

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 7

901 NORTH 5th STREET
KANSAS CITY, KANSAS 66101

BEFORE THE ADMINISTRATOR

UNITED STATES
ENVIRONMENTAL
PROTECTION AGENCY - *MC*
REGION 7
2012 SEP 17 *AM/PM* 8:34

IN THE MATTER OF)
)
)
DOUG CLAASSEN, doing business as)
HENRY CREEK FARMS, INC.)
)
)
Respondent,)
)
)
Proceeding under Section 309(a)(3) of the)
Clean Water Act, 33 U.S.C. § 1319(a)(3))
_____)

Docket No. CWA-07-2012-0050

FINDINGS OF VIOLATION
ORDER FOR COMPLIANCE

Preliminary Statement

1. The following Findings of Violation are made and 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 7, and redelegated to the Director of Region 7’s Water, Wetlands and Pesticides Division.
2. The Respondent is Doug Claassen, who is an owner and operator of Henry Creek Farms, Inc., an animal feeding operation permitted to confine 3,258 swine weighing over 55 pounds, 3,160 swine weighing under 55 pounds, and 200 head of cattle near Whitewater, 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. 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 502(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. “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.
7. “Process wastewater” is an agricultural waste defined by 40 C.F.R. § 122.23(b)(7) to include water directly or indirectly used in the operation of an animal feeding operation, including, *inter alia*, spillage or overflow from animal watering systems and any water which comes into contact with any raw materials, products, or byproducts including manure, feed or bedding.
8. “Point source” is defined by Section 502(14) of the CWA, 33 U.S.C. § 1362(14), 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, [or] concentrated animal feeding operation . . . from which pollutants are or may be discharged.”
9. To implement Section 402 of the CWA, EPA promulgated regulations codified at 40 C.F.R. Part 122. Under 40 C.F.R. § 122.23(d)(1), the owner or operator of a concentrated animal feeding operation must apply for an NPDES permit if the concentrated animal feeding operation discharges.
10. “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.
11. “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, *inter alia*, a Large CAFO in accordance with 40 C.F.R. § 122.23(b)(4).
12. “Large CAFO” is defined according to 40 C.F.R. § 122.23(b)(4)(iv) as an animal feeding operation that stables or confines as many or more than 2,500 swine each weighing 55 pounds or more. Once a given operation is defined as a CAFO, regardless of animal type, the regulations apply to all of the manure, litter, and wastewater generated by the operation. *See National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines and Standards for Concentrated Animal Feeding Operations*, 68 Fed. Reg. 7194 (February 12, 2003).
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. The Kansas Department of Health and Environment (“KDHE”) is the agency within the state of Kansas authorized to administer the federal NPDES Program pursuant to Section 402 of the CWA, 33 U.S.C. § 1342, and a Memorandum of Understanding between EPA and KDHE. EPA maintains concurrent enforcement authority with authorized state NPDES programs for violations of the CWA.

EPA Findings

Findings of Fact and Law

15. Respondent owns and operates an animal feeding operation (the “Facility”) that is located in the Southwest ¼ of Section 6, Township 24 South, Range 4 East, in Butler County, Kansas.
16. On February 16, 2012, the EPA conducted a compliance evaluation inspection of the Facility.
17. The Facility confines and feeds or maintains swine and cattle for a total of forty-five (45) days or more in any twelve month period.
18. Crops, vegetation, forage growth, and post harvest residues are not sustained over any portion of the Facility that confines swine or cattle while swine or cattle are present.
19. The Facility is an AFO as defined by 40 C.F.R. § 122.23(b)(1).
20. At the time of the EPA inspection, the Facility was confining approximately 3,800 finishing swine, 900 nursery swine, 640 sows, 90 sows/litters, and 210 head of beef cattle.
21. The number of swine weighing 55 pounds or more confined and fed or maintained at the Facility is greater than 2,500, therefore the Facility is a large CAFO as that term is defined in 40 C.F.R. § 122.23(b)(4)(iv).
22. The Facility is a CAFO as defined by 40 C.F.R. § 122.23(b)(2) and as that phrase is used in Section 502(14) of the CWA, 33 U.S.C. § 1362(14).
23. Respondent is currently operating under NPDES permit number KS0089451, which was issued on January 19, 2010, and will expire on January 18, 2015.
24. The Facility is located approximately 50 feet from Henry Creek. Henry Creek borders the north and east sides of the Facility and flows east approximately ¼ mile before entering the Whitewater River. Henry Creek and the Whitewater River are waters of the United

States, as defined in 40 C.F.R. Part 122.2.

