

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

BEFORE THE ADMINISTRATOR

James Schindler)	
D/B/A Schindler Cattle Company)	Docket No. CWA-07-2015-0075
Elgin, Nebraska)	
)	
Respondent)	FINDING OF VIOLATION
)	ORDER FOR COMPLIANCE
)	
Proceedings under)	
Section 309(a)(3))	
of the Clean Water Act,)	
33 U.S.C. § 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 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, James Schindler doing business as Schindler Cattle Company (“Respondent”), owns and/or operates an animal feeding operation located in the northeast ¼ of Section 9 in Township 24 North, Range 07 West, in Antelope 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. 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 of pollutants may be authorized and establish design, construction, operation, and maintenance requirements for the permit holder.

5. Section 502(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. “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.
7. “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, [or] concentrated animal feeding operation . . . from which pollutants are or may be discharged.”
8. 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)(1), the owner or operator of a concentrated animal feeding operation (“CAFO”) must apply for an NPDES permit if the CAFO discharges a pollutant into a water of the United States.
9. “Process wastewater” is defined by 40 C.F.R. § 122.23(b)(7) as water “directly or indirectly used in the operation of the animal feeding operation (“AFO”) for any or all of the following: spillage or overflow from animal or poultry watering systems; washing, cleaning, or flushing pens, barns, manure pits, or other AFO facilities; direct contact swimming, washing, or spray cooling of animals; or dust control. Process wastewater also includes any water which comes into contact with any raw materials, products, or byproducts including manure, litter, feed, milk, eggs or bedding.”
10. “Production Area” is defined by 40 C.F.R. § 122.23 and means that part of an animal feeding operation that includes the animal confinement area, the manure storage area, the raw materials storage areas, and the waste containment areas. The animal confinement area includes but is not limited to open lots, housed lots, feedlots, confinement houses, stall barns, free stall barns, milkrooms, milking centers, cowyards, barnyards, medication pens, walkers, animal walkways, and stables. The manure storage area includes, but is not limited to, lagoons, runoff ponds, storage sheds, stockpiles, under house or pit storages, liquid impoundments, static piles, and composting piles. The raw materials storage area includes, but is not limited to, feed silos, silage bunkers, and bedding materials. The waste containment area includes, but is not limited to, settling basins, and areas within berms and diversions which separate uncontaminated storm water. Also

included in the definition of production area is any egg washing or egg processing facility, and any area used in the storage, handling, treatment, or disposal of mortalities.

11. “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 forty-five (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.
12. “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 Medium CAFO in accordance with 40 C.F.R. § 122.23(b)(6).
13. “Medium CAFO” is defined according to 40 C.F.R. § 122.23(b)(6) as an animal feeding operation that stables or confines 300 to 999 beef cattle and either of the following conditions are met:
 - a. Pollutants are discharged into waters of the United States through a man-made ditch, flushing system, or other similar man-made device; or
 - b. Pollutants are discharged directly into waters of the United States which originate outside of and pass over, across, or through the facility or otherwise come into direct contact with the animals confined in the operation.
14. Section 502(7) of the CWA, 33 U.S.C. § 1362(7), defines the term “navigable waters” as “waters of the United States, including the territorial seas.” “Waters of the United States” have been further defined to include, inter alia, waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce (hereinafter “traditional navigable waters”) and tributaries of such waters. 40 C.F.R. § 122.2.
15. 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 and Findings of Violation

16. Respondent owns and/or operates a feedlot (“Facility”) that is located in the northeast ¼ of Section 9 in Township 24 North, Range 07 West, in Antelope County, Nebraska.

17. On March 24, 2015, EPA personnel conducted a compliance evaluation of the Facility. During the inspection, the inspectors observed that process wastewater from production areas (e.g., the “East,” “Southeast,” and “Southwest” lots) flowed through a culvert discharging directly into Antelope Creek. Inspectors also observed that the runoff from the Facility’s feedstock storage area flows through the “Big” and “West” lots and discharges into an unnamed tributary of Antelope Creek, which flows 100 yards into Antelope Creek. They also documented that runoff from the northern portion of lot #2 flows into the south road ditch of 845 Road. Runoff then flows west through the ditch for approximately 150 yards before discharging into Antelope Creek.
18. Antelope Creek is a tributary of the Elkhorn River, a TNW.
19. The culvert and road ditch are both considered a man-made ditch, flushing system or similar man-made device pursuant to 40 C.F.R. § 122.23(b)(6).
20. Antelope Creek, which has a bed, banks, and an ordinary high water mark and has been identified as a perennial stream by the U.S. Geological Survey, is tributary of the traditionally navigable Elkhorn River, and is a water of the United States, as defined in 40 C.F.R. § 122.2.
21. Respondent’s statements during the inspection confirm that the Facility confines and feeds or maintains beef cattle for a total of forty-five (45) days or more in any twelve month period.
22. Crops, vegetation, forage growth, and post-harvest residues are not sustained over any portion of the Facility’s confinement areas when animals are present.
23. The Facility is an AFO as defined by 40 C.F.R. § 122.23(b)(1).
24. The Facility was confining approximately 325 head of beef cattle at the time of the March 24, 2015, EPA inspection. The Facility’s capacity is 999 head of beef cattle.
25. At times pertinent to this order the number of cattle confined and fed at the Facility was greater than 300 and process waste water containing pollutants flowing from the Facility passed through a culvert and discharged into waters of the United States. Therefore, the Facility is a Medium CAFO as that term is defined in 40 C.F.R. § 122.23(b)(6).
26. The Facility is a CAFO as defined by 40 C.F.R. § 122.23(b)(2), and as that phrase is used in Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

