

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 7

901 NORTH 5th STREET

KANSAS CITY, KANSAS 66101

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ENVIRONMENTAL PROTECTION
AGENCY-REGION VII
REGIONAL HEARING CLERK

BEFORE THE ADMINISTRATOR

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David Uecker & Michael Uecker)	Docket No. CWA-07-2011-0091
d/b/a Dave Uecker Livestock)	
)	
)	
Respondents)	FINDING OF VIOLATION
)	ORDER FOR COMPLIANCE
)	
)	
Proceedings under)	
Sections 308(a) and 309(a)(3))	
of the Clean Water Act,)	
33 U.S.C. §§ 1318(a) and 1319(a)(3))	
)	

Preliminary Statement

1. The following Findings of Violation are made and Order for Compliance (Order) issued pursuant to the authority of Section 308(a) and Section 309(a)(3) of the Clean Water Act (CWA or Act), 33 U.S.C. §§ 1318 and 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. The Respondents are David Uecker and Michael Uecker d/b/a Dave Uecker Livestock who own and/or operate an animal feeding operation near Norfolk, Nebraska. The animal feeding operation ("Facility") is located in the northwest ¼ of Section 4 and the northeast ¼ of Section 5, Township 24 North, Range 01 West, Madison County, Nebraska.

Statutory and Regulatory Authority

3. Respondents are "persons" as that terms is defined by Section 502(5) of the CWA, 33 U.S.C. § 1362(12).

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4. 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.
5. 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.
6. Section 502(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.”
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, [or] concentrated animal feeding operation . . . from which pollutants are or may be discharged.”
9. To implement Section 402 of the CWA, EPA promulgated regulations codified at 40 C.F.R. § 122. Under 40 C.F.R. § 122.23(d)(1), the owner or operator of a CAFO must apply for an NPDES permit if the CAFO discharges.
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 Medium CAFO in accordance with 40 C.F.R. § 122.23(b)(6).
12. “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.
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. "Waters of the United States" are defined in 40 C.F.R. § 122.2 to include intrastate rivers and streams, and tributaries thereto.
 15. The Nebraska Department of Environmental Quality ("NDEQ") is the agency within the State of Nebraska authorized to administer the federal NPDES Program pursuant to Section 402 of the Act, 33 U.S.C. § 1342. The EPA maintains concurrent enforcement authority with authorized state NPDES programs for violations of the CWA.

Factual Background and Findings of Violation

16. On July 12, 2011, EPA personnel conducted a compliance evaluation inspection of the Facility. During the inspection, EPA's inspector observed manure, litter, and process wastewater discharging through a roadside ditch, culvert, and drainage ditch into an unnamed tributary to the North Fork of the Elkhorn River. The inspector sampled the manure, litter and process wastewater. Sample results confirmed that the runoff entering the unnamed tributary to the North Fork of the Elkhorn River contained feedlot related pollutants from Respondents' Facility.
17. The roadside ditch, culvert and drainage ditch are man-made devices pursuant to 40 C.F.R. § 122.23(b)(6).
18. The North Fork of the Elkhorn River and its tributaries are waters of the United States, as defined in 40 C.F.R. §122.2.
19. The Facility confines and feeds or maintains cattle for a total of forty-five (45) days or more in any twelve month period.

20. Crops, vegetation, forage growth, and post harvest residues are not sustained over any portion of the Facility's feeding areas.
21. The Facility is an AFO as defined by 40 C.F.R. §122.23(b)(1).
22. The Facility has a capacity of 900 head and was confining approximately 450 head of beef cattle at the time of the July 12, 2011, EPA inspection.
23. At times pertinent to this order the number of cattle confined and fed at the Facility was between 300 and 999 and storm water containing pollutants has flowed from the Facility through the roadside ditch and discharged into waters of the United States. Therefore, the Facility is a Medium CAFO as that term is defined in 40 C.F.R. § 122.23(b)(6).
24. The Facility is a CAFO as defined by 40 C.F.R. § 122.23(b)(2), and as that phrase is used in Section 502(14) of the CWA, 33 U.S.C. § 1362(14).
25. The Facility does not have adequate livestock waste control facilities to prevent the discharge of manure, litter, and process waste water into the North Fork of the Elkhorn River and its tributaries.
26. Respondents have not applied for an NPDES permit for the Facility.
27. The intermittent yet ongoing flow of process waste water from Respondents' Facility through man-made devices and into the North Fork of the Elkhorn River and its tributaries constitutes unauthorized discharges of pollutants from a point source to waters of the United States. The unauthorized discharges are violations of Sections 301, of the CWA, 33 U.S.C. §§1311.

