

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

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ENVIRONMENTAL PROTECTION
AGENCY-REGION VII
REGIONAL HEARING CLERK

BEFORE THE ADMINISTRATOR

)
) Docket No. CWA-07-2007-0004
)
)
) TERRY PFLUEGER,
) D/B/A/ PFLUEGER FEEDLOT
) WAYNE COUNTY, NEBRASKA
)
) Respondent
) FINDING OF VIOLATION
) ORDER FOR COMPLIANCE
)
)
)
) Proceedings under
) Section 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 Sections 308(a) and 309(a)(3) of the Clean Water Act (“CWA” or “Act”), 33 U.S.C. §§ 1318(a) 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 7, and redelegated to the Director of Region 7’s Water, Wetlands and Pesticides Division.
2. The Respondent is Terry Pflueger (“Respondent”) d/b/a Pflueger Feedlot, an individual that owns and operates an animal feeding operation (“Facility”) that is located in Section 21 of Township 25 North, Range 4 East in Wayne County, 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, *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 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 Nebraska Department of Environmental Quality (“NDEQ”) is the agency within the State of Nebraska with the delegated authority to administer the federal NPDES Program pursuant to Section 402 of the CWA, the Nebraska Environmental Protection

Act (Secs. 81-1504 (11), Reissue 1987), and the State of Nebraska Department of Environmental Quality, Title 119, Rules and Regulations Pertaining to the Issuance of Permits Under the National Pollutant Discharge Elimination System. 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 that is located in Section 21 of Township 25 North, Range 4 East in Wayne County, Nebraska.
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. On March 28, 2006, EPA personnel conducted a compliance evaluation inspection of the Facility.
19. At various times between October 2001 and February 2006, the Facility confined greater than 1,000 head of cattle; therefore the Facility is a large CAFO as that term is defined in 40 C.F.R. § 122.23(b)(4).
20. Respondent does not have a NPDES permit to operate the Facility and did not have an NPDES Permit at all times pertinent to this Order.
21. Runoff from pen number 1 at the Facility flows south approximately 100 yards to a culvert emptying into a county road ditch. The distance from the culvert to Plum Creek is approximately 50 yards via the county road ditch.
22. Runoff from the remainder of the pens at the Facility drains to a series of settling basins that discharge into a county road ditch. The distance from the southern settling basins to Plum Creek is approximately 50 yards via the county road ditch.
23. Plum Creek and its tributaries are waters of the United States, as defined under 40 C.F.R. Part 122.2.

24. During the March 28, 2006, inspection, there was evidence that the two southern settling basins were overflowing into Plum Creek.
25. Based on the size of the Facility, the distance from the Facility to Plum Creek, and the slope and condition of the land across that distance, wastewater containing pollutants from open feeding areas at the Facility will discharge to Plum Creek as a result of significant precipitation events.
26. At all times pertinent to this Order, Respondent had a duty to obtain a NPDES permit for the Facility. In particular, Respondent confined greater than 1,000 head of cattle at the Facility between October 16, 2005, and March 7, 2006, without a NPDES permit.
27. At times, including the period between October 16, 2005 and March 7, 2006, the flow of wastewater from Respondent's Facility to Plum Creek constituted 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. Furthermore, Respondent's failure to obtain a NPDES permit for the facility is also a violation of Section 402 of the Clean Water Act. 33 U.S.C. § 1342.

Order For Compliance

Based on the Findings of Violation set forth above, and pursuant to Section 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:

28. Respondent shall immediately comply with the Clean Water Act.
29. Respondent shall not repopulate cattle above regulatory thresholds at the Facility unless the Facility can be operated in a manner that maintains compliance with the Clean Water Act.
30. Within 30 days of receipt 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.
31. Unless Respondent permanently reduces the number of cattle confined at the Facility below regulatory thresholds, Respondent shall obtain a NPDES Permit for the Facility.

Upon issuance of the NPDES Permit, Respondent shall comply with all terms contained therein.

32. If Respondent intends to construct runoff control structures to allow the confinement of cattle above regulatory thresholds then beginning thirty (30) days of receipt 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.
33. Upon completion of 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.
34. Within one (1) week of completion of feedlot waste controls, Respondent shall submit an application for a NPDES permit to NDEQ. Respondent shall provide written notice to the EPA that a NPDES application was submitted to NDEQ.
35. On a quarterly basis for one year, Respondent shall submit to EPA copies of all inventory records that document the number of cattle confined at the Facility as well as the pen ID/numbers in which they are held. The first quarterly report shall be submitted to EPA on July 1, 2007, and subsequent reports shall be submitted on October 1, 2007, January 1, 2008, and April 1, 2008.

Effect of Order

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.
37. 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.
38. 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.

39. 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 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.
40. 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.
41. All submissions to the EPA required by this Order shall be sent to:

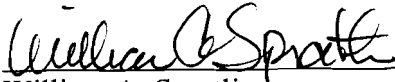
Stephen Pollard
CAFO Enforcement Program
Water, Wetlands and Pesticides Division
U.S. Environmental Protection Agency Region 7
901 North 5th Street
Kansas City, Kansas 66101.

42. 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.
43. 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).

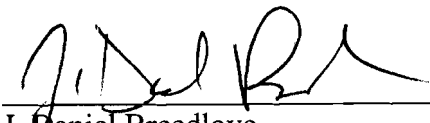
44. The terms of this Order shall be effective and enforceable against Respondent upon its receipt of the Order.

Date 4/19/07



William A. Spratlin
Director
Water, Wetlands and Pesticides Division

Date 4/19/07



J. Daniel Breedlove
Assistant Regional Counsel

CERTIFICATE OF SERVICE

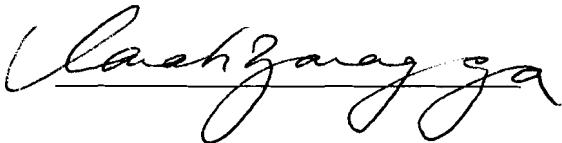
I certify that on the date note below I filed the original and one true and correct copy of the signed original Findings of Violation and Order of Compliance with the Regional Hearing Clerk, Region 7.

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 and small business assistance information, to the following address:

Terry Pflueger
Pflueger Feedlot
57873 848 Road
Wayne, Nebraska 68787.

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 Nebraska:

Dennis Heitmann
Supervisor, Agriculture Section
Water Quality Division
Nebraska Department of Environmental Quality
Suite 400, 1200 N Street, The Atrium
Lincoln, Nebraska 68509.



4/25/07

Date