

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION VII
901 N. 5th Street
KANSAS CITY, KANSAS 66101

04 DEC 27 AM 8:25
ENVIRONMENTAL PROTECTION
AGENCY-REGION VII
REGIONAL HEARING CLERK

BEFORE THE ADMINISTRATOR

)
) Docket No. CWA-07-2005-0082
)
)
DB FEEDYARDS, INC.)
BURT COUNTY, 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 the Order for Compliance (“Order”) is 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. DB Feedyards, Inc. (“Respondent”) owns and operates an animal feeding operation located in the West 1/2 of the Northeast 1/4 of Section 7, Township 20 N, Range 10 E in Burt County, Nebraska (“Facility”). The Facility is an open cattle feedlot.

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 40 C.F.R. § 122.1, an 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. An “animal feeding operation” 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. According to 40 C.F.R. § 122.23(b)(2) a “concentrated animal feeding operation” is an animal feeding operation that meets the definition of either a Large CAFO or Medium CAFO under 40 C.F.R. § 122.23(b)(4) or 40 C.F.R. § 122.23(b)(6).
11. “Large CAFO” is defined by 40 C.F.R. § 122.23(b)(4)(iii) as an animal feeding operation where at least “1,000 cattle other than mature dairy cows or veal calves” are stabled or confined.
12. “Waters of the United States” are defined in 40 C.F.R. § 122.2 to include interstate 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. NDEQ’s authority is found in 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. EPA maintains concurrent enforcement authority with delegated state NPDES programs for violations of the CWA.

Factual Background and Findings of Violation

14. Respondent is a corporation and therefore a person as defined by Section 502(5) of the CWA, 33 U.S.C. § 1362.
15. Respondent owns and operates the Facility. The Facility has been in operation since August 1973 and is permitted for 5001 head of cattle. The Facility is located on 60 acres of land.
16. Respondent does not have an NPDES permit for the Facility. Although Respondent has submitted numerous permit applications, it has thus far failed to submit a proper or complete application as directed by NDEQ. On November 2, 1990, NDEQ issued a compliance order requiring the Facility to submit a permit application for construction of wastewater controls. The permit application submitted by Respondent on May 22, 1991 was incomplete. Respondent's resubmission of the permit application on September 3, 1991 was also incomplete. Respondent again submitted an incomplete permit application on June 23, 1992 and resubmitted its application on June 29, 1992. NDEQ issued Respondent a construction permit on August 12, 1992 but revoked it on January 10, 1994 because plans for a full retention system had not been received. Respondent then submitted a new permit application on March 28, 2003. Respondent was notified by NDEQ that the March 28, 2003 application was incomplete on April 24, 2003, and Respondent has taken no action to submit a new or corrected permit application since that date.
17. On May 6, 2004, EPA personnel conducted an inspection of the Facility.
18. At the time of EPA's May 6, 2004 inspection, there were approximately 3,800 head of cattle confined and fed at the Facility. The number of cattle confined and fed at the Facility is above the threshold defined in 40 C.F.R. § 122.23(b)(4)(iii) for Large CAFOs.
19. The Facility confines and feeds or maintains at least 1,000 cattle for a total of 45 days or more in any twelve-month period.
20. No crops, vegetation, forage growth, or post-harvest residues were sustained over any portion of the Facility at the time of inspection, and no such growth is sustained at the Facility in the normal growing season.

21. The Facility is a “concentrated animal feeding operation” as defined by 40 C.F.R. § 122.23(b)(4)(iii), and as that phrase is used in Section 502(14) of the CWA, 33 U.S.C. § 1362(14).
22. The Facility does not have livestock waste controls to control wastewater runoff from the open feedlots. An unnamed tributary of Bell Creek flows across the Facility and connects to Bell Creek two miles east of the Facility. There is a settling basin at the Facility and process wastewater is channeled to the unnamed tributary of Bell Creek via a perforated standpipe. Runoff from the facility flows southeast to the unnamed tributary of Bell Creek.
23. Bell Creek and its unnamed tributary that flows across the Facility are waters of the United States, as defined under 40 C.F.R. Part 122.2.
24. Based on the size of the Facility, the distance of the Facility from waters of the United States, and the slope and condition of the land across that distance, EPA has concluded that wastewater containing pollutants from open lots at the Facility has flowed, and will continue to flow, into Bell Creek and its unnamed tributary during precipitation events, including precipitation events that are smaller than 25-year, 24-hour storm events.
25. The ongoing flow of wastewater from Respondent’s Facility to Bell Creek and its unnamed tributary constitutes an unauthorized discharge of pollutants from a point source to waters of the United States. This, and Respondent’s failure to obtain a permit from NDEQ are violations of Sections 301 and 402 of the CWA, 33 U.S.C. §1311 and 1342, and implementing regulations.
26. Respondent still does not have a permit from NDEQ for construction of livestock waste controls at the Facility.