Order For Compliance

Based on the Findings of Violation set forth in paragraphs 15 through 27 above, and pursuant to Sections 308(a) and 309(a)(3) of the CWA, 33 U.S.C. §§ 1318(a) and 1319(a)(3), Respondents are hereby ORDERED to take the following actions to eliminate its violations of the CWA:

28. Within twenty (20) days of the effective date of this Order, Respondents shall submit an Interim Measures Plan (Plan) to EPA. The Plan shall describe, in detail, actions that Respondents will take to reduce the discharge of pollutants from Respondents' Facility to waters of the U.S. until permanent livestock waste controls are in place. The Plan shall also include a schedule for implementation of the interim measures. The interim

measures shall remain in place and operated until Respondents complete construction of the feedlot waste controls as required by NDEQ. Respondents shall implement the Plan immediately.

29. Unless Respondents eliminates the use of man-made ditches and culverts to facilitate flow of process wastewater from the Facility to waters of the U.S. or Respondents permanently reduce the number of livestock confined at the Facility below regulatory thresholds, then Respondents shall complete construction of feedlot waste controls as required by NDEQ pursuant to NPDES and other state issued permits. Construction shall be completed no later than October 31, 2012. If construction is not completed by this date, Respondents shall cease operations within areas of the Facility where feedlot runoff cannot be managed to prevent discharges to waters of the United States. If Respondents are unable to prevent the discharges by this date then Respondents shall reduce the number of cattle confined at the Facility below regulatory threshold for a Medium CAFO until the controls are in place and Respondents have received an NPDES permit. Respondents shall not repopulate cattle above this regulatory threshold at the Facility unless the Facility can be operated in a manner that complies with the CWA.
30. If Respondents intend to construct runoff controls and apply for an NPDES permit to allow the confinement of cattle above regulatory thresholds, then beginning thirty (30) days after receipt of this Order and continuing monthly on the seventh day of each month until Respondents submit a Notice of Construction Completion to EPA, Respondents shall submit written monthly progress reports to 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.
31. Upon completion of the runoff control structures, Respondents shall submit a Notice of Construction Completion certified by a professional engineer to EPA within thirty (30) days of completion of construction. The notification shall be in writing and shall include as-built drawings of the constructed improvements.
32. Within one (1) week of completion of feedlot waste controls, Respondents must submit an application for an NPDES permit to NDEQ. Respondents shall provide written notice to the EPA that an NPDES application was submitted to NDEQ.

Effect of Order

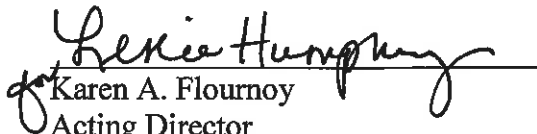
33. This Order shall not constitute a permit under the CWA. Compliance with the terms of this Order shall not relieve Respondents of their responsibility to obtain any required local, state, and/or federal permits.
34. Compliance with the terms of this Order shall not relieve Respondents of liability 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.
35. 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.
36. EPA may subsequently amend this Order in accordance with the authority of the CWA. For example, EPA may amend this Order to address any non-compliance with the CWA, including, but not limited to, any non-compliance 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.
37. 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.
38. All submissions to the EPA required by this Order shall be sent to:


Stephen Pollard
Water Enforcement Branch
Water, Wetlands and Pesticides Division
U.S. Environmental Protection Agency, Region 7
901 North 5th Street
Kansas City, Kansas 66101.
39. 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

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 CWA appear in 40 C.F.R. § 2.302.

40. 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 CWA, 33 U.S.C. § 1319(d); or (2) civil action in federal court for injunctive relief, pursuant to Section 309(b) of the CWA, 33 U.S.C. § 1319(b).
41. The terms of this Order shall be effective and enforceable against Respondents upon the date of its issuance as evidenced by the date stamp on the first page of this Order.

3-15-2011
Date


for Karen A. Flourney
Acting Director
Water, Wetlands and Pesticides Division


Chris Muehlberger
Assistant Regional Counsel

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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 Docket 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:

Mr. David Uecker
Dave Uecker Livestock
2300 Bel Air Road
Norfolk, Nebraska 68701-2579

Mr. Michael Uecker
Dave Uecker Livestock
4403 Old Hadar Road
Norfolk, Nebraska 68701.

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 Nebraska:

Dennis Heitmann
Nebraska Department of Environmental Quality
1200 N Street, Suite 400
P.O. Box 98922
Lincoln, Nebraska 68509.

8.15.11

Date