

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

)
) Docket No. CWA-07-2005-0238
)
)
WARREN HELLER,)
d/b/a WARREN HELLER FEEDLOT)
)
WISNER, NEBRASKA)
)
Respondent) **FINDING OF VIOLATION**
) **ORDER FOR COMPLIANCE**
)
)
Proceedings under)
Section 309(a)(3))
of the Clean Water Act,)
33 U.S.C. § 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 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 VII, and redelegated to the Director of Region VII’s Water, Wetlands and Pesticides Division.
2. The Respondent is Warren Heller (“Respondent”). The Respondent is the owner and operator of an animal feeding operation (“Facility”) known as Warren Heller Feedlot located in Section 34 of Township 23 North, Range 4 East, and Section 3 of Township 22 North, Range 4 East, in Cuming County, Nebraska. The Facility is an open cattle feedlot located near Wisner, Nebraska.

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. 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.
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. Part 122. Under C.F.R. Part 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. § 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).
11. “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.”

12. "Waters of the United States" are defined in 40 C.F.R. Part 122.2 to include intrastate rivers and streams, and tributaries thereto.
13. 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, 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. The EPA maintains concurrent enforcement authority with delegated state NPDES programs for violations of the CWA.

Factual Background and Findings of Violation

14. Respondent owns and operates an animal feeding operation that is located in Section 34 of Township 23 North, Range 4 East, and Section 3 of Township 22 North, Range 4 East, in Cuming County, Nebraska.
15. On June 16, 2004, EPA personnel conducted a compliance evaluation inspection of the Facility.
16. The Facility confines and feeds or maintains cattle for a total of forty-five (45) days or more in any twelve month period.
17. Neither crops, vegetation, forage growth, nor post harvest residues are sustained over any portion of the Facility's feeding areas.
18. The Facility is an AFO as defined by 40 C.F.R. §122.23(b)(1), and as that phrase is used in Section 502(14) of the CWA, 33 U.S.C. § 1362(14).
19. At the time of the EPA inspection, the Facility was confining approximately 3,500 head of cattle. The number of cattle confined and fed at the Facility is greater than 1,000, therefore the Facility is a large CAFO as that term is defined in 40 C.F.R. §122.23(b)(4).
20. Respondent does not have an NPDES permit for the Facility. However, the facility was issued a construction permit for the construction of livestock waste controls, by NDEQ, on October 25, 2002.

21. The Facility has two separate but contiguous feeding areas. Runoff from these feeding areas flows into an unnamed tributary of Rock Creek. The tributary runs south and east from Respondent's property and the tributaries confluence with Rock Creek is approximately 3,500 feet southeast of the facility. From this confluence Rock Creek flows approximately 8 miles until it reaches the Elkhorn River.
22. The Elkhorn River, Rock Creek and their tributaries are waters of the United States, as defined under 40 C.F.R. Part 122.2. The segment of the Elkhorn River into which wastewater from Respondent's facility has discharged is designated for recreation, warm water aquatic life and agricultural uses. In 2004, NDEQ listed this segment of the Elkhorn River as impaired for recreation uses due to high levels of fecal coliform bacteria, which is one of the primary pollutants found in livestock wastes.
23. The Facility contains a sedimentation basin that serves the feeding areas located in Section 3, however the Facility does not have livestock waste control structures to prevent the discharge of animal waste to Rock Creek.
24. Based on the size of the Facility, the distance from the Facility to waters of the United States, and the slope and condition of the land across that distance, wastewater containing pollutants from open feeding areas at the Facility will continue to flow into Rock Creek.
25. The ongoing flow of wastewater from Respondent's Facility to the tributary of Rock Creek and Rock Creek constitute unauthorized discharges of pollutants from a point source to waters of the United States. This is a violation of Sections 301 and 402 of the Clean Water Act, 33 U.S.C. §1311 and 1342, and implementing regulations.

Order For Compliance

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

26. Within fifteen (15) days of the effective date of this Order, Respondent shall submit an Interim Measures Plan to the EPA for review and approval. The Plan shall describe, in detail, actions that Respondent will take to reduce the discharge of runoff from Respondent's feedlots to waters of the United States. The Plan shall also include a schedule for implementation of the interim measures. The interim controls shall remain in place and operated until Respondent completes construction of the feedlot waste control structures necessary to comply with the Clean Water Act. Upon EPA approval of the Interim Measures Plan, Respondent shall implement the Plan immediately.