Findings of Violation

25. The facts stated in Paragraphs 15 through 24, above, are herein incorporated.

Unauthorized Discharges

26. Paragraph 2 of the Standard Conditions section of Respondent's NPDES permit requires that animal waste management systems shall be designed, constructed, maintained and operated to prevent the pollution of waters of the State and to protect public health and the environment. Part B of Respondent's NPDES permit further requires that runoff and wastewater containing livestock or related waste not collected or retained by water pollution control facilities shall be controlled in a manner to prevent water pollution.
27. During the EPA inspection referenced in Paragraph 16 above, the inspector observed that the East cattle feeding pen and the northeast corner of the Middle cattle feeding pen did not have runoff controls. During precipitation events, process wastewater from the East pen and the northeast corner of the Middle pen flows north and northeast, respectively, approximately 50 feet before directly entering Henry Creek. The inspector documented pronounced erosional features beginning on the north side of the East and Middle cattle feeding pens and running generally northeast. The inspector also noted manure solids present in the area located between these pens and Henry Creek.
28. During the EPA inspection referenced in Paragraph 16 above, the inspector observed that the silage bunker at the feedstock storage area of the Facility did not have runoff controls. The inspector documented process wastewater pooled near the silage bunker and observed process wastewater flow paths from the silage bunker to Henry Creek. During a precipitation event, process wastewater from the silage bunker flows north then east through a defined channel into Henry Creek.
29. Paragraph 1 of the Standard Conditions section of Respondent's NPDES permit defines process wastes as including excrement from animal carcasses and raw, intermediate, or finished materials associated with wastes or contaminated stormwater runoff from animal waste or dead animal composting operations.
30. During the EPA inspection referenced in Paragraph 16 above, the inspector observed that the cattle mortality disposal site located on the bank of Henry Creek, north of the Retention Structure #5, did not have runoff controls. Process wastewater from the mortality disposal site flows down the bank and directly into Henry Creek.
31. During the EPA inspection referenced in Paragraph 16 above, the inspector observed that

the Facility was using a composting area to dispose of swine mortalities which did not have runoff controls. During a precipitation event process wastewater from the mortality composting area flows east then south directly into Henry Creek.

32. Respondent did not have adequate animal waste management systems to control runoff and process wastewater from the East and Middle cattle feeding pens, the silage bunker, the cattle mortality disposal site, or the mortality composting area in a manner that would prevent water pollution during a precipitation event. Based on the size of the Facility, the distance from these areas to Henry Creek, and the slope and condition of the land across that distance, process wastewater pollutants from these areas have and will continue to flow into Henry Creek during precipitation events less than a 25-year, 24-hour rainfall event.
33. The intermittent yet ongoing flow of process wastewater pollutants from uncontrolled production areas at Respondent's Facility to Henry Creek constitutes unauthorized discharges of pollutants from a point source to waters of the United States. This is a violation of Respondent's NPDES permit and of Sections 301 and 402 of the Clean Water Act, 33 U.S.C. §§ 1311 and 1342, and implementing regulations.

Change in Operations

34. Paragraph 1 of Part D of Respondent's NPDES permit requires that any significant operational changes, modifications, or capacity increases shall be reported and approved by KDHE prior to implementation. Paragraph 9 of the Standard Conditions section of the NPDES permit requires that any significant anticipated change in operations shall be reported to the Division at least one hundred eighty (180) days before such change occurs. The Standard Conditions define a "significant Change in Operations" to include a change in construction or operation of a confined feeding facility that may affect the collection, storage, handling, treatment, utilization, or disposal of animal or other process wastes. Paragraph 9 further states that notification to and approval by the Director is required prior to a significant change in disposal method.
35. The EPA inspection referenced in Paragraph 16 above, and review of the Facility's Swine Dead Handling Plan, revealed that the mortality disposal method approved by KDHE is to bury mortalities on site. Respondent stated during the inspection that the Facility is testing composting methods of disposal for mortality management, and the EPA inspector documented composting methods being used to dispose swine mortalities. Correspondence between EPA and KDHE confirmed that Respondent failed to notify and await approval from KDHE before changing operational mortality handling practices from burial to composting.
36. Respondent's failure to notify and await approval from KDHE prior to operational

changes in the mortality disposal method is a violation of Respondent's NPDES permit and of Section 402 of the Clean Water Act, 33 U.S.C. § 1342.

