

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 7
901 N. 5th STREET
KANSAS CITY, KANSAS 66101

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ENVIRONMENTAL PROTECTION
AGENCY-REGION VII
REGIONAL HEARING CLERK

IN THE MATTER OF:)

SELLERS FARMS, INC.)
RICE COUNTY, KANSAS)

Respondent,)

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

) Docket No. CWA-07-2006-0204

) CONSENT AGREEMENT AND
) FINAL ORDER

CONSENT AGREEMENT AND FINAL ORDER

The United States Environmental Protection Agency, Region 7 (EPA) and Sellers Farms, Inc. (Respondent) have agreed to settle the alleged violations set forth in this Consent Agreement and Final Order. Thus this action is simultaneously commenced and concluded pursuant to Rules 22.13(b) and 22.18(b)(2) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits, 40 C.F.R. Part 22 (Consolidated Rules).

This Consent Agreement and Final Order completely and finally settles all civil and administrative penalty claims and causes of action set forth below for Respondent's alleged discharges of pollutants into a tributary of Cow Creek, a navigable water of the United States in Rice County, Kansas.

ALLEGATIONS

Jurisdictional Allegations

1. This is an administrative action for the assessment of civil penalties instituted pursuant to Section 309(g)(2)(B) of the Clean Water Act (CWA), 33 U.S.C. § 1319(g)(2)(B), and in accordance with the Consolidated Rules.

2. This Consent Agreement and Final Order serves as notice that EPA has reason to believe that Respondent has violated Section 301 of the CWA, 33 U.S.C. § 1311, by discharging pollutants from a concentrated animal feeding operation into the navigable waters of the United States in a manner that was not in accordance with Respondent's National Pollutant Discharge Elimination System (NPDES) permit.

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, among other things, Section 402 of the CWA, 33 U.S.C. § 1342. Section 402 of the CWA provides that pollutants may be discharged only in accordance with the terms of a National Pollutant Discharge Elimination System (NPDES) permit.

4. The CWA prohibits the unpermitted discharge of "pollutants" by any "person" 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.

5. "Pollutant" is defined by Section 502(6) of the CWA, 33 U.S.C. § 1362 to include, among other things, biological materials and agricultural waste discharged to water.

6. "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."

7. 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.

8. 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).

9. "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.

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

11. 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.

12. Section 309(g) of the CWA, 33 U.S.C. § 1319(g), authorizes the EPA to commence an action for administrative penalties against any person who violates Section 301, 33 U.S.C. § 1311.

Factual Allegations

13. Respondent owns and operates an animal feeding operation that is located in the Southwest Quarter of Section 6 and the North Half of Section 7 of Township 20 South, Range 8 West in Rice County, Kansas.

14. On May 24, 2005, EPA personnel conducted a compliance inspection of the Facility that included surface water sampling.

15. The Facility confines and feeds or maintains cattle for a total of forty-five (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. At the time of the EPA inspection, the Facility was confining approximately 7,529 head of cattle and the Facility is permitted to confine 12,000 head. 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).

19. Respondent is currently operating under a NPDES permit (KS0086690) which was issued on January 28, 2002 and expires January 27, 2007.

20. Runoff from the Facility's feeding pens on the northeast corner of the facility drain south and then east to a ditch that flows 0.6 miles south and 0.1 miles east to an unnamed tributary of the Little Cow Creek. Upon entering the unnamed tributary the runoff flows 0.8 miles to Little Cow Creek. Little Cow Creek flows 1.0 miles to Cow Creek which feeds into the Arkansas River. At the time of the EPA inspection, the EPA observed that liquid waste from the facility was flowing through the ditch and into the unnamed tributary of Little Cow Creek.

21. The drainage ditch at the Facility, Little Cow Creek, Cow Creek and the Arkansas River are waters of the United States, as defined under 40 C.F.R. Part 122.2. The Cow Creek has been listed by the State of Kansas as an impaired waterbody because of elevated presence of fecal coliform and dissolved oxygen. Fecal coliform is a contaminant associated with cattle feedlot runoff and low concentrations of dissolved oxygen is characteristic of a stream that may have been impacted by feedlot runoff.

22. At times pertinent to this Consent Agreement and Final Order, the Facility had only partial livestock waste control structures to prevent the discharge of animal waste to the Little Cow Creek. At times pertinent to this Consent Agreement/Final Order the controls were insufficient to prevent discharges from the Facility into the Little Cow Creek.

