

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

BEFORE THE ADMINISTRATOR

In the Matter of)	
)	
Bar MK, L.L.C.)	Docket No. CWA-07-2017-0374
)	
Respondent)	

**FINDINGS OF VIOLATION AND
ADMINISTRATIVE ORDER FOR COMPLIANCE ON CONSENT**

PRELIMINARY STATEMENT

1. The United States Environmental Protection Agency (EPA), Region 7 and Bar MK, L.L.C. (Respondent) have agreed to voluntarily enter into this Administrative Order for Compliance on Consent (Order) for the purpose of carrying out the goals of the Clean Water Act (CWA or the Act), 33 U.S.C. § 1251 et seq., to “restore and maintain the chemical, physical and biological integrity of the Nation’s waters.”
2. It is the Parties’ intent through entering into the Order to address noncompliance by Respondent in violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a).
3. By entering into the Order, Respondent: (1) consents to and agrees not to contest EPA’s authority or jurisdiction to issue or enforce the Order; (2) agrees to undertake all actions required by the terms and conditions of the Order; and (3) consents to be bound by the requirements set forth herein.
4. Respondent neither admits nor denies the specific factual allegations or Findings of Violation in the order, except that Respondent admits the jurisdictional allegations herein.
5. Respondent waives any and all remedies, claims for relief and otherwise available rights to jurisdictional or administrative review that Respondent may have with respect to any issue of fact or law set forth in the Order, including, but not limited to, any right of judicial review of the Order under Chapter 7 of the Administrative Procedure Act, 5 U.S.C. §§ 701-706.

JURISDICTION

6. The following Findings of Violation are made and Order issued pursuant to the authority of Section 309(a)(3) of the CWA, 33 U.S.C. § 1319(a)(3).

PARTIES

7. Complainant, by delegation from the Administrator of the EPA and the Regional Administrator, EPA, Region 7, is the Director of Water, Wetlands and Pesticide Division.

8. Respondent is Bar MK, L.L.C., owner and operator of an animal feeding operation located at: 1466 13th Road, Beemer, Nebraska 68716.

9. Complainant and Respondent are hereinafter collectively referred to as “the Parties.”

STATUTORY AND REGULATORY AUTHORITY

10. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of any pollutant by any person except in compliance with, *inter alia*, a permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

11. Section 502(12) of the CWA, 33 U.S.C. § 1362(12), defines the terms “discharge of a pollutant” and “discharge of pollutants” as, *inter alia*, any addition of any pollutant to navigable waters from any point source.

12. Section 502(6) of the CWA, 33 U.S.C. § 1362(6), defines the term “pollutant” as, *inter alia*, biological materials and agriculture waste discharged to water.

13. Section 502(7) of the CWA, 33 U.S.C. § 1362(7), defines the term “navigable waters” as, *inter alia*, the “waters of the United States,” as defined at 40 C.F.R. § 122.2, which includes intrastate rivers and streams, and tributaries thereto.

14. Section 502(14) of the CWA, 33 U.S.C. § 1362(14), defines the term “point source” 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.”

15. Section 502(5) of the CWA, 33 U.S.C. § 1362(5), defines the term “person” as, *inter alia*, an individual, corporation, partnership, or association.

16. 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.

17. Pursuant to Section 402 of the CWA, 33 U.S.C. § 1342, the EPA authorizes states to issue 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.

18. To implement Section 402 of the CWA, the EPA promulgated regulations codified at 40 C.F.R. Part 122.

19. Pursuant to 40 C.F.R. § 122.1, an NPDES permit is required for the discharge of “pollutants” from any “point source” into “waters of the United States,” as those terms are defined at 40 C.F.R. § 122.2.

20. Pursuant to 40 C.F.R. § 122.23(a), “concentrated animal feeding operations,” or “CAFOs,” are point sources subject to NPDES permitting requirements.

21. “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 or Medium CAFO in accordance with 40 C.F.R. § 122.23(b).

22. “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, vegetative, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility.

23. “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 cattle other than mature dairy cows or veal calves” and where 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.

24. “Process wastewater” is defined by 40 C.F.R. § 122.23(b)(7) as water “directly or indirectly used in the operation of the 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.”

25. “Production area” is defined by 40 C.F.R. § 122.23 as that part of an AFO 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.

26. The Nebraska Department of Environmental Quality (NDEQ) is the state agency authorized to administer the federal NPDES program in the state of Nebraska pursuant to Section 402 of the CWA, 33 U.S.C. § 1342. The EPA maintains concurrent enforcement authority with authorized states for violations of the CWA.

FACTUAL BACKGROUND

27. Bar MK, L.L.C. owns or operates an animal feeding operation that is located in the eastern ½ of the northeast ¼ of the northwest ¼ of Section 30, Township 23 North, Range 6 East, in Cuming County, Nebraska, and has a street address of at 1466 13th Road, Beemer, Nebraska 68716, more commonly known as Bar MK (the Facility).

