

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 7

901 NORTH FIFTH STREET
KANSAS CITY, KANSAS 66101

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ENVIRONMENTAL PROTECTION
AGENCY REGION VII
REGIONAL HEARING CLERK

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)

POVERTY KNOB FARM, INC.)

IDA COUNTY, IOWA)

Respondent,)

Proceedings under Section 309(g) of the)
Clean Water Act, 33 U.S.C. § 1319(g))

) Docket No. CWA-07-2008-0030

) COMPLAINT, NOTICE OF
) PROPOSED PENALTY AND
) NOTICE OF OPPORTUNITY
) FOR HEARING

COMPLAINT

Jurisdiction

1. This is an administrative action for the assessment of civil penalties instituted pursuant to Section 309(g) of the Federal Water Pollution Control Act, commonly referred to as the Clean Water Act ("CWA"), 33 U.S.C. § 1319(g), and in accordance with the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. Part 22.

2. This Complaint serves as notice that the United States Environmental Protection Agency ("EPA") has reason to believe that Respondent has violated Sections 301, 308, and 402 of the CWA, 33 U.S.C. §§ 1311, 1318 and 1342, and regulations promulgated thereunder.

Parties

3. The authority to take action under Section 309(g) of the CWA, 33 U.S.C. § 1319(g), is vested in the Administrator of EPA. The Administrator has delegated this authority to the Regional Administrator, EPA Region 7, who in turn has delegated it to the Director of the Water, Wetlands and Pesticides Division of EPA Region 7 ("Complainant").

4. Respondent is Poverty Knob Farm, Inc., a corporation authorized to conduct business in the state of Iowa.

Statutory and Regulatory Framework

5. 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. 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.

6. The CWA prohibits the discharge of “pollutants” from a “point source” into a “navigable water” of the United States, as these terms are defined by Section 502 of the CWA, 33 U.S.C. § 1362. Section 502 of the CWA states that “navigable waters” means the 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. Section 308(a) of the CWA, 33 U.S.C. § 1318(a), states in pertinent part that “whenever required to carry out the objective of this chapter, including but not limited to (1) developing or assisting in the development of any . . . limitation, prohibition, or standard of performance under this chapter; (2) determining whether any person is in violation of any such . . . limitation, prohibition, or . . . standard of performance; (3) any requirement established under this section; or (4) carrying out sections 305, 311, 402, 404 (relating to state permit program), 405, 504 of the [CWA] –

(A) the Administrator shall require the owner or operator of any point source to (i) establish and maintain records, (ii) make such reports, (iii) install, use, and maintain such monitoring equipment or methods . . . (iv) sample such effluents . . . ; and (v) provide such other information as he may reasonable be required . . .”

10. To implement Sections 301, 308 and 402 of the CWA, 33 U.S.C. §§ 1311, 1318 and 1342, the EPA promulgated regulations codified at 40 C.F.R. § 122. Under 40 C.F.R. § 122.1, a NPDES permit is required for any point source that discharges or proposes to discharge into waters of the United States.

11. The EPA's specific regulation of CAFOs began March 18, 1976, when the EPA promulgated regulations requiring, *inter alia*, all AFOs to apply for a NPDES permit if they confined greater than 1,000 cattle and discharged to waters of the United States as a result of precipitation events with less than a 25-year/24 hour frequency/intensity. 41 Fed. Reg. 11458 (1976). The 1976 regulations were in effect until the current CAFO regulations became effective on April 14, 2003. The 2003 CAFO regulations, *inter alia*, retained the definition of an AFO in the 1976 regulations and eliminated the 25-year/24-hour frequency/intensity discharge exemption to the permitting requirement. *See*, 68 Fed. Reg. 7176 (2003).

12. "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.

13. "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)(4).

14. "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."

15. "Waters of the United States" are defined in 40 C.F.R. § 122.2 to include intrastate rivers and streams, and tributaries thereto.

16. The Iowa Department of Natural Resources ("IDNR") is the agency within the state of Iowa with the delegated authority to administer the federal NPDES Program. The EPA maintains concurrent enforcement authority with delegated state NPDES programs for violations of the CWA.