23. The Facility NDPEs permit states "stockpiles shall be located in areas not subject to uncontrolled runoff." At the time of the EPA inspection, the EPA observed that the Facility had four manure piles stockpiled on site subject to uncontrolled runoff.

24. Runoff from manure piles drained to an unnamed tributary of the Little Cow Creek. At the time of the EPA inspection, the EPA observed that liquid waste from one manure pile located on the east side of 14th Road flows 0.6 miles south to the roadside ditch and 0.1 miles west to the unnamed tributary to the Little Cow Creek. At the time of the EPA inspection, the EPA also observed that liquid waste from the manure pile located northwest of the facility on the east side of 13th Road flows into the unnamed tributary to the Little Cow Creek. Upon entering the unnamed tributary, the tributary flows north approximately 0.5 miles and then flows northeast approximately 0.3 miles and then flows southeast approximately 1.5 miles to Little Cow Creek. Little Cow Creek flows 1.0 miles to Cow Creek which feeds into the Arkansas River.

25. Based on the size of the Facility, the distance and proximity of the Facility to waters of the United States, and the slope and condition of the land across that distance, waste water containing pollutants from open feeding areas at the Facility flowed into Little Cow Creek during significant precipitation events.

26. The flow of waste water from Respondent's Facility and Respondent's failure to adequately stockpile manure in a manner to prevent discharges to Little Cow Creek constitute 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.

Alleged Violations

27. The allegations set forth in paragraphs 1 through 26 are incorporated herein.

28. Respondent is a corporation and therefore a person as defined by Section 502(5) of the CWA, 33 U.S.C. § 1362.

29. 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). As a result, the Facility is a “point source” within the meaning of Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

30. 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.

31. Little Cow Creek, Cow Creek, the Arkansas River and their tributaries are waters of the United States, as defined by 40 C.F.R. Part 122.2.

32. Wastewater runoff discharged from the Facility into the tributary of Little Cow Creek during and after significant precipitation events, contained “pollutants” within the meaning of Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

33. Respondent’s Facility has discharged wastewater into Little Cow Creek and its tributary. Respondent’s discharges constitute unauthorized discharges of pollutants from a point source to waters of the United States. This, coupled with Respondent not having an NPDES permit has resulted in violations of Sections 301 and 402 of the CWA, 33 U.S.C. §1311 and 1342, and implementing regulations.

CONSENT AGREEMENT

34. Respondent admits the jurisdictional allegations in this Consent Agreement and Final Order and agrees not to contest EPA’s jurisdiction in this proceeding or any subsequent proceeding to enforce the terms of the Consent Agreement and Final Order.

35. Respondent neither admits nor denies the factual allegations contained in this Consent Agreement and Final Order.

36. Respondent waives any right to contest the allegations as well as its right to appeal the proposed Final Order accompanying this Consent Agreement.

37. Respondent and Complainant each agree to bear their own costs and attorney’s fees.

38. Nothing contained in the Consent Agreement and Final Order shall alter or otherwise affect Respondent’s obligation to comply with all applicable federal, state, and local environmental statutes and regulations and applicable permits.

Supplemental Environmental Project (SEP)

39. Respondent shall expend a minimum of \$3,535 (Total SEP Expenditure) in approvable costs to construct a pump station and pipeline to transfer water from Retention Structure #1 to Retention Structure #3. Approvable costs shall only include costs directly related to the construction of the SEP pursuant to the requirements of this Order.

40. Respondent shall complete construction of the pump station and pipeline on or before April 1, 2007. Beginning with the effective date of this Order and continuing until the pump station and pipeline are operational; the Respondent shall provide monthly status reports to EPA. Such monthly reports shall be submitted on or before the 15th day of each month and shall provide the status of the project, along with any encountered problems and/or expected delays. Respondent shall provide notice to EPA when the installation of the pump station and pipeline has been completed.

Stipulated Penalties for Non-Performance of SEP

41. In the event Respondent fails to satisfactorily complete the SEP the Respondent shall pay a stipulated penalty not to exceed \$590. In the event the Respondent satisfactorily completes the SEP, but fails to spend at least 90% of the amount required for Total SEP Expenditures, the Respondent shall pay a stipulated penalty not to exceed \$590 but shall be based upon a pro-rata share of the costs incurred to implement the SEP in relation to the penalty mitigated by the SEP.

42. The determinations of whether the SEP has been satisfactorily completed and whether the Respondent has made a good faith, timely effort to implement the SEP shall be within the sole discretion of the EPA.

