

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION VII

901 NORTH 5th STREET
KANSAS CITY, KANSAS 66101

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ENVIRONMENTAL PROTECTION
AGENCY-REGION VII
REGIONAL HEARING CLERK

BEFORE THE ADMINISTRATOR

PERFORMANCE FEEDERS, INC.)	
)	Docket No. CWA-07-2007-0051
)	
O'BRIEN COUNTY, IOWA)	
)	
Respondent)	FINDING OF VIOLATION
)	ORDER FOR COMPLIANCE
)	
)	
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 308(a) and Section 309(a)(3) of the Clean Water Act ("CWA" or "Act"), 33 U.S.C. §§ 1318 and 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. Performance Feeders, Inc., ("Respondent") owns and/or operates an animal feeding operation located in Section 11 of Township 97 North, Range 42 West, in O'Brien County, Iowa.

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, the EPA promulgated regulations codified at 40 C.F.R. § 122. Under 40 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 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 and Findings of Violation

14. Respondent owns and operates an animal feeding operation (“Facility”) that is located in Section 11 of Township 97 North, Range 42 West, in O’Brien County, Iowa.
15. The Facility confines and feeds or maintains cattle for a total of 45 days or more in any twelve-month period.
16. Neither crops, vegetation, forage growth, nor post harvest residues are sustained over any portion of the Facility’s feeding areas.
17. 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).
18. Inspectors from EPA inspected the Facility on January 30, 2007.
19. At the time of the January 30, 2007 inspection, the Facility was confining approximately 2,300 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 did not have an NPDES permit for the facility at the time of the inspection.
21. Runoff from Respondent’s feed storage area, temporary manure storage area and certain open pens located on the south side of the southern shelter building have no run off controls in place. Runoff from the feed storage area and temporary manure storage area flows overland southeast around the east side of the primary basin then flows south into the Floyd River. Runoff from certain outdoor pen areas at the facility flow overland south/southeast around the south side of the secondary basin and into the Floyd River.
22. The Floyd River is a water of the United States, as defined by 40 C.F.R. Part 122.2.
23. The Facility does not have adequate livestock waste control facilities to prevent the discharge of animal waste to the Floyd River. The EPA inspection performed on January 30, 2007 revealed that Respondent does not have adequate runoff controls for the feed storage area, temporary manure storage area and certain outdoor pen areas to prevent feedlot waste from reaching the Floyd River. The Floyd River is located approximately 300 yards from the southern shelter building. Feedlot runoff discharging from the Facility contains pollutants including ammonia, fecal coliform and other pollutants typically associated with feedlots.

24. Based on the size of the Facility, the distance from the Facility to the Floyd River, and the slope and condition of the land across that distance, wastewater containing pollutants from the feed storage area, temporary manure storage area and certain outdoor pens, discharges into the Floyd River as a result of significant precipitation events.
25. The ongoing flow of wastewater from Respondent's Facility to the Floyd River constitutes unauthorized discharges of pollutants from a point source to waters of the United States. This is a violation of Sections 301 and 402 of the Clean Water Act, 33 U.S.C. §§ 1311 and 1342, and implementing regulations.

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:

26. Respondent shall immediately comply with the Clean Water Act by immediately ceasing discharges or removing cattle from all areas within the Facility where runoff is not controlled in a manner to prevent discharges to waters of the United States. If cattle cannot be confined at the Facility in a manner that prevents discharges to waters of the United States then Respondent shall reduce the number of cattle confined at the Facility below regulatory thresholds within 30 calendar days of Respondent's receipt of this Order. Respondent shall not repopulate cattle above regulatory thresholds at the Facility unless the Facility can be operated in a manner that prevents discharges to waters of the United States and maintains compliance with the Clean Water Act.
27. For the purposes of determining the regulatory status of the Facility, Respondent shall count all cattle confined at the facility and not make a distinction between indoor and outdoor confinement.
28. Regardless of whether the number of cattle is reduced below regulatory thresholds, if Respondent cannot immediately cease all discharges from the Facility to waters of the United States then Respondent shall immediately remove and properly dispose manure from areas that cannot be controlled in a manner to prevent discharges.
29. Within thirty (30) days of the effective date of this Order, Respondent shall inform the EPA, in writing, of all actions that Respondent has taken to comply with the Clean Water Act and the terms of this Order.
30. Unless Respondent permanently reduces the number of cattle confined at the Facility below regulatory thresholds, Respondent shall apply to IDNR for an NPDES permit for

the Facility within thirty (30) days of receipt of this Order. Upon issuance of the NPDES Permit, Respondent shall comply with all terms contained therein including terms related to the construction and operation of livestock waste controls.

31. If Respondent intends to construct runoff control structures to allow the confinement of cattle above regulatory thresholds, then beginning thirty (30) days after 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 the EPA, Respondent shall submit written monthly progress reports to the 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/will be addressed.
32. Upon completion of the runoff control structures Respondent shall submit a Notice of Construction Completion certified by a professional engineer to EPA within thirty (30) days of construction completion. The notification shall be in writing and shall include as-built drawings of the constructed improvements.
33. Upon receipt of this Order and continuing until such time as Respondent is issued an NPDES Permit for the Facility, Respondent shall perform the following monitoring and recordkeeping activities: 1) maintain land application records, including dates, location, amounts applied, and application rates; 2) maintain precipitation records; and, if applicable, 3) record and maintain storage facility liquid levels after every event with the potential to change the amount of liquid in the storage facility. Respondent shall submit copies of these records to the EPA on a quarterly basis for the periods of May-July, August-October, November-January, and February-April. Records must be submitted on or before the seventh day of the month following the end of the period (August 7, November 7, February 7, and May 7). Upon issuance of an NPDES permit, Respondent shall maintain and submit records as required by the NPDES permit.

Effect of Order

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. 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.

36. 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.
37. The 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 non-compliance with the CWA, including, but not limited to, any non-compliance 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.
38. 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.
39. All submissions to the EPA required by this Order shall be sent to:

Donald F. Hamera
CAFO Enforcement Program
Water, Wetlands and Pesticides Division
U.S. Environmental Protection Agency Region, VII
901 North 5th Street
Kansas City, Kansas 66101
40. 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.
41. 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).
42. The terms of this Order shall be effective and enforceable against Respondent upon its receipt of the Order.

6/14/07
Date

Mary Tutz Munday for
William A. Spratlin
Director
Water, Wetlands and Pesticides Division

6/13/2007
Date

Elizabeth Heston for
J. Daniel Breedlove
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.

Mr. Elwyn Hoogendorn
Performance Feeders
5145 280th Street
Sheldon, Iowa 51201

Mr. Gwyn Hoogendorn
13819 Waterthrush Place
Bradenton, Florida 34202

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 Iowa:

Gene Tinker
Animal Feeding Operations Coordinator
Iowa Department of Natural Resources
Wallace State Office Building
900 East Grand
Des Moines, Iowa 50319





Date