28. Respondent is and, at all relevant times, was a limited liability company registered under the laws of the state of Nebraska.

29. Respondent is and, at all times referred to herein, was a “person” as defined by Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

30. On or about April 18, 2017, a representative of the EPA conducted a compliance evaluation inspection at the Facility (the “inspection”). The inspection was conducted under the authority of Section 308 of the CWA, 33 U.S.C. § 1318, to evaluate Respondent’s compliance with the requirements of the CWA and the federal regulations promulgated thereunder.

31. At the time of the EPA inspection, the Facility was confining approximately 678 beef cattle. Based on information collected during and following the inspection, Respondent has consistently confined at least 300 head of beef cattle at the Facility.

32. At all times relevant to the allegations herein, the Facility stabled or confined and fed or maintained animals for a total of 45 days or more in a twelve (12) month period.

33. At all times relevant to the allegations herein, neither crops, vegetation, forage growth, nor post-harvest residues were sustained over any portion of the Facility's confinement areas.

34. Observations made during the inspection revealed that the Facility lacks adequate livestock waste control facilities, structures, or measures to prevent the discharge of manure and process wastewater from Facility's production areas. The EPA inspector observed manure and process wastewater discharging from the open confinement lots and feedstock storage areas that was flowing north and east through defined field drainage for approximately 900 yards before entering the south road ditch along O Road. From there the discharged manure and process wastewater flowed approximately 425 yard before discharging into Plum Creek.

35. The road ditches and culverts are "man-made ditches, flushing systems or similar man-made devices," as included in the definition of Medium CAFO in 40 C.F.R. § 122.23(b)(6).

36. Process wastewater discharged from the Facility contains "pollutants" as defined by Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

37. Analysis of samples collected during the inspection documented that pollutants, including *Escherichia coli* (*E. coli*), a disease-causing type of fecal coliform bacteria passed through the fecal excrement of livestock and associated with discharges from CAFOs, discharge from the Facility into Plum Creek.

38. Plum Creek is a perennial flowing stream directly east of the Facility and is tributary to the Elkhorn River, a traditionally navigable water.

39. Plum Creek and the Elkhorn River are "waters of the United States" and therefore, "navigable waters" pursuant to Section 502(7) of the CWA, 33 U.S.C. § 1362(7).

40. The Elkhorn is impaired by *E. coli* and Atrazine, for which a Total Maximum Daily Load (TMDL) was placed and approved for the Elkhorn River on December 2013.

41. At all times relevant to the allegations herein, the Facility was an "animal feeding operation" or "AFO" as defined by 40 C.F.R. § 122.23(b)(1).

42. At all times relevant to the allegations herein, the Facility was a “Medium CAFO” as defined by 40 C.F.R. § 122.23(b)(4).

43. The Facility is a “concentrated animal feeding operation” or “CAFO” as defined by 40 C.F.R. § 122.23(b)(2).

44. The Facility is a “point source” as defined by 40 C.F.R. § 122.23(a) and Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

45. Respondent does not have an NPDES permit authorizing the discharge of pollutants from the Facility.

FINDINGS OF VIOLATION

46. The facts stated above are herein incorporated.

47. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants, unless such discharge is in compliance with an NPDES permit.

48. As described above, based on the size of the Facility, the lack of waste containment, presence of erosional features and conveyances that facilitate pollutant discharges, and the proximity of the Facility to Plum Creek, pollutants from production areas at the Facility will continue to flow into Plum Creek and the Elkhorn River as a result of significant precipitation events.

49. The flow of process wastewater from the Facility to Plum Creek and the Elkhorn River constitutes unauthorized discharges of pollutants to waters of the United States in violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a), and implementing regulations.

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 and AGREES to take the following actions to eliminate violations of the CWA:

50. Respondent shall comply with the CWA.

51. If Respondent cannot immediately cease all discharges from the Facility into waters of the United States, regardless of whether the number of livestock is reduced below regulatory thresholds, then Respondent shall immediately remove and properly dispose of manure, litter, and process wastewater from areas that cannot be controlled in a manner to prevent discharges.

52. Within 30 days of the Effective Date of this Order, Respondent shall inform EPA in writing of all actions that Respondent has taken or will take to comply with the CWA and the terms of this Order.

53. Within one year of the effective date of this Order, Respondent shall complete construction of feedlot waste control structures that prevent the unauthorized discharges from the Facility to waters of the United States. If construction is not completed by this date, Respondent shall reduce the number of cattle confined at the Facility below the Medium CAFO regulatory threshold of 300 head of beef cattle.

54. If Respondent intends to construct runoff control structures that enable confinement of beef cattle above regulatory thresholds, then Respondent shall submit written monthly progress reports to the EPA beginning within sixty (60) days of the Effective Date of this Order and continuing monthly on the seventh (7th) day of each month until Respondent submits a Notice of Construction Completion 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 or will be addressed.