43. Respondent shall pay any stipulated penalties within thirty (30) days after the date of receipt of a written demand from EPA for payment. The payment shall be in accordance with the provisions of Paragraph 45.

Penalty

44. Respondent consents to the issuance of the Final Order and consents to the payment of a mitigated civil penalty of twelve thousand four hundred and eleven dollars (\$12,411).

45. Payment of the penalty shall be by cashier or certified check made payable to "United States Treasury." The check must include the docket number and the name of the case. The check must be remitted to:

U.S. EPA Region VII7
P.O. Box 371099M

Pittsburgh, PA 15251

Copies of the transmittal letter and the check shall simultaneously be sent to:

Regional Hearing Clerk
U.S. Environmental Protection Agency - Region 7
901 N. 5th Street
Kansas City, Kansas 66101;

and

J. Daniel Breedlove
Assistant Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency - Region 7
901 N. 5th Street
Kansas City, Kansas 66101.

46. Respondent's failure to pay any portion of the civil penalty of in accordance with the provisions of this Consent Agreement and Final Order may result in commencement of a civil action in Federal District Court to recover the total penalty, together with interest thereon at the applicable statutory rate.

47. Payment of the entire civil penalty and the completion of the SEP shall resolve all civil and administrative claims of the United States alleged in the Alleged Violations.

48. Respondent certifies by the signing of this Consent Agreement/Final Order that it is in compliance at the Facility with the requirements of Sections 301 and 402 of the CWA, 33 U.S.C. §§ 1311 and 1342. The effect of the settlement described in paragraph 45 above is conditional upon the accuracy of this certification.

49. The EPA reserves the right to take any enforcement action with respect to any other violations of the CWA or any other applicable law and to enforce the terms and conditions of this Consent Agreement and Final Order. Respondent reserves the right to defend against such actions on any basis in law or fact.

50. The undersigned representative of Respondent certifies that they are fully authorized to enter the terms and conditions of this Consent Agreement and Final Order and to execute and legally bind Respondent to it.

51. This Final Order shall be entered and become effective only after the conclusion of the period of public notice and comment required pursuant to Section 309(g)(4), 33 U.S.C. § 1319(g)(4), and 40 C.F.R. § 22.45. The effective date shall be the date it is signed by the Regional Judicial Officer.

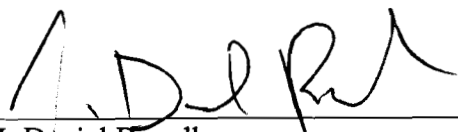
For the Respondent:

8-8-06
Date

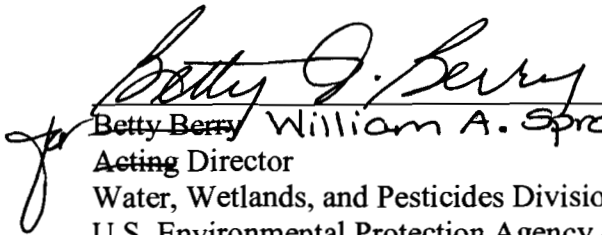

Steve Sellers, Owner
Sellers Farms, Inc

For the United States Environmental Protection Agency - Region 7

9/26/2006
Date


J. Daniel Breedlove
Assistant Regional Counsel
U.S. Environmental Protection Agency Region VII

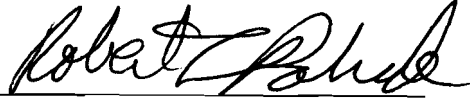
09/26/06
Date


~~Betty Berry~~ William A. Spradlin
Acting Director
Water, Wetlands, and Pesticides Division
U.S. Environmental Protection Agency - Region VII

FINAL ORDER

The foregoing Consent Agreement is hereby approved and incorporated by reference into this Final Order. The Respondent is ordered to comply with the terms of the above Consent Agreement, effective immediately.

IT IS SO ORDERED.



ROBERT L. PATRICK
Regional Judicial Officer
U.S. Environmental Protection Agency
Region VII

Date: September 27, 2006

IN THE MATTER OF Sellers Farms, Inc., Respondent
Docket No. CWA-07-2006-0204

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Consent Agreement and Final Order was sent this day in the following manner to the addressees:

Copy hand delivered to:

J. Daniel Breedlove
Assistant Regional Counsel
901 N. 5th Street
Kansas City, Kansas 66101

Copy by Certified Mail Return Receipt to:

Steve Sellers
Sellers Farms, Inc.
1420 Avenue North
Lyons, Kansas 67554

9/27/06

Dated



Kathy Robinson
Hearing Clerk, Region 7