27. The Facility does not have adequate livestock waste control facilities to prevent the discharge of manure, litter, and wastewater into Antelope Creek and its tributaries.
28. Respondent has not applied for an NPDES permit for the Facility.
29. The intermittent yet ongoing flow of wastewater from Respondent's Facility through the culvert and into Antelope Creek and its tributaries without NPDES permit authorization constitutes unauthorized discharges of pollutants from a point source to waters of the United States. The unauthorized discharges are violations of Section 301 of the Clean Water Act, 33 U.S.C. §1311, and implementing regulations.

Order For Compliance

Based on the Findings of Violation set forth in paragraphs 16 through 29 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:

30. Within thirty (30) days of the effective date of this Order, Respondent shall submit an Interim Measures Plan (Plan) to the EPA. The Plan shall describe, in detail, actions that Respondent has taken and will take to minimize the discharge of pollutants from Respondent's Facility to waters of the United States. The Plan shall include a schedule for implementation of the interim measures. The interim measures shall remain in place until Respondent completes construction of the feedlot waste controls as required by NDEQ or otherwise complies with the CWA. Respondent shall implement the Plan immediately.
31. Within one-hundred and eighty (180) days of the effective date of this Order, Respondent shall:
 - a. permanently reduce the number of livestock confined at the Facility below regulatory thresholds;
 - b. operate the Facility so that process wastewater discharges are not facilitated by a man-made ditch, flushing system or similar man-made device or otherwise comply with the CWA; or
 - c. unless Respondent is able to permanently correct the cause of the CWA violations, apply for an NPDES permit for the Facility. Upon issuance of the NPDES Permit, Respondent shall comply with all terms contained therein, including terms related to the design, construction, operation, and maintenance of livestock waste controls.

32. If Respondent intends to apply for an NPDES permit and construct runoff controls 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 EPA, Respondent shall submit written monthly progress reports to 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. If Respondent intends to apply for an NPDES permit and construct runoff controls to allow the confinement of cattle above regulatory thresholds, Respondent shall complete construction of feedlot waste controls, as required by NDEQ, no later than August 1, 2016. If construction is not completed by this date, Respondent shall cease operations within areas of the Facility where feedlot runoff cannot be managed to prevent unauthorized discharges to waters of the United States. If Respondent is unable to prevent unauthorized discharges by this date then Respondent shall reduce the number of cattle confined at the Facility below regulatory threshold for a Medium CAFO until the controls are in place. Respondent shall not repopulate cattle above this regulatory threshold at the Facility unless the Facility can be operated in a manner that complies with the CWA.
34. 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 completion of construction. The notification shall be in writing and shall include as-built drawings of the constructed improvements.

General Provisions

Opportunity to Confer

35. This Order shall become effective thirty (30) days after its receipt by Respondent. Prior to the effective date, Respondent has the opportunity to confer with and/or submit information to EPA concerning the validity of this Order, including the basis for the Order, the terms of the Order, and the applicability of the Order to Respondent. Within ten (10) days of receipt of this Order, Respondent may request a conference regarding the Order or to submit information to EPA. If Respondent requests a conference or wishes to submit information, the conference or submission of information shall take place within twenty (20) days of receipt of this Order. EPA shall deem a failure to request a conference or to submit information as a waiver of the opportunity to confer.

36. Requests for a conference shall be made in writing to the EPA contact identified in Paragraph 42.


Effect of Order


37. 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.
38. Compliance with the terms of this Order shall not relieve Respondent of liability, 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.
39. 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.
40. EPA may subsequently amend this Order in accordance with the authority of the CWA. For example, 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.
41. 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.
42. All submissions to the EPA required by this Order shall be sent to:

Stephen Pollard
Water Enforcement Branch
Water, Wetlands and Pesticides Division
U.S. Environmental Protection Agency Region 7
11201 Renner Boulevard
Lenexa, Kansas 66219.

43. 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.
44. 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.
45. 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).
46. The Effective Date of this Order shall be thirty (30) days following receipt by Respondent. The terms of this Order shall become effective and enforceable against Respondent upon the Effective Date.

8-11-15
Date


Karen A. Flournoy
Director
Water, Wetlands and Pesticides Division


J. Daniel Breedlove
Senior Counsel

CERTIFICATE OF SERVICE

I certify that on the date noted 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 Docket 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:

James Schindler
Schindler Cattle Company
51848 845 Road
Elgin, Nebraska 68636.

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:

Mr. Blake Onken, Section Supervisor
Nebraska Department of Environmental Quality
1200 N Street Suite 400
The Atrium, PO Box 98922
Lincoln, Nebraska 68509-8922.

Carah A. Moreno

8/12/15

Date