Factual Background

17. Respondent is a "person" as defined by Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

18. Respondent owns and operates an animal feeding operation ("Facility") that is located in Section 3 of Township 89 North, Range 40 West, in Ida County, Iowa. The Facility consists of two separate open confinement pen areas. Each confinement pen area has the capacity to confine approximately 900 head of cattle.

19. The Facility confined and fed or maintained cattle for a total of 45 days or more in any twelve-month period pertinent to this Complaint.

20. Neither crops, vegetation, forage growth, nor post harvest residues were sustained over any portion of the Facility's feeding areas at any time pertinent to this Complaint.

21. The Facility was an AFO as defined by 40 C.F.R. § 122.23(b)(1) at all times pertinent to this Complaint.

22. Inspectors from EPA inspected the Facility on March 20, 2007.

23. At the time of the March 20, 2007 inspection, Respondent was confining approximately 1,400 head of cattle. Approximately 800 head were located in the southern feeding pens and 600 head were located in the northern feeding pens. Respondent currently confines approximately 1,800 head at the facility. Respondent confined greater than 1,000 head of beef cattle at all times pertinent to this Complaint.

24. The Facility has been 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) at all times pertinent to this Complaint.

25. Respondent does not have a NPDES permit for the Facility. Respondent did not have a NPDES permit at any time pertinent to this Order.

26. Feedlot runoff from the southern confinement pens enters a road ditch and through a culvert under Eagle Avenue. The runoff then flows approximately 900 feet through a defined erosional feature northward through a pasture before discharging into an unnamed tributary of Silver Creek. Discharge from the Facility flows approximately ½ mile before reaching Silver creek. At the time of the inspection a large manure flow from the southern confinement pens was visible in the ditch and culvert on Eagle Avenue.

27. Feedlot runoff from the northern confinement pens is diverted by a series of runoff control terraces toward a road ditch along Eagle Avenue. The runoff is diverted by the terraces into the road ditch and flows into the unnamed tributary of Silver Creek. Feedlot runoff from the north confinement pens discharges into the unnamed tributary approximately 250 feet downstream of the point where feedlot runoff from the southern confinement pens discharges into the unnamed tributary.

28. Silver Creek and its tributaries are waters of the United States, as defined by 40 C.F.R. Part 122.2.

29. The Facility did not have adequate livestock waste controls to prevent the discharge of animal waste to the unnamed tributary of Silver Creek and Silver Creek at any time pertinent to this Complaint. Feedlot runoff from the Facility contains pollutants including ammonia, fecal coliform and other pollutants typically associated with feedlots. IDNR sampling identified feedlot contaminants in the tributary of Silver Creek.

30. Based on the size of the Facility, the distance from the Facility to Silver Creek and its tributaries, and the slope and condition of the land across that distance, wastewater containing pollutants from open feeding areas at the Facility discharge into Silver Creek and its tributaries as a result of significant precipitation events.

Findings of Violation

Count I

Unpermitted Discharge of Pollutants to Waters of the United States

31. The facts stated in paragraphs 17 through 30 above are herein incorporated.

32. Based on the size of the Facility, the lack of adequate runoff control structures, the distance from the Facility to Silver Creek and its tributary, and the slope and condition of the land across that distance, the Facility discharged wastewater containing pollutants into Silver Creek and its tributary as a result of significant precipitation events while Respondent has confined greater than 1,000 head at the Facility. Precipitation records demonstrate that there have been a minimum of five (5) precipitation events while the Facility confined greater than 1,000 head since 2004 that have resulted in the discharge of pollutants from the Facility to Silver Creek.

33. The flow of wastewater from Respondent's Facility to Silver Creek and its tributary constituted unauthorized discharges of pollutants from a point source to waters of the United States. The discharges are violations of Sections 301 and 402 of the CWA, 33 U.S.C. §§ 1311 and 1342, and implementing regulations.

Count 2

Failure to Apply for a NPDES Permit

34. The facts stated in paragraphs 17 through 30 above are herein incorporated.

35. Based on the size of the Facility, the lack of adequate runoff control structures, the distance from the Facility to Silver Creek and its tributary, and the slope and condition of the land across that distance, the Facility discharged wastewater containing pollutants into Silver

Creek and its tributary as a result of significant precipitation events while Respondent has confined greater than 1,000 head at the Facility. Precipitation records demonstrate that there have been a minimum of five (5) precipitation events while the Facility confined greater than 1,000 head since 2004 that have resulted in the discharge of pollutants from the Facility to Silver Creek and its tributary.

