Township 94 North, Range 44 West, in Sioux County, Iowa, and has a street address of 4833 Kingbird Ave, Alton, Iowa.

Statutory and Regulatory Authority

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.
4. Pursuant to Section 402 of the CWA, 33 U.S.C. § 1342, EPA authorizes states to issue National Pollutant Discharge Elimination System (“NPDES”) permits that, among other things, prescribe conditions whereby a discharge of pollutants may be authorized and

establish design, construction, operation, and maintenance requirements for the permit holder.

5. Section 504(12) of the CWA, 33 U.S.C. § 1362(12), defines the term “discharge of pollutant” to include “any addition of any pollutant to navigable waters from any point source.”
6. To implement Section 402 of the CWA, the EPA promulgated regulations codified at 40 C.F.R. § 122. Under 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.
7. “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.
8. “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.”
9. “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.
10. “Concentrated animal feeding operation” or “CAFO” is defined by 40 C.F.R. § 2.23(b)(2) as an animal feeding operation that is defined as a Large or medium CAFO in accordance with 40 C.F.R. § 122.23(b).
11. “Medium CAFO” is defined, according to 40 C.F.R. § 122.23(b)(6), as an animal feeding operation that stables or confines “300 to 999 cattle other than mature dairy cows or veal calves” and either of the following conditions are met:
 - a) Pollutants are discharged into waters of the U.S. through a man-made ditch, flushing system, or other similar man-made device; or
 - b) Pollutants are discharged directly into waters of the U.S. which originate outside of and pass over, across, or through the facility or otherwise come into direct contact with the animals confined in the operation.

12. “Waters of the United States” are defined in 40 C.F.R. § 122.2 to include intrastate rivers and streams, and tributaries thereto.
13. “Process wastewater” is defined by 40 C.F.R. § 122.23 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.”
14. “Production Area” is defined by 40 C.F.R. § 122.23 and means 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.
15. Iowa Department of (“IDNR”) is the agency within the state of Iowa authorized to administer the federal NPDES Program. EPA maintains concurrent enforcement authority with delegated state NPDES programs for violations of the CWA.

Factual Background and Findings of Violation

16. Respondents own or operate an animal feeding operation (“Facility”) that is located in Section 24 of Township 94 North, Range 44 West, in Sioux County, Iowa, and has a street address of 4833 Kingbird Ave, Alton, Iowa.
17. On or around September 23, 2014, EPA personnel conducted a compliance evaluation inspection of the Facility.
18. At the time of the EPA inspection, the Facility was confining approximately 380 head of beef cattle. EPA’s inspector requested inventory records to document the number of

cattle and the periods of confinement at the Facility. Records indicate that for a period of 12 months, the facility has confined greater than 300 head of cattle for more than 45 days. At times the Facility has confined up to 850 head of cattle. The Facility has confined less than 1,000 head of cattle for the last 22 months.

19. Neither crops, vegetation, forage growth, nor are post-harvest residues sustained over any portion of the Facility's confinement areas at times relevant to this Order.
20. The Facility confines and feeds or maintains between 300 and 999 head of cattle.
21. The Facility is an AFO as defined by 40 C.F.R. § 122.23(b)(1).
22. The EPA inspector observed that the Facility lacks adequate engineered livestock waste control facilities (LWCFs) to prevent discharges of manure and process wastewater.
23. The inspector also observed that a culvert and road ditches facilitate manure and process wastewater discharges into Willow Creek and its tributaries. The culverts and road ditches are man-made ditches, flushing systems or similar man-made devices.
24. At times relevant to this Order, the number of beef cattle confined at the Facility was between 300 and 999 head for 45 days or more during a twelve month period, and pollutants discharges flowed through a man-made culvert and road ditches, therefore the Facility was/is a medium CAFO as that term is defined in 40 C.F.R. §122.23(b)(6) and as the term CAFO is used in Section 502(14) of the CWA, 33 U.S.C. § 1362(14).
25. Willow Creek is a water of the United States, as defined by 40 C.F.R. Part 122.2.
26. Based on the size of the Facility, the presence of the culvert and road ditches that facilitate pollutant discharges and the proximity of the Facility to Willow Creek and its tributaries, process wastewater containing pollutants from production areas at the Facility will continue to intermittently flow into Willow Creek and its tributaries as a result of significant precipitation events.
27. On December 7, 2012, the IDNR notified the Facility that discharging through a man-made conveyance, such as a culvert, would make the Facility a medium CAFO.
28. The intermittent but continuing flow of process wastewater from Respondents' Facility to Willow Creek and its tributaries constitutes unauthorized discharges of pollutants from a point source to waters of the United States. These are violations of Section 301 of the Clean Water Act, 33 U.S.C. § 1311, and implementing regulations.