55. Upon completion of permanent runoff control structures, Respondent shall submit to the EPA a Notice of Construction Completion within thirty (30) days of the completion of construction. The notification shall be in writing and shall include as-built drawings of the constructed improvements.

56. All submitted documents, including certifications, required to be submitted to the EPA by the Order, shall be submitted by electronic mail or in hard-copy to the following:

Stephen Pollard, or his successor
Water Enforcement Branch
Water, Wetlands and Pesticides Division
U.S. Environmental Protection Agency, Region 7

11201 Renner Boulevard
Lenexa, Kansas 66219
pollard.stephen@epa.gov

57. Electronic submissions will be deemed submitted on the date they are transmitted electronically.

58. Pursuant to 40 C.F.R. §§ 2.201-2.311, Respondent may assert a business confidentiality claim covering any portion of the information submitted that is entitled to confidential treatment and which is not effluent data. For any such claim, Respondent must describe the basis for the claim under the applicable regulation. Any material for which business confidentiality is claimed should be placed in a separately enclosed 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.

General Provisions

Effect of Compliance with the terms of the Order

59. The Order shall not constitute a permit under the CWA. Compliance with the terms of the Order shall not relieve Respondent of its responsibility to obtain any required local, state, and/or federal permits.

60. This Order does not constitute a waiver or a modification of any requirements of the CWA, 33 U.S.C. § 1251 *et seq.*, all of which remain in full force and effect. The EPA retains the right to seek any and all remedies available under Section 309 of the CWA, 33 U.S.C. § 1319, for any violation cited in this Order. Issuance of this Order shall not be deemed an election by the EPA to forgo any civil or criminal action to seek penalties, fines, or other appropriate relief under the CWA for any violation whatsoever.

61. Compliance with the terms of the Order shall neither relieve Respondent of liability for any violations of the CWA nor preclude the EPA from initiating an administrative or civil judicial enforcement action to recover penalties or seek additional injunctive relief pursuant to Section 309 of the CWA, 42 U.S.C. § 1319, for such violations.

Access and Requests for Information

62. Nothing in the Order shall limit the EPA’s right to obtain access to and/or inspect the Facility and/or to request additional information from Respondent pursuant to the authority of Section 308 of the CWA, 33 U.S.C. § 1318.

Severability

63. If any provision or authority of the Order or the application of the Order to Respondent is held by federal judicial authority to be invalid, the application to Respondent of the remainder of the Order shall remain in full force and effect and shall not be affected by such a holding.

Parties Bound

64. This Order shall apply to and be binding upon Respondent, its agents, successors and assigns. Respondent shall ensure that any directors, officers, employees, contractors, consultants, firms or other persons or entities acting under or for it with respect to matters included herein comply with the terms of this Order.

Effective Date

65. The terms of this Order shall be effective and enforceable against Respondent on the Effective Date, which is the date of EPA's signature.

Termination

66. This Order shall remain in effect until a written notice of termination is issued by an authorized representative of the EPA.


Failure to Comply

67. Notice is hereby given that violation of, or failure to comply with, any of the provisions of the Order may subject Respondent to civil penalties of up to \$52,414 per day for each violation, pursuant to Section 309(d) of the CWA, 33 U.S.C. § 1319(d), and 40 C.F.R. Part 19; or civil action in federal district court for injunctive relief, pursuant to Section 309(b) of the CWA, 33 U.S.C. § 1319(b).

RESPONDENT

Bar MK, L.L.C.

Date: 7-23-2018

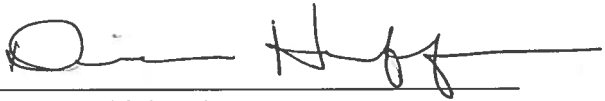
By: 

Karla Knobbe Bar MK LLC
Print Name


Member
Title

COMPLAINANT
U.S. ENVIRONMENTAL PROTECTION AGENCY

Date: 7-31-18

for 
Jeffery Robichaud
Director
Water, Wetlands and Pesticides Division
U.S. Environmental Protection Agency, Region 7

Date: 8.1.18


Christopher Muehlberger
Associate Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 7

CERTIFICATE OF SERVICE

I certify that on the date noted below, I hand delivered the original and one true and correct copy of the signed original Findings of Violation and Order of Compliance on Consent with the Regional Hearing Clerk, U.S. Environmental Protection Agency, 11201 Renner Boulevard, Lenexa, Kansas 66219.

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:

Karla A. Knobbe, Registered Agent
Bar MK, L.L.C.
1466 13th Road
Beemer, Nebraska 68716

and to:

Blake Onken
Nebraska Department of Environmental Quality
1200 N Street, Suite 400
PO Box 98922
Lincoln, Nebraska 68509


Name

8.1.18
Date