36. Large CAFOs that discharge have the duty to apply for a NPDES permit. 40 C.F.R. § 122.21 (a). Respondent's Facility is a large CAFO which discharged pollutants without a NPDES permit in violation of Sections 301 and 402 of the CWA, 33 U.S.C. §§ 1311 and 1342, and implementing regulations. Respondent had a duty to apply for a NPDES permit 180 days prior to discharging any pollutants to waters of the United States and has not applied for a NPDES permit.

37. Respondent's failure to apply for a permit is a daily violation of Section 301, 308, and/or 402 of the CWA, 33 U.S.C. §§ 1311, 1318, and/or 1342, and implementing regulations.

Relief

38. Section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), authorizes the administrative assessment of civil penalties in an amount not to exceed \$10,000 per day for each day during which the violation continues, up to a maximum total penalty of \$125,000. Pursuant to the Civil Monetary Penalty Inflation Adjustment Rule of 2004, as mandated by the Debt Collection Improvement Act of 1996, and the EPA's implementing regulations at 40 C.F.R. Parts 19 and 27, civil administrative penalties of up to \$11,000 per day for each day during which a violation continues, up to a maximum of \$157,500, may be assessed for violations of CWA Sections 301 and 402, 33 U.S.C. §§ 1311 and 1342, that occur after March 15, 2004.

39. Based on the foregoing Finding of Violations, and pursuant to Section 309(g) of the CWA, 33 U.S.C. § 1319(g), EPA, Region 7 hereby proposes to issue a Final Order Assessing an Administrative Penalty against the Respondent for the violations cited above, in the amount of up to \$11,000 per day for each day during which a violation occurred on or after January 31, 1997, up to a maximum of \$137,500, and \$11,000 per day for each day during which a violation occurred on or after March 16, 2004, up to a maximum of \$157,500.

40. The proposed penalty is based upon the facts stated in this Complaint, the nature, circumstances, extent, and gravity of the violation, and with respect to the violator, ability to pay, any prior history of such violation, the degree of culpability, economic benefit or savings resulting from the violation, and such other matters as justice may require.

41. The penalty proposed in this Complaint is based upon the best information available to EPA at the time that the Complaint was issued. The penalty may be adjusted if the

Respondent establishes bona fide issues of ability to pay, or other defenses relevant to the appropriate amount of the proposed penalty.

42. As required by Section 309(g)(4) of the CWA, 33 U.S.C. § 1319(g)(4), prior to the assessment of a civil penalty, EPA will provide public notice of the proposed penalty, and reasonable opportunity for the public to comment on the matter, and present evidence in the event a hearing is held.

43. The EPA has notified the state of Iowa regarding this proposed action by mailing a copy of this document to the Iowa Department of Natural Resources.

NOTICE OF OPPORTUNITY TO REQUEST A HEARING

Answer and Request for Hearing

44. Respondent may request a hearing to contest any material fact contained in the Complaint above or to contest the appropriateness of the proposed penalty set forth therein. Such a hearing will be held and conducted in accordance with the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. Part 22, a copy of which is enclosed herein.

45. To avoid being found in default, which constitutes an admission of all facts alleged in the Complaint and a waiver of the right to hearing, Respondent must file a written answer and request for hearing within thirty (30) days of service of this Complaint and Notice of Opportunity for Hearing. The answer shall clearly and directly admit, deny, or explain each of the factual allegations contained in this Complaint with respect to which Respondent has any knowledge, or shall clearly state that Respondent has no knowledge as to particular factual allegations in this Complaint. The answer shall also state (a) the circumstances or arguments which are alleged to constitute the grounds of defense; (b) the facts that Respondent disputes; (c) the basis for opposing any proposed relief; and (d) whether a hearing is requested. Said answer shall be filed with the following:

Regional Hearing Clerk
United States Environmental Protection Agency, Region 7
901 North 5th Street
Kansas City, Kansas 66101

46. Failure to admit, deny or explain any material factual allegation in this Complaint constitutes an admission of the allegation.

