

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

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BEFORE THE ADMINISTRATOR

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Central Feeders, Inc.)	Docket No. CWA-07-2013-0022
)	
Overton, Nebraska)	
)	
Respondent)	FINDING OF VIOLATION
)	ORDER FOR COMPLIANCE
)	
)	
Proceedings under)	
Section 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 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. Central Feeders, Inc., (“Respondent”) operates an animal feeding operation (“Facility”) that is located in Section 28 of Township 09 North, Range 19 West, in Dawson County, Nebraska, and has a street address of 75161 Road 447, Overton, 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. 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. The Federal Register preamble to 40 C.F.R. § 122 states that incidental vegetation in a clear area of confinement, such as a feedlot or pen, does not exclude an operation from meeting the definition of an AFO. The preamble also states that the absence of vegetation criterion is evaluated when the animals are confined and, therefore, the use of the lot or facility to grow crops or vegetation when animals are not confined does not exclude the facility from meeting the definition of an AFO.
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 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. “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. “Waters of the United States” are defined in 40 C.F.R. § 122.2 to include intrastate rivers and streams, and tributaries thereto.
14. “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.”
15. “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.

16. The Nebraska Department of Environmental Quality (“NDEQ”) is the agency within the state of Nebraska 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

17. Respondent owns or operates an animal feeding operation (“Facility”) that is located in Section 28 of Township 09 North, Range 19 West, in Dawson County, Nebraska, and has a street address of 75161 Road 447, Overton, Nebraska. The Facility has a maximum capacity of 2500 head of beef cattle confined in open-lot pens or winter feeding areas.
18. On June 13, 2012, EPA personnel conducted a compliance evaluation inspection of the Facility.
19. At the time of the EPA inspection, the Facility was confining approximately 837 head of cattle. During the inspection Respondent stated that approximately 1,100-1,200 head of cattle have been confined within the open pens at the Facility for 80-150 days each of the last three to five years. Respondent also stated that additional cattle are confined in cornfields adjacent to the Facility and used as winter feeding areas from October through April each year.
20. Aerial observations made on May 15, 2012 and inspector observations confirmed that no vegetation or only incidental vegetation is present within confinement pens at the Facility. Only incidental vegetation is present within winter feeding areas when animals are present.
21. In November 2012, the EPA issued an information request seeking additional information from Respondent regarding the number of animals currently confined at the Facility and the number of cattle Respondent foresees confining during the next 12 months. Respondent confirmed in its response that it currently confines approximately 880 head of beef cattle and intends to confine approximately this number of animals through November 2013.
22. Neither crops, vegetation, forage growth, nor post harvest residues are sustained over any portion of the Facility that confines animals. Any vegetation that may have been present was incidental.

23. The Facility confines and feeds or maintains cattle for a total of forty-five (45) days or more in any twelve month period.
24. The Facility is an AFO as defined by 40 C.F.R. § 122.23(b)(1).
25. The number of cattle confined and fed at the Facility was greater than 1,000 for 45 days or more during a twelve month period, therefore the Facility was/is a large CAFO as that term is defined in 40 C.F.R. §122.23(b)(4) and as that phrase is used in Section 502(14) of the CWA, 33 U.S.C. § 1362(14).
26. The EPA inspector observed that the Facility lacks adequate engineered livestock waste control facilities (LWCFs). The inspector observed that a number of pens drain to “wet basins” adjacent to Buffalo Creek. However, the basins are not engineered nor are they operated or maintained to prevent all discharges from production areas to Buffalo Creek. The inspector also observed that Respondent uses Mud Creek as a “wet basin” to capture process wastewater runoff from portions of the Facility production areas.
27. The inspector also observed that a culvert facilitates process wastewater drainage from the feedstock storage area to Mud Creek.
28. Respondent currently confines approximately 800 head of beef cattle and process wastewater discharges to Mud Creek from the Facility’s feedstock storage area are facilitated by a culvert which is a man-made conveyance. As a result, as currently operated, the Facility meets the definition of a medium CAFO.
29. Buffalo Creek and Mud Creek are immediately adjacent to Facility productions areas. The Facility lacks adequate runoff controls to prevent process wastewater discharges to Buffalo and Mud Creeks.
30. Buffalo Creek and Mud Creek are waters of the United States, as defined by 40 C.F.R. Part 122.2.
31. The Facility does not have adequate livestock waste control facilities to prevent the discharge of animal waste to Buffalo Creek and/or Mud Creek.
32. Based on the size of the Facility, the presence of the culvert and the proximity of the Facility to Buffalo Creek and Mud Creek, process wastewater containing pollutants from productions areas at the Facility will continue to intermittently flow into Buffalo Creek and/or Mud Creek as a result of significant precipitation events.

