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

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)	
)	
)	CONSENT AGREEMENT
)	AND FINAL ORDER
)	
)	
Douglas and Renee Sunderman)	
D/B/A/ Sunderman Feedlots)	
)	
Norfolk, Nebraska)	
Respondents.)	
)	Docket No. CWA 07-2014-0085
Proceedings under Section 309(g) of the)	
Clean Water Act, 33 U.S.C. Section)	
1319(g))	
)	
)	
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CONSENT AGREEMENT AND FINAL ORDER

The United States Environmental Protection Agency, Region 7 (EPA) and Douglas and Renee Sunderman, doing business as Sunderman Feedlots (Respondents), have agreed to a settlement of the alleged violations set forth in this Consent Agreement and Final Order. This action is simultaneously commenced and concluded pursuant to 40 C.F.R. Part 22, Sections 22.13(b) and 22.18(b)(2) (the 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. Respondents neither admit nor deny the factual allegations or the violations alleged in this Consent Agreement and Final Order.

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. The EPA has reason to believe that Respondents violated Sections 301 and 402 of the CWA, 33 U.S.C. §§ 1311 and 1342, by discharging pollutants from a concentrated animal feeding operation (CAFO) into navigable waters of the United States in violation of its National Pollutant Discharge Elimination System (NPDES) permit and failing to operate in accordance with Respondents' 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, *inter alia*, a National Pollutant Discharge Elimination System (NPDES) permit issued pursuant to 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 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 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.

6. Section 504(12) of the CWA, 33 U.S.C. § 1362(1), defines the term "discharge of pollutant" to include "any addition of any pollutant to navigable waters from any point source."

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

8. "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.

9. "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."

10. “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.

11. “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).

12. “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.”

13. “Waters of the United States” are defined in 40 C.F.R. § 122.2 to include intrastate rivers and streams, and tributaries thereto.

14. The Nebraska Department of Environmental Quality (“NDEQ”) is the agency within the state of Nebraska with the authority to administer the federal NPDES Program. The EPA maintains concurrent enforcement authority with authorized state NPDES programs for violations of the CWA.

15. 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 or 402 of the CWA, 33 U.S.C. §§ 1311 and 1342.

16. NDEQ issued a general permit for CAFOs confining cattle in open lots (NEG011000). This general permit became effective on April 1, 2008 and expired on March 31, 2013 (referenced herein as the General Permit or Respondents’ NPDES Permit). The Respondents are in the process of renewing their NPDES permit.

Factual Allegations

17. Respondents own and operate an animal feeding operation known as Sunderman Feedlot West that is located near Norfolk, Nebraska (referenced herein as the Facility).

18. At all times relevant to this action, Respondents operated under the General NPDES Permit described in Paragraph 16.

19. On or around June 13, 2013, EPA personnel conducted a compliance inspection of the Facility that consisted of a review of facility operations, required records, waste generation and management practices, and a visual inspection of the Facility.

20. At the time of the June 2013 EPA inspection, the Facility confined approximately 7,500 head of cattle and the Facility is permitted to confine 9,000 head.

21. The Facility confines and feeds or maintains cattle for a total of forty-five (45) days or more in any twelve month period.

22. Neither crops, vegetation, forage growth, nor post harvest residues are sustained over any portion of the Facility's feeding areas.

23. The Facility is an AFO as defined by 40 C.F.R. § 122.23(b)(1).

24. Based on inspector observations and Respondents' records, the number of cattle confined and fed at the Facility at all times relevant to this action were greater than 1,000, therefore the Facility was a large CAFO as that term is defined in 40 C.F.R. § 122.23(b)(4) and as that phrase is used in Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

25. The Elkhorn River and its tributaries are waters of the United States, as defined under 40 C.F.R. Part 122.2.

Alleged Violations

26. Paragraphs 1-25 above are hereby incorporated by reference.

27. 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.

28. The Facility's General Permit requires that open feedlot CAFOs are not allowed to discharge manure, litter, or process wastewater pollutants into waters of the state from the production area, except when precipitation causes an overflow of manure, litter, or process wastewater. The overflow may be discharged into waters of the state, provided: the livestock waste control facility ("LWCF") is designed, constructed, operated and maintained to contain all manure, litter, and process wastewater including the runoff and the direct precipitation from a 25-year, 24-hour rainfall event; such discharge was the result of the rainfall event; no feasible alternative to discharging existed; and only waste in excess of storage capacity was discharged.

29. According to records provided by Respondents to NDEQ, Respondents' CAFO discharged process waste water to a tributary of the Elkhorn River June 22-23, 2010 and on June 3, 2012.

30. The June 22-23, 2010 unauthorized discharge is associated with the continued dewatering of Respondents' livestock waste control facilities (holding ponds) into a tributary of the Elkhorn River after Respondents had already reached the necessary pump down levels. Although initial dewatering activities were an authorized response to a large precipitation event, the continued dewatering was not solely waste in excess of storage capacity, the discharge exceeded the NPDES permit authorization and was a violation of the NPDES permit and the CWA.