47. A hearing upon the issues raised by this Complaint and the answer may be held if requested by Respondent in the answer. If Respondent does not request a hearing, the Presiding Officer may hold a hearing if issues appropriate for adjudication are raised in the answer.

48. In any hearing on the proposed penalty for this Complaint, members of the public to whom EPA is obligated to give notice of this proposed penalty action, will have the right, under Section 309(g)(4)(B) of CWA, 33 U.S.C. § 1319(g)(4)(B), to be heard and present evidence on the merits of the proposed CWA penalty assessment. If no hearing is held, EPA will issue a Final Order Assessing Administrative Penalties pursuant to the CWA, and only members of the public who submitted timely comments on the proposed penalty assessment will have an additional thirty (30) days to petition to set aside the said Order and to hold a hearing thereon. The EPA will grant the petition and will hold a hearing only if the petitioners' evidence is material and was not considered by EPA in the issuance of the Final Order.

49. If Respondent fails to file a written answer within thirty (30) days of service of this Complaint and Notice of Opportunity for Hearing, Respondent may be found in default. Such default by Respondent constitutes an admission of all facts alleged in the Complaint and a waiver of Respondent's right to contest such factual allegations. A Default Order may thereafter be issued by the Presiding Officer and the civil penalties proposed herein shall become due and payable unless the record clearly demonstrates that the requested relief is inconsistent with the CWA.

Informal Settlement Conference

50. Whether or not Respondent requests a hearing, an informal conference may be requested in order to discuss the facts of this case, the proposed penalty, and the possibility of settlement. To request a settlement conference, please contact:

J. Daniel Breedlove
Assistant Regional Counsel
United States Environmental Protection Agency, Region 7
901 North 5th Street
Kansas City, Kansas 66101
Telephone (913) 551-7172

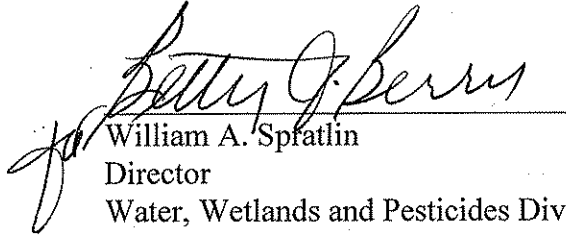
51. Please note that a request for an informal settlement conference does not extend the thirty (30) day period during which a written answer and request for a hearing must be submitted.

52. The EPA encourages all parties against whom a civil penalty is proposed to pursue the possibilities of settlement as a result of informal conference. Any settlement which may be reached as a result of such a conference shall be embodied in a written Consent

Agreement and Final Order issued by the Regional Judicial Officer, EPA, Region 7. The issuance of such a Consent Agreement and Final Order shall constitute a waiver of Respondent's right to request a hearing on any matter stipulated therein.


53. If Respondent has not filed an answer within the thirty (30) day time period allowed by this Notice, the penalties proposed above may be assessed by the entry of a Default Order.

02/01/08
Date



William A. Spratlin
Director
Water, Wetlands and Pesticides Division

1/29/2008
Date



J. Daniel Breedlove
Assistant Regional Counsel

CERTIFICATE OF SERVICE

I certify that on the date indicated below, I hand delivered the original and one true copy of this Complaint and Notice of Opportunity for Hearing to the Regional Hearing Clerk, United States Environmental Protection Agency, 901 North 5th Street, Kansas City, Kansas 66101.

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 Complaint and Notice of Opportunity for Hearing and a Small Business Fact Sheet to:

Eldon McAfee
Beving, Swanson & Forrest, P.C.
321 E. Walnut St., Suite 200
Des Moines, IA 50309

Mr. Jon Schubert
Poverty Knob Farm, Inc.
1034 Eagle Avenue
Holstein, Iowa 51025

Kenneth Hessenius
Field Office Supervisor
Field Office #3
Iowa Department of Natural Resources
1900 North Grand Avenue
Spencer, Iowa 51301.

2/1/08

Date

Kimberly West