33. The intermittent flow of process wastewater from Respondent's Facility to Buffalo Creek and/or Mud Creek constitutes unauthorized discharges of pollutants from a point source to waters of the United States. These were violations of Sections 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), Respondent is hereby ORDERED to take the following actions to eliminate its violations of the CWA:

34. Respondent shall comply with the CWA.
35. Respondent shall maintain fewer than 1,000 head of cattle unless Respondent applies for an NPDES permit and the Facility is maintained so that manure, litter or process wastewater can be managed at the Facility (including, but not limited to, cattle pens, compost areas, feed storage, winter feeding areas and other productions areas) in a manner that prevents discharges to waters of the United States, except as authorized by an NPDES permit.
36. Within sixty (60) days of the effective date of this Order, Respondent shall reduce the number of cattle confined at the Facility below the regulatory threshold for a medium CAFO, 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 Respondent applies for a NPDES permit that authorizes pollutant discharges to waters of the United States.
37. If Respondent 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 Respondent shall immediately remove and properly dispose of manure, litter and process wastewater from areas that cannot be controlled in a manner to prevent discharges.
38. Within 30 days of the Effective Date of this Order, Respondent shall inform the EPA, in writing, of all actions that Respondent has taken to comply with the Clean Water Act and the terms of this Order.
39. Upon issuance of a NPDES Permit, Respondent shall comply with all terms contained therein.

40. If Respondent intends to construct runoff control structures to allow the confinement of cattle above regulatory thresholds then beginning within thirty (30) days of the Effective Date of this Order and continuing monthly on the seventh day of each month until Respondent submits a Notice of Construction Completion to the EPA, Respondent 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.
41. Upon completion of runoff control structures, Respondent 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.
42. On a quarterly basis for one year, Respondent 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 March-May 2013 on June 7, 2013, and subsequent reports shall be submitted on August 7, 2010, November 7, 2013, and February 7, 2014.

General Provisions

Opportunity to Confer

43. This Order shall become effective 40 days after Water, Wetlands and Pesticides Division Director signature. Prior to the Effective Date, Respondent has 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 Respondent. Within ten days of receipt of this Order, Respondent may request a conference regarding the Order or to submit information to EPA. If Respondent requests a conference or wishes to submit information, the conference or submission of information shall take place within 30 days of the Effective Date of this Order. EPA shall deem a failure to request a conference or to submit information as a waiver of the opportunity to confer.
44. Requests for a conference shall be made in writing to the EPA contact identified in Paragraph 50.


Effect of Order

45. 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. Respondent has 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.
46. 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.
47. 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.
48. 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.
49. 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.
50. 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
11201 Renner Boulevard
Lenexa, Kansas 66219.

51. 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.
52. Failure to comply with the terms of this Section 309(a)(3) Compliance Order may result in your liability for statutory civil penalties under Section 309(d) of the Act, 33 U.S.C. § 1319(d), as modified by 40 C.F.R. Part 19. Should EPA commence an action seeking penalties for violations of this Compliance Order, a United States District Court may impose civil penalties if the court determines that you have violated the Act and failed to comply with the terms of the Order.
53. The Effective Date of this Order shall be 40 days following signature by the Water, Wetlands and Pesticides Division Director, below. The terms of this Order shall become effective and enforceable against Respondent upon the Effective Date.

Date 3-13-13


Karen Flournoy
Director
Water, Wetlands and Pesticides Division



J. Daniel Breedlove
Senior 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 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:

Scott Philpot
Central Feeders, Inc.
75161 Road 447
Overton, Nebraska 68863.

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.



03-14-13
Date