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:

27. Within 15 days of receipt of this Order, Respondent shall submit, in writing to EPA for review and approval, an interim measures plan (“Plan”). Upon EPA approval, Respondent shall implement the Plan immediately and continue its implementation until Respondent completes construction of the wastewater control structures necessary to comply with the CWA. The Plan shall describe in detail, actions that Respondent will take to reduce the discharge of runoff from the Facility to waters of the United States.

The Plan shall include specific actions that will immediately reduce runoff of pollutants from the Facility, including, but not limited to, protection of runoff from manure piles and repair of the dam that borders the southeast settling basin. The Plan shall also include a schedule for implementation of the interim measures.

28. Within one year of the effective date of this Order, Respondent shall complete construction of feedlot waste control structures in order to prevent the unauthorized discharges from the Facility to waters of the United States. 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.
29. Respondent shall submit to EPA a notice of construction completion within thirty days of when the construction of all feedlot waste control structures at the Facility is completed. This notification shall be in writing and shall include as-built drawings of the constructed improvements.
30. Thirty days after the effective date of this Order Respondent shall submit a written progress report to EPA. Respondent shall submit a written progress report to EPA every month (on or before the 7th day of each month) until such time as Respondent completes construction of its feedlot waste control structures and submits its notice of construction completion. Each progress report 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 construction, and continuing until such time as NDEQ issues Respondent an NPDES Permit for the Facility, Respondent shall maintain the following operational records: 1) records of the waste levels in lagoons (or waste levels in any similar liquid waste storage structure) taken after every event that either raises or lowers lagoon waste levels, including but not limited to, land application events or precipitation events; 2) land application records, including application date, location of application, amount of waste applied, and application rate; and 3) records of precipitation at the Facility. Respondent shall submit copies of these records to 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, i.e., October 7, January 7, April 7 and July 7. Upon receipt of an NPDES permit, Respondent shall maintain and submit records as required by the NPDES permit.
32. Within seven days of completion of feedlot waste control construction, Respondent must submit an application for an NPDES permit to NDEQ for the Facility. Respondent shall provide written notice to EPA stating that it submitted an NPDES application to NDEQ.

Effect of Order

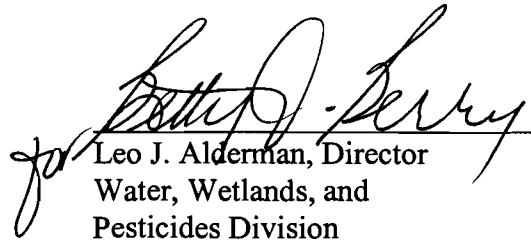
33. Compliance with the terms of this Order shall not relieve Respondent of liability for, or preclude EPA from initiating an administrative or judicial enforcement action to recover, penalties for any violations of the CWA, or seek additional injunctive relief, pursuant to Section 309 of the CWA, 42 U.S.C. § 1319.
34. 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.
35. Nothing in this Order shall limit 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.
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 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.
37. If any provision of this Order, or the application of this Order to Respondent, is invalidated by federal judicial authority, the remainder of this Order shall remain in full force and effect with respect to Respondent and shall not be affected by such a holding.
38. All submissions to EPA required by this Order shall be sent to:


Kimberly Harbour
CAFO Enforcement Program
Water, Wetlands, and Pesticides Division
U.S. Environmental Protection Agency B Region VII
901 N. 5th Street
Kansas City, KS 66101
39. 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 EPA to release the submitted information to the public without further notice. 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 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).
41. The terms of this Order shall be effective and enforceable against Respondent upon its receipt of the Order.

Date: 12/15/04
(Effective Date)


Leo J. Alderman, Director
Water, Wetlands, and
Pesticides Division
EPA Region 7


Michael P. Massey
Assistant Regional Counsel

CERTIFICATE OF SERVICE

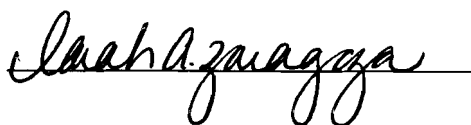
I certify that on the date note below I filed the original and one true and correct copy of the signed original Findings of Violation and Order of Compliance with the Regional Hearing Clerk, Region VII.

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 DB Feedyards, Inc.:

DB Feedyards, Inc.
2370 County Road D
Tekamah, NE 68061-5043

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, NE 68509



12/27/04

Date