27. Respondent shall complete construction of feedlot waste control structures that prevent the unauthorized discharges from the Facility to waters of the United States by January 1, 2006. If construction is not completed by this date, Respondent shall cease operations within areas of the Facility where feedlot runoff cannot be managed to prevent discharges to waters of the United States.
28. Respondent shall submit to EPA a Notice for Construction Completion within thirty (30) days of when construction of all feedlot waste control structures is completed. The notification shall be in writing and shall include as-built drawings of the constructed improvements.
29. Beginning thirty (30) days after the effective date of this Order and continuing monthly on the seventh of each month until Respondent submits a Notice of Construction Completion to the EPA, Respondent shall submit written monthly progress reports to the EPA that 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.
30. Upon completion of construction and continuing until such time as Respondent is issued an NPDES Permit for the Facility, Respondent shall maintain the following operational records: 1) storage facility liquid levels after every event with the potential to change the amount of liquid in the storage facility; 2) land application records, including dates, location, amounts applied, and application rates; and 3) precipitation records. Respondent shall submit copies of these records to the EPA on a quarterly basis for the periods of January-March, April-June, July-September and October-December. Records must be submitted on or before the 7th day of the month following the end of the period (October 7, January 7, April 7 and July 7). Upon issuance of an NPDES permit, Respondent shall maintain and submit records as required by the NPDES permit.
31. Within one (1) week of completion of feedlot waste controls, Respondent must submit an application for an NPDES permit to NDEQ. Respondent shall provide written notice to the EPA that an NPDES application was submitted to NDEQ.

Effect of Order

32. Compliance with the terms of this Order shall not relieve Respondent 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.

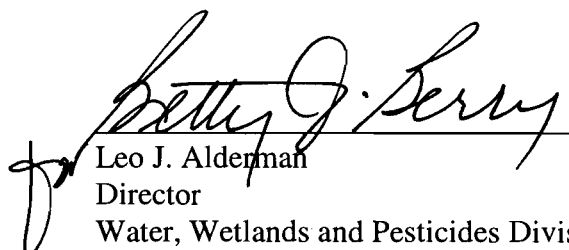
33. This Order shall not constitute a permit under the CWA. Compliance with the terms of this Order shall not relieve Respondent of its responsibility to obtain any required local, state and/or federal permits.
34. Nothing in this Order shall limit the EPA's right to obtain access to, and/or inspect Respondent's Facility, and/or to request additional information from Respondent, pursuant to the authority of Section 308 of the CWA, 33 U.S.C. § 1318.
35. 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.
36. If any provision or authority of this Order or the application of this Order to Respondent is held by federal judicial authority to be invalid, the application to Respondent of the remainder of this Order shall remain in full force and effect and shall not be affected by such a holding.
37. All submissions to the EPA required by this Order shall be sent to:

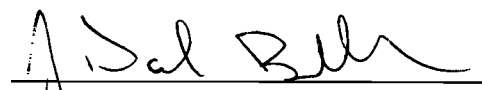
Stephen Pollard
CAFO Compliance Officer
Water, Wetlands and Pesticides Division
U.S. Environmental Protection Agency, Region VII
901 N. 5th Street
Kansas City, Kansas 66101
38. Pursuant to 40 C.F.R. 2.201-2.311, Respondent may assert a business confidentiality claim covering any portion of the submitted 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.

39. Notice is hereby given that violation of, or failure to comply with, any of the provisions of the foregoing Order may subject Respondent to (1) civil penalties of up to \$32,500 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).
40. The terms of this Order shall be effective and enforceable against Respondent upon its receipt of the Order.

Date

05/19/05


Leo J. Alderman
Director
Water, Wetlands and Pesticides Division


J. Daniel Breedlove
Assistant Regional Counsel

CERTIFICATE OF SERVICE

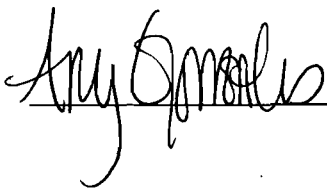
I certify that on the date noted below I filed the original and one true and correct copy of the signed original Findings of Violation and Order of Compliance with the Regional Hearing Clerk, Region VII.

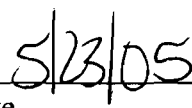
I further certify that I sent by certified mail, return receipt requested, a true and correct copy of the signed original Findings of Violation and Order for Compliance together with cover letter and small business assistance information, to the following registered agent for Jessen Feedlot:

Warren Heller
Warren Heller Feedlots
460 M Road
Wisner, Nebraska 68791

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
Supervisor, Agriculture Section
Water Quality Division
Nebraska Department of Environmental Quality
Suite 400, 1200 N Street, The Atrium
Lincoln, Nebraska 68509




Date _____