

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION VII

901 N. 5th Street

KANSAS CITY, KANSAS 66101

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ENVIRONMENTAL PROTECTION
AGENCY-REGION VII
REGIONAL HEARING CLERK

BEFORE THE ADMINISTRATOR

IN THE MATTER OF

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) Docket No. CWA-ACO-7-2004-0046

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Heritage Feeders

Pawnee County, Kansas

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Respondent

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FINDINGS OF VIOLATION
ORDER FOR COMPLIANCE

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Proceedings under

Section 309(a)(3)

of the Clean Water Act,

33 U.S.C. § 1319(a)(3)

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Preliminary Statement

1. The following Findings of Violation and Order for Compliance (“Order”) are made and 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. The Respondent is Heritage Feeders, which owns and operates an animal feeding operation located in the East 1/2 of Section 21, Township 22S, Range 16W in Pawnee County, Kansas.

Statutory and Regulatory Framework

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. Part 122. Under C.F.R. Part 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. “Concentrated animal feeding operation” is defined by 40 C.F.R. § 122.23(b)(3) as “an ‘animal feeding operation’ which meets the criteria in Appendix B of this part.”
 10. “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.
 11. Appendix B to 40 C.F.R. § 122.23 states that an animal feeding operation is a concentrated animal feeding operation for purposes of § 122.23 if the animal feeding operation confines more than 1,000 slaughter and feeder cattle.
 12. Concentrated Animal Feeding Operations are by definition point sources subject to the NPDES permit program. 40 C.F.R. § 122.23(a).
 13. “Waters of the United States” are defined in 40 C.F.R. Part 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 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

15. Respondent is a limited liability company and is therefore a person as defined by Section 502(5) of the CWA, 33 U.S.C. § 1362(5).
16. Respondent owns and operates a cattle feeding operation (“Facility”) located in the East 1/2 of Section 21, Township 22S, Range 16W of Pawnee County, Kansas.

Respondent’s facility consists of approximately 163 acres of open pen lots and appurtenant structures. Runoff from the lots is collected in eight wastewater retention ponds.

17. On August 12, 2003, EPA conducted an NPDES inspection of Respondent’s animal feeding operation.
18. At the time of the inspection, the Facility confined at least 1,000 cattle, which is equivalent to at least 1,000 “animal units” as that term is defined in 40 C.F.R. Part 122, Appendix B.
19. The Facility confines and feeds or maintains cattle for a total of 45 days or more in any 12-month period.
20. Neither crops, vegetation, forage growth, nor post-harvest residues were sustained over any portion of the confined feeding areas at the Facility at the time of the inspection.
21. The Facility is a “concentrated animal feeding operation” as defined by 40 C.F.R. § 122.23(b)(3), and is therefore a “point source” as defined by CWA Section 502(14), 33 U.S.C. § 1362(14).
22. KDHE granted a NPDES Permit, No. KS 0037575, effective August 6, 2003, to Respondent.
23. On page 1, paragraph 3 of Respondent’s NPDES permit no. KS0037575 provided:

“...the water pollution retention structures(s) shall be maintained with adequate freeboard to insure structural stability and with sufficient available storage capacity to retain future dry weather wastewater accumulations from a two (2) week period plus the runoff from all contributing drainage areas from a 25-year, 24-hour storm event.”
24. At the time of inspection on August 12, 2003, Heritage Feeders did not have the adequate freeboard in lagoons 2, 3, and 8 as required in their NPDES permit.

25. On page 6 of Respondent's NPDES permit no. KS0037575 it states that "The manure/waste management plan developed by the designer and approved by the Department shall be adhered to as a condition of this permit."
26. The inspector states in his report that "The Manure/Waste Management Plan indicates that the facility has 1,113 acres available for effluent application. These 1,113 acres include 126 acres known as A.W. South and 126 acres known as A.W. North. At the time of inspection, these two areas were not connected to the effluent distribution system and thus, was not available for use."

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 permit conditions and the CWA:

27. Within 30 days of receipt of this Order, Respondent shall make available the required freeboard and storage capacity in all runoff retention structures.
28. Within 60 days of receipt of this Order, Respondent shall connect areas known as A.W. North and A.W. South to the effluent distribution system.
29. On a quarterly basis for one year, Respondent shall submit to EPA copies of all lagoon level, precipitation, and land application records that Respondent is required to keep pursuant to Respondent's NPDES permit. The first quarterly report shall be submitted to EPA on April 1, 2004, and subsequent reports shall be submitted on July 1, 2004, October 1, 2004, and January 1, 2005.

Effect of Order


30. 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.
31. 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.

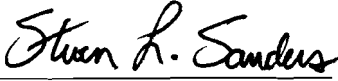
32. Nothing in this Order shall limit EPA's right to obtain access to, and/or inspect Respondent's Facility, and/or to request additional information from Respondent pursuant to the authority of Section 308 of the CWA, 33 U.S.C. § 1318.
33. EPA may subsequently amend this Order in accordance with the 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.
34. 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.
35. All submissions to EPA required by this Order shall be sent to:

Paula Higbee
CAFO Enforcement Coordinator
Water, Wetlands, and Pesticides Division
U.S. Environmental Protection Agency – Region VII
901 N. 5th Street
Kansas City, KS 66101
36. 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 Clean Water Act appear in 40 C.F.R. § 2.302.
37. 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 \$27,500 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).

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

Date 12-30-03


for Leo M. Alderman
Director
Water, Wetlands, and Pesticides Division


Steven L. Sanders
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, small business assistance information and a copy of the Part 22 Rules to the following:

Heritage Feeders, L.P. - Larned
P.O. Box 134
Larned, Kansas 67550

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 representatives 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

1/5/04
Date

