

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 7  
11201 RENNER BOULEVARD  
LENEXA, KANSAS 66219

2013 FEB -1 AM 8:54

BEFORE THE ADMINISTRATOR

IN THE MATTER OF )

Warren Wortman )  
D/B/A Warren Wortman & Sons )  
Creighton, Nebraska )

Respondent )

Proceedings under )  
Section 309(a)(3) )  
of the Clean Water Act, )  
33 U.S.C. § 1319(a)(3) )

Docket No. CWA-07-2013-0011

FINDING OF VIOLATION  
ORDER FOR COMPLIANCE

**PRELIMINARY STATEMENT**

1. The following Findings of Violation are made and Order for Compliance (Order) 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 Warren Wortman, doing business as Warren Wortman & Sons Livestock, who owns and operates an animal feeding operation that confines approximately 1900 head of cattle and 2800 head of swine at varying weights in Creighton, Nebraska.

**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, among other things, 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 may be authorized and establish design, construction, operation, and maintenance requirements for the permit holder.
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. § 122. Under 40 C.F.R. § 122.23(d), an NPDES permit is required for any CAFO that discharges.
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)(4).
11. “Large CAFO” is defined according to 40 C.F.R. § 122.23(b)(4) 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 Nebraska Department of Environmental Quality (NDEQ) is the agency within the state of Nebraska authorized to administer the federal NPDES Program. EPA maintains concurrent enforcement authority with authorized state NPDES programs for violations of the CWA.

### **FACTUAL BACKGROUND**

14. Respondent owns and operates an animal feeding operation (Facility) that is located in the West 1/2, Section 2, Township 28 North, Range 05 West, within Antelope County, Nebraska. The street address of the Facility is 86930 532<sup>nd</sup> Avenue, Creighton, Nebraska. The Facility is comprised of outdoor cattle pens and indoor swine facilities, with a capacity of approximately 2,500 head of feeder cattle, 1,300 nursery swine, and 2,400 swine greater than 55 pounds.
15. A January 10, 2007, inspection by NDEQ identified that staff gauges as required by Nebraska Administrative Code Title 130, Chapter 8 and Respondent's NPDES permit were not properly installed or marked at Livestock Waste Control Facilities (LWCFs), and that records for both the swine and feeder cattle portions of the facility, as required by Title 130, Chapter 12 were not properly maintained.
16. On April 28, 2011, NDEQ inspected the Facility and again identified that Respondent was failing to maintain adequate records and the Facility did not have a permanent staff gauge as required by its NPDES permit and Nebraska Title 130, Livestock Waste Control Regulations. NDEQ required Respondent to immediately comply with recordkeeping requirements and install staff gauges by August 1, 2011.
17. On April 25, 2012, the EPA conducted an inspection of the Facility pursuant to Section 308 of the CWA, 33 U.S.C. § 1318.
18. During the April 2012 inspection, the EPA observed that there were no staff gauges to measure liquid levels in the north or south LWCFs at the Facility and that records required by the Facility's NPDES permit had not been maintained. EPA issued a Notice of Potential Violation (NOPV) associated with these findings in the course of the inspection. The NOPV requested Respondent to, within 10 days, submit a written description of the actions taken to address the compliance concerns identified by the NOPV. To date, Respondent has not responded to the EPA regarding actions it has taken to correct these violations.
19. On October 17, 2012, NDEQ visited the Facility and observed that staff gauges had been installed in the LWCFs, however, critical levels were not marked on the gauges. A subsequent visit to the Facility by NDEQ on November 6, 2012, identified that the staff

gauges still had not yet been appropriately marked. The October 17 and November 6 NDEQ visits also confirmed that Respondent continues to fail to maintain records required by the Facility's NPDES permit.

20. The Facility confines and feeds or maintains cattle and swine for a total of forty-five (45) days or more in any twelve month period.
21. Neither crops, vegetation, forage growth, nor post harvest residues are sustained over any portion of the Facility that confines animals while cattle or swine are present.
22. The Facility is an AFO as defined by 40 C.F.R. §122.23(b)(1).
23. At all times relevant to this Order, Respondent confined greater than 1,000 head of beef cattle and met the definition of a Large CAFO.
24. At all times relevant to this Order, Respondent was operating under an NPDES permit (NE 0135623) which became effective on September 15, 2006, and expired on September 14, 2011. This NPDES permit is administratively extended until NDEQ issues a superseding permit.
25. Bazile Creek is the receiving water for pollutant discharges from the Facility.
26. Bazile Creek and its tributaries are waters of the United States, as defined pursuant to 40 C.F.R. Part 122.2.