Order for Compliance

Based on the Findings of Violation set forth above, and pursuant to Section 309(a)(3) of the CWA, 33 U.S.C. § 1319(a)(3), Respondents is hereby ORDERED to take the following actions to eliminate its violations of the CWA:

29. Respondents shall comply with the CWA.
30. Within one hundred and eighty (180) days of the effective date of this Order, Respondents shall reduce the number of cattle confined at the Facility below the medium CAFO regulatory threshold of 300 head of beef cattle, unless the Facility can be managed in a manner that prevents pollutant discharges into waters of the United States through a man-made ditch, flushing system, or other similar man-made device or Respondents apply for a NPDES permit that authorizes pollutant discharges to waters of the United States.
31. If Respondents cannot cease all discharges from the Facility to waters of the United States, regardless of whether the number of livestock is reduced below regulatory thresholds, then Respondents shall immediately remove and properly dispose of manure, litter and process wastewater from areas that cannot be controlled in a manner to prevent discharges.
32. Within Sixty (60) days of the Effective Date of this Order, Respondents shall inform the EPA, in writing, of all actions that Respondents have taken or will take to comply with the Clean Water Act and the terms of this Order.
33. Upon issuance of a NPDES Permit, Respondents shall comply with all terms contained therein.
34. If Respondents intend to construct runoff control structures to allow the confinement of cattle above regulatory thresholds then beginning within sixty (60) days of the Effective Date of this Order and continuing monthly on the seventh day of each month until Respondents submits a Notice of Construction Completion to the EPA, Respondents shall submit written monthly progress reports to the EPA. The monthly reports shall describe, in detail, the construction and related activities that occurred at the Facility during the reporting period, construction and related activities anticipated during the upcoming reporting period, and a description of any problems encountered or anticipated and how these problems were/will be addressed.

35. Upon completion of runoff control structures, Respondents shall submit a Notice of Construction Completion certified by a professional engineer to EPA within thirty (30) days of construction completion. The notification shall be in writing and shall include as-built drawings of the constructed improvements.
36. On a quarterly basis for one year, Respondents shall submit to EPA copies of all inventory records that document the number of cattle confined at the Facility as well as the pen ID/numbers in which they are held. The first quarterly report shall be submitted for the period April – June 2015 on July 7, 2015, and subsequent reports shall be submitted on October 7, 2015, January 7, 2016, and April 7, 2016.

General Provisions

Opportunity to Confer

37. This Order shall become effective 30 days after its receipt by Respondents. Prior to the effective date, Respondents have the opportunity to confer with and/or submit information to EPA concerning the validity of this Order, including the basis for the Order, the terms of the Order, and the applicability of the Order to Respondents. Within ten days of receipt of this Order, Respondents may request a conference regarding the Order or to submit information to EPA. If Respondents request a conference or wishes to submit information, the conference or submission of information shall take place within 20 days of receipt of this Order. EPA shall deem a failure to request a conference or to submit information as a waiver of the opportunity to confer.
38. Requests for a conference shall be made in writing to the EPA contact identified in Paragraph 44.

