

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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) Docket No. CWA-07-2011-0057
)
KM Feeders, LLC
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Respondent
) FINDING OF VIOLATION
) ORDER FOR COMPLIANCE
)
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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 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. The Respondent is KM Feeders, LLC who owns and operates an animal feeding operation permitted to confine 6,000 beef cattle near Lyons, Kansas. The animal feeding operation (“Facility”) is located in the Northwest 1/4 of Section 22, Township 20 South, Range 7 West in Rice County, Kansas.

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, 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 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 authorized state NPDES programs for violations of the CWA.

Factual Background

14. Respondent owns and operates an animal feeding operation that is located in the NW 1/4 of Section 22, Township 20 South, Range 7 West in Rice County, Kansas
15. On February 15, 2011, 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 5,200 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 is currently operating under a NPDES permit (KS0080730) which was issued on May 21, 2009, and expires May 20, 2014.

Findings of Violation

Count 1

21. Respondent’s NPDES permit requires that water pollution control facilities be operated and maintained to prevent the discharge of livestock waste into waters of the United States. Specifically, the permit requires all waste retention structures be regularly maintained with adequate freeboard to insure 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 the EPA inspection referenced in paragraph 15, the inspector observed that the operating levels for the northwest and south Structures were over levels required by Respondent's NPDES permit.
23. According to Respondent's operational records, between April 2009 and December 2010, Respondent failed to maintain the required operating level in the Northwest Structure 19 of the 21 months; failed to maintain the required operating level in the North Structure four of the 21 months, and; failed to maintain the required operating level in the South Structure 18 of the 21 months. Also, Respondent failed to dispose of wastewater contained within its runoff storage structures on days defined as suitable for land application.
24. Respondent's failure to maintain adequate freeboard and failure to land-apply wastewater on days suitable for land application are violations of Respondent's NPDES permit, and as such, are violations of Section 402 of the CWA, 33 U.S.C. § 1342.

Count 2

25. Respondent's NPDES permit states that available storage depth shall be recorded daily whenever the water level infringes on the required freeboard or the required storage capacity is not available in any retention structure. Daily records are to be kept until the required storage capacity is again available.
26. According to Respondent's operational records for January 2010 to December 2010, daily records of operating levels were not kept on days when the required freeboard level was exceeded.
27. Respondent's failure to record available storage depth when wastewater levels exceeded the required freeboard is a violation of Respondent's NPDES permit, and as such, is a violation of Section 402 of the CWA, 33 U.S.C. § 1342.

Count 3

28. Respondent's NPDES permit required a staff gauge to be installed in the south retention structure by December 1, 2009.
29. During the EPA inspection referenced in paragraph 15, the inspector observed that the staff gauge was not present in the South Structure. The inspector also observed that the staff gauge in the Northwest Structure did not have markings on the gauge to determine the liquid depth of the storage structure.

30. Respondent's failure to provide staff gauges to record available storage depth wastewater levels is a violation of Respondent's NPDES permit, and as such, is a violation of Section 402 of the CWA, 33 U.S.C. § 1342.

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:

31. Respondent shall ensure that wastewater levels in retention structures are in compliance with the storage structure operating levels of Respondent's NPDES permit. On an ongoing basis, Respondent shall remove wastewater from the storage structures in a timely manner so that the Facility remains in continuous compliance with retention structure operating level requirements. Respondent shall comply with all applicable requirements regarding the proper land application of wastes.
32. Respondent shall ensure that it meets or exceeds the inspection and record keeping requirements of its NPDES permit.
33. Within 15 days of the effective date of this Order, Respondent shall install a clearly marked staff gauge in the south retention structure and mark the northwest structure gauge in a way that the liquid depth of the storage structure can be determined.
34. Within 15 days of the effective date of this Order, Respondent shall inform EPA, in writing, of all actions that Respondent has taken and will take to comply with its NPDES permit, the CWA, and the terms of this Order.
35. On a monthly basis for one year, Respondent shall submit to EPA copies of all retention structure levels, precipitation, and land application monthly records (Operations Report) that Respondent is required to keep pursuant to Respondent's NPDES permit.

The first monthly report shall be submitted to EPA on June 10, 2011 and subsequent reports shall be submitted on the 10th day of each month until the final report which is due May 10, 2012.

Effect of Order

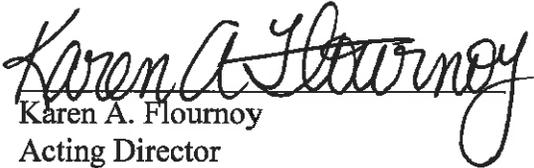
36. Compliance with the terms of this Order shall not relieve Respondent of liability for, or preclude the EPA from initiating an administrative or judicial enforcement action to recover penalties for any violations of the CWA, or seek additional injunctive relief, pursuant to Section 309 of the CWA, 42 U.S.C. § 1319.

37. 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.
38. 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.
39. 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.
40. 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.
41. All submissions to the EPA required by this Order shall be sent to:

Lantz Tipton
CAFO Enforcement Program
Water, Wetlands and Pesticides Division
U.S. Environmental Protection Agency Region 7
901 North 5th Street
Kansas City, Kansas 66101.
42. 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.

43. 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 \$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).
44. The terms of this Order shall be effective and enforceable against Respondent upon its receipt of the Order.

5/10/11
Date


Karen A. Flournoy
Acting Director
Water, Wetlands and Pesticides Division


Chris Muehlberger
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 to:

Kendall Martens
KM Feeders, LLC
2240 Avenue P
Lyons, Kansas 67554.

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:

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



5/10/11
Date