Permitted Capacity

37. The Facility Summary on Page 1 of Respondent's NPDES permit allows the Facility to have a maximum capacity of 3,258 head of swine weighing greater than 55 pounds and 3,160 head of swine weighing 55 pounds or less. The NPDES permit also allows for a maximum capacity of 200 head of cattle weighing less than 700 pounds.
38. The EPA inspection referenced in Paragraph 16 above revealed that the Facility contained approximately 3,800 finishing swine, 900 nursery swine, 640 sows, 90 sows/litters, and 210 head of beef cattle at the time of the inspection. Therefore Respondent was exceeding the Facility's permitted maximum capacity by approximately 1,272 head of swine weighing over 55 pounds and by approximately 10 head of beef cattle.
39. Respondent's failure to comply with the permitted maximum capacity is a violation of Respondent's NPDES permit and of Section 402 of the Clean Water Act, 33 U.S.C. § 1342.

Section 309(a) Order for Compliance

Based on the EPA's Findings 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:

40. Immediately upon receipt of this Order, Respondent shall identify and implement all necessary actions to correct the deficiencies cited above, and to comply with the conditions and limitations of its NPDES permit and the CWA.
41. If Respondent is unable to prevent all unauthorized discharges from uncontrolled production areas at the Facility, Respondent shall remove cattle and manure from the uncontrolled areas, and properly dispose of the manure, within 30 calendar days of receipt of this Order. Respondent shall cease the use of these areas until adequate runoff controls are constructed.
42. Respondent shall contact KDHE to report all proposed changes in operation, including capacity increases and composting as the mortality management method, to prevent water pollution and to protect public health and the environment.
43. Within thirty (30) days of the effective date of this Order, Respondent shall inform EPA,

in writing, of all actions taken to comply with its NPDES permit, the CWA, and the terms of this Order.

44. If Respondent intends to construct manure, litter, or process wastewater control structures or intends to repair structures that are inadequate to control runoff, Respondent shall submit written monthly progress reports to EPA 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 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 or will be addressed.
45. Respondent shall submit a Notice of Construction completion certified by a professional engineer to EPA within thirty (30) days of completing construction or repair of manure, litter, or process wastewater control structures. The notification shall be in writing and shall include as-built drawings of the constructed improvements.
46. All submissions to the EPA required by this Order shall be sent to:

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

General Provisions

Opportunity to Confer

47. This Order shall become effective 30 days after its receipt by Respondent. 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 20 days of receipt of this Order. EPA shall deem a failure to request a conference or to submit information as a waiver of the opportunity to confer.
48. Requests for a conference shall be made in writing to the EPA contact identified in

Paragraph 46.


Effect of Order

49. Failure to comply with the terms of the Section 309(a)(3) Compliance Order may result in Respondent's 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 Respondent has violated the Act and failed to comply with the terms of the Order.
50. 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 preclude EPA from seeking additional injunctive relief, pursuant to Section 309 of the CWA, 42 U.S.C. § 1319.
51. 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.
52. 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.
53. 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.
54. 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.
55. 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.
56. Pursuant to 40 C.F.R. § 2.201-2.311, Respondent may assert a business confidentiality

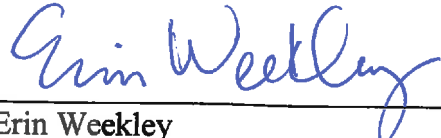
claim covering any portion of the submitted information which is entitled to confidential treatment and which is not effluent data. For any such claim, describe the basis for the claim under the applicable regulation. Any material for which business confidentiality is claimed should be placed in a separate 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. 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.

57. The terms of this Order shall be effective and enforceable against Respondent 30 days after Respondent receives an executed copy of the Order.
58. This Order shall remain in effect until a written notice of termination is issued by an authorized representative of EPA. Such notice shall not be given until all of the requirements of this Order have been met.

Date SEP 17 2012



Karen A. Flourmoy
Director
Water, Wetlands and Pesticides Division



Erin Weekley
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 Docket 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:

Doug Claassen
Henry Creek Farms
10636 N.W. 110th Street
Whitewater, Kansas 67154

and to

Olin K. Claassen
Registered Agent
Henry Creek Farms, Inc.
10636 N.W. 110th Street
Whitewater, Kansas 67154.

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:

Michael B. Tate
Interim Director, Bureau of Water
Kansas Department of Health and Environment
1000 SW Jackson Street, Suite 420
Topeka, Kansas 66612-1367.

SEP 17 2012



Date