Effect of Order

39. This Order shall not constitute a permit under the CWA. Compliance with the terms of this Order shall not relieve Respondents of their responsibility to obtain any required local, state and/or federal permits. Respondents have the right to seek immediate federal judicial review of the Order pursuant to Chapter 7 of the Administrative Procedure Act, 5 U.S.C. §§ 701-706. Section 706, which is set forth at <http://uscode.house.gov/download/pls/05C7.txt>, provides the grounds for such review.
40. Compliance with the terms of this Order shall not relieve Respondents of liability for, or preclude the EPA from initiating an administrative or judicial enforcement action to

recover penalties for any violations of the CWA, or seek additional injunctive relief pursuant to Section 309 of the CWA, 42 U.S.C. § 1319.

41. Nothing in this Order shall limit the EPA's right to obtain access to, and/or inspect Respondents' Facility, and/or to request additional information from Respondents, pursuant to the authority of Section 308 of the CWA, 33 U.S.C. § 1318.
42. The EPA may subsequently amend this Order in accordance with the authority of the CWA. For example, the EPA may amend this Order to address any noncompliance with the CWA, including, but not limited to, any noncompliance with the requirements of Section 402 of the CWA. In the event of any such subsequent amendment to this Order, all requirements for performance of this Order not affected by the amendment shall remain as specified by this original Order.
43. If any provision or authority of this Order or the application of this Order to Respondents is held by federal judicial authority to be invalid, the application to Respondents of the remainder of this Order shall remain in full force and effect and shall not be affected by such a holding.
44. All submissions to the EPA required by this Order shall be sent to:

Don Hamera
Water Enforcement Branch
Water, Wetlands and Pesticides Division
U.S. Environmental Protection Agency Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219.
45. Pursuant to 40 C.F.R. §§ 2.201-2.311, Respondents may assert a business confidentiality claim covering any portion of the submitted information which is entitled to confidential treatment and which is not effluent data. For any such claim, describe the basis for the claim under the applicable regulation. Any material for which business confidentiality is claimed should be placed in a separate envelope labeled, "Confidential Business Information." Failure to assert a claim in the manner described in 40 C.F.R. § 2.203(b) allows the EPA to release the submitted information to the public without further notice. The EPA may disclose information subject to the business confidentiality claim only to the extent set forth in the above-cited regulations. Special rules governing information obtained under the Clean Water Act appear in 40 C.F.R. § 2.302.

46. Notice is hereby given that violation of, or failure to comply with, any of the provisions of the foregoing Order may subject Respondents to (1) civil penalties of up to \$37,500 per day for each violation, pursuant to Section 309(d) of the Act, 33 U.S.C. § 1319(d); or (2) civil action in federal court for injunctive relief, pursuant to Section 309(b) of the Act, 33 U.S.C. § 1319(b).
47. The Effective Date of this Order shall be 30 days following Respondents' receipt of the Order. The terms of this Order shall become effective and enforceable against Respondents upon the Effective Date.

Date 2-27-15



Karen Flournoy
Director
Water, Wetlands and Pesticides Division



Sara Hertz Wa
Attorney

CERTIFICATE OF SERVICE

I certify that on the date noted below I filed the original and one true and correct copy of the signed original Findings of Violation and Order of Compliance with the Regional Hearing Clerk, Region 7.

I further certify that I sent by certified mail, return receipt requested, a true and correct copy of the signed original Findings of Violation and Order for Compliance together with cover letter and small business assistance information, to the following address:

Tony Kellen as Registered Agent for Kellen Farms, Inc.
and
Rick Kellen
Kellen Farms, Inc.
4833 Kingbird Ave.
Alton, Iowa 51003.

I further certify that on the date noted below, I sent by certified mail, return receipt requested, a true and correct copy of the signed original Findings of Violation and Order for Compliance to the following representative of the State of Iowa:

Mr. Ken Hessenius
Field Office #3
Iowa Department of Natural Resources
1900 Grand Avenue
Gateway North Mall, Suite E17
Spencer, Iowa 51301.

Clara A. Moore

3/3/15

Date