31. The June 3, 2012 unauthorized discharge resulted when a new and uncalibrated pump was used for the land application of process wastewater. Respondents' failures to accurately determine application rates and monitor the land application area resulted in over-application, runoff from the land application area and unauthorized discharge of process wastewater into a tributary of the Elkhorn River. This discharge resulted from Respondents' failure to contain all manure, litter, and process wastewater including the runoff and the direct precipitation from a 25-year, 24-hour rainfall event

32. Respondents' unauthorized discharges of pollutants (i.e., process wastewater) to an unnamed tributary of the Elkhorn River were violations of Respondent's NPDES permit and Section 301 and 402 of the CWA, 33 U.S.C. §§ 1311 and 1342, and implementing regulations.

CONSENT AGREEMENT

33. Solely for the purpose of this proceeding, and to fully resolve the EPA's allegations without the need for a trial, Respondents admit the jurisdictional allegations in this Consent Agreement and Final Order and agree not to contest EPA's jurisdiction in this proceeding or any subsequent proceeding to enforce the terms of this Consent Agreement and Final Order.

34. Respondents neither admit nor deny the factual allegations or the violations alleged in this Consent Agreement and Final Order.

35. Respondents waive any right to contest the allegations of this Consent Agreement as well as their right to appeal the proposed Final Order accompanying this Consent Agreement.

36. Respondents and EPA shall each agree to bear their own costs and, if applicable, any attorney's fees.

37. Nothing contained in this Consent Agreement and Final Order shall alter or otherwise affect Respondents' obligation to comply with all applicable federal, state, and local environmental statutes and regulations and applicable permits.

38. Respondents consent to the issuance of the Final Order and consent to the payment of a civil penalty of Sixteen Thousand Five Hundred Dollars (\$16,500).

39. Respondents shall pay the penalty within thirty (30) days of the Effective Date of this Consent Agreement and Final Order. Payments shall be made 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. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, Missouri 63197-9000.

Copies of the transmittal letters and the checks shall simultaneously be sent to:

Regional Hearing Clerk
U.S. Environmental Protection Agency - Region 7
11201 Renner Blvd.
Lenexa, Kansas 66219;
and

J. Daniel Breedlove
Senior Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency - Region 7
11201 Renner Blvd.
Lenexa, Kansas 66219.

40. Respondents' failure to pay any portion of the civil penalty 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.

41. The penalty payment made by Respondents pursuant to this Consent Agreement and Final Order is payment of a civil penalty and shall not be deductible for purposes of federal, state, or local income taxes.

42. Payment of the entire civil penalty shall resolve all civil and administrative claims of the United States and Respondents' liability for civil penalties based on the Alleged Violations and facts alleged in this Consent Agreement and Final Order.

43. Respondents certify by the signing of this Consent Agreement and Final Order that the Facility is operating in compliance with the requirements of Sections 301 and 402 of the CWA, 33 U.S.C. §§ 1311 (a) and 1342 (k). The effect of the settlement described in paragraph 42 above is conditioned upon the accuracy of this certification.

44. This Consent Agreement and Final Order shall not relieve Respondents of their obligation to comply with all applicable federal, state, and local laws, nor shall it be construed to be a ruling on, or determination of, any issue related to any federal, state, or local permit.


45. 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. Respondents reserve the right to defend against such actions on any basis in law or fact.

46. The undersigned representative of Respondents certifies that he/she is fully authorized to enter the terms and conditions of this Consent Agreement and Final Order and to execute and legally bind Respondents to it.

47. 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.

COMPLAINANT:
U.S. ENVIRONMENTAL PROTECTION AGENCY

9/12/14
Date



Karen A. Blournoy
Director
Water, Wetlands and Pesticides Division



J. Daniel Breedlove
Senior Counsel

RESPONDENT:

7.24.2014

Date



Douglas or Renee Sunderman
Sunderman Feedlots



Stephen D. Mossman
Attorney
Mattson Ricketts Davies Stewart & Calkins
134 S. 13th Street, Suite 1200
Lincoln, Nebraska 68508

IT IS SO ORDERED. This Final Order shall become effective immediately.

Karina Borromeo
Karina Borromeo
Regional Judicial Officer

9-16-14
Date

IN THE MATTER OF Douglas and Renee Sunderman D/B/A/ Sunderman Feedlots,
Respondents
Docket No. CWA-07-2014-0085

CERTIFICATE OF SERVICE

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

Copy by email to Attorney for Complainant:

breedlove.dan@epa.gov

Copy by First Class Mail to:

Stephen D. Mossman, Attorney
Mattson Ricketts Davies Stewart & Calkins
134 S. 13th Street, Suite 1200
Lincoln, Nebraska 68508

Dated: 9/16/14



Kathy Robinson
Hearing Clerk, Region 7