

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. § 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. § 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. § 122.2 to include intrastate rivers and streams, and tributaries thereto.

13. The Kansas Department of Health and Environment (“KDHE”) is the agency within the State of Kansas with the delegated authority to administer the federal NPDES Program pursuant to Section 402 of the Act, 33 U.S.C. § 1342, and a Memorandum of Understanding between EPA and KDHE. 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 (“Facility”) that is located in the Southwest Quarter of Section 5, Township 31 South, Range 21 East, in Labette County, Kansas.
15. On July 27, 2005, 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. The Facility confines greater than 1,000 head of cattle for at least 45 days over a 12 month period, therefore the Facility is a large CAFO as that term is defined in 40 C.F.R. §122.23(b)(4). At the time of the inspection, the Facility Manager indicated the facility was confining approximately 15,000 head of feeder cattle.
20. KDHE issued an NPDES permit to the Facility on October 7, 2002. The facility is permitted for a maximum of 18,000 head of beef cattle weighing more than 700 pounds. The NPDES permit expired on December 26, 2004. The Facility has applied for re-issuance of their permit. The new permit is being processed by KDHE and the 2002 NPDES permit has been administratively extended and its terms remain enforceable.
21. The NPDES permit requires that retention structures be maintained with an adequate storage capacity to ensure structural stability, and provide storage capacity for a two-week period plus precipitation induced flow from a 25-year, 24-hour storm event.

22. During April 2005 through June 2005, the Respondent did not maintain an adequate storage capacity in lagoon cell 1. In June 2005, the Respondent did not maintain an adequate storage capacity in lagoon cell 2, as required by the permit.
23. The NPDES permit requires that the available storage depth shall be recorded daily whenever the water level infringes on the required freeboard, until the required storage capacity is achieved.
24. Operational records indicate the Respondent was not taking daily readings of the available storage depth when the water level infringed upon the required freeboard level.

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:

25. Respondent shall ensure that water levels of all retention structures are in compliance with the operating levels identified in the Respondent's permit. On an ongoing basis, the Respondent shall remove waste water from the retention structures in a timely manner so that the Facility remains in continuous compliance with the retention structure operating level requirements. When removing waste water from the retention structures, the Respondent shall comply with all applicable requirements regarding proper land application of waste water.
26. Respondent shall record all information on a written operational log as required by the permit. The information shall include daily capacity depth readings whenever the water level infringes upon the required capacity level, until the required capacity level is achieved.
27. On a quarterly basis for one year, the Respondent shall submit to EPA copies of completed operational logs that Respondent is required to keep pursuant to Respondent's NPDES permit. The first quarterly report shall be submitted to EPA by April 10, 2006 and subsequent reports shall be submitted by July 10, 2006, October 10, 2006, and January 10, 2007.

Effect of Order

28. 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.
29. 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.
30. 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.
31. 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.
32. 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.
33. All submissions to the EPA required by this Order shall be sent to:

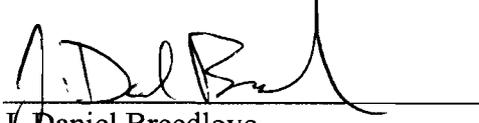
Rochelle Gibson
CAFO Enforcement Program
Water, Wetlands and Pesticides Division
U.S. Environmental Protection Agency Region 7
901 North 5th Street
Kansas City, Kansas 66101.
34. Pursuant to 40 C.F.R. § 2.201-2.311, Respondent may assert a business confidentiality claim covering any portion of the submitted 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.

35. 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).
36. The terms of this Order shall be effective and enforceable against Respondent upon its receipt of the Order.

Date 02/10/06


Betty Berry
Acting Director
Water, Wetlands and Pesticides Division


J. Daniel Breedlove
Assistant Regional Counsel

CERTIFICATE OF SERVICE

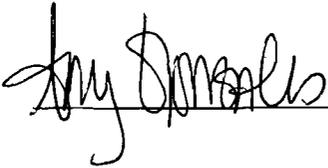
I certify that on the date note below I filed the original and one true and correct copy of the signed original Findings of Violation and Order of Compliance with the Regional Hearing Clerk, Region 7.

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 registered agent for Heritage Feeders, L.P.:

Coporation Service Corporation
Registered Agent for Heritage Feeders, L.P.
200 SW 30th Street
Topeka, Kansas 66611-0000

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 Kansas:

John Harsch, Chief
Livestock Waste Management Program
Kansas Department of Health and Environment
1000 S.W. Jackson
Topeka, Kansas 66612




Date _____