### **FINDINGS OF VIOLATION**

#### **NPDES Permit Violations**

27. The facts stated in Paragraphs 14 through 26, above, are herein incorporated.
28. Respondent's NPDES permit requires that Respondent shall maintain production area records, land application area records, waste transfer records, and other records at the facility for a period of five years from the date they are created. These requirements are described in Part II(F) of permit NE 0135623.
29. When requested, Respondent was unable to produce records that are required pursuant to the NPDES permit. Records produced by Respondent during the April 2012 inspection by EPA were limited to rainfall information, and land application records of liquid hog wastes for March 2012 and April 2012. A November 6, 2012, Facility visit by NDEQ confirmed that Respondent had not corrected the failure to meet the recordkeeping

requirements of the NPDES permit. As of January 16, 2013 Respondent had not contacted NDEQ regarding correction of the violations.

30. Respondent's failure to maintain records associated with production areas, land application areas, waste transfer and other records as required by the NPDES permit are violations of Respondent's NPDES permit, and as such, are violations of Section 402 of the CWA.
31. Respondent's NPDES permit, Part II(G)(1)(b), requires, that a permanent marker (staff gauge or marking device) be installed in each LWCF to measure liquid depth within each LWCF, and that critical liquid levels, including freeboard level, must pump level, winter pump down level, and minimum treatment volume level be identified on such markers. Upon EPA inspection in April 2012, no such markers were found in either the north or south LWCF at the facility. As of November 2012, markers had been installed in the LWCFs, however, critical liquid levels were not identified on the markers. Respondent's failure to provide permanent, appropriate markers in the Facility's LWCFs is a violation of Respondent's NPDES permit, and as such, is a violation of Section 402 of the CWA.

### **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 the CWA:

32. Respondent shall immediately comply with all terms of its NPDES permit, its NMP and the CWA. Among other things, Respondent shall immediately perform the following:
  - Initiate record keeping requirements for all activities as required by Respondent's current NPDES permit and NMP.
  - Install permanent markers in each LWCF to measure liquid depth as specified in the NPDES permit, condition II(G)(1)(b), with critical liquid levels appropriately identified. Upon installing such markers, supporting photographic evidence of compliance shall be submitted to EPA.
33. 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.
34. Commencing on the Effective Date of this Order and continuing quarterly for two years, Respondent shall submit records compiled and retained pursuant to its current and/or revised NMP and NPDES permit to EPA. Quarterly submissions shall, at a minimum,

include all information required in Section II(F) of the NPDES permit and the NMP. Respondent shall submit copies of these records to EPA on a quarterly basis (every three months) beginning on the Effective Date of this Order. Records must be submitted on or before the seventh day of the month following the end of the quarterly reporting period (for example, if the quarterly period ends July 31<sup>st</sup> then the submission is due August 7<sup>th</sup>).

#### Effect of Order


35. 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.
36. 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. 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.
37. 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.
38. 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.
39. 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.
40. All submissions to EPA required by this Order shall be sent to:

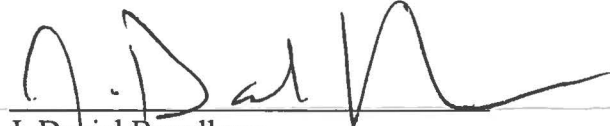
Scott Marquess  
CAFO Enforcement Program  
Water, Wetlands and Pesticides Division  
U.S. Environmental Protection Agency Region 7

11201 Renner Boulevard  
Lenexa, Kansas 66219.

41. 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.
42. 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 \$37,500 per day for each violation, pursuant to Section 309(d) of the CWA, 33 U.S.C. § 1319(d); or (2) civil action in federal court for injunctive relief, pursuant to Section 309(b) of the CWA, 33 U.S.C. § 1319(b).
43. The terms of this Order shall be effective and enforceable against Respondent upon its receipt of the Order.

Date 1-30-13

  
Karen A. Flournoy  
Director  
Water, Wetlands and Pesticides Division

  
J. Daniel Breedlove  
Senior Counsel  
Office of 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 7.

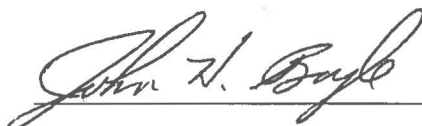
I further certify that I sent by certified mail, return receipt requested, a true and correct copy of the signed original Findings of Violation and Order for Compliance together with cover letter to:

Warren Wortman  
86930 532<sup>nd</sup> Street  
Creighton, Nebraska 68729.

*first class*

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:

Dennis Heitmann  
Nebraska Department of Environmental Quality  
1200 N Street, Suite 400  
P.O. Box 98922  
Lincoln, Nebraska 68509.

  
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*